

Supreme Court Holds That Bank Secrecy Act Imposes Single Penalty For Nonwillful Failure To File Timely, Accurate Annual Report Of Foreign Bank And Financial Accounts

Client Alert | February 28, 2023

Decided February 28, 2023 *Bittner v. United States*, No. 21-1195 Today, in a 5–4 opinion, the Supreme Court held that the Bank Secrecy Act imposes a single penalty for each nonwillful failure to file an annual form disclosing foreign financial accounts, regardless of the number of accounts that were not disclosed.

Background: The Bank Secrecy Act requires U.S. residents and citizens to report all of their foreign financial accounts each year in a report known as an FBAR (for Report of Foreign Bank and Financial Reports). The Act also imposes statutory penalties on those who do not file an accurate, timely report. Nonwillful violations carry a maximum penalty of \$10,000, and willful violations trigger a maximum penalty of \$100,000 or 50% of the balance of the account at issue.

Alexandru Bittner did not timely file timely FBARs to report his more than 50 foreign bank accounts over a five-year period. The IRS imposed a \$10,000 penalty for 272 separate nonwillful violations—in other words, a separate penalty for each account that was not timely reported each year—for a total statutory penalty of \$2.72 million. Bittner fought the assessment on the theory that he committed only five violations of the Act—one for each year he did not file a timely FBAR. The Fifth Circuit, departing from a previous decision of the Ninth Circuit, disagreed, holding that the Bank Secrecy Act imposes a separate penalty for each improperly disclosed foreign account.

Issue: Whether a person who nonwillfully fails to report multiple foreign financial accounts faces a single annual penalty for not filing a complete FBAR or separate penalties for each account that was not properly reported. **Court's Holding:** The Bank Secrecy Act authorizes only a single \$10,000 penalty for the nonwillful failure to file an annual FBAR, even if multiple foreign financial accounts are not reported.

"Best read, the [Bank Secrecy Act] 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."

Justice Gorsuch, writing for the Court

What It Means:

- The Court's holding that the Bank Secrecy Act's penalty provision for nonwillful violations operates on a per-form basis, with one penalty each year there is no timely FBAR, significantly curtails monetary liability under the Act. An FBAR lists

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ten accounts on average, which means that, had the government prevailed, the average maximum penalty for nonwillful violations would have been \$100,000 rather than \$10,000.

- According to the Court, its interpretation avoids anomalies that would have been created by reading the Act to impose a separate \$10,000 penalty for each foreign account not reported in a timely FBAR. Under the interpretation the government urged, for instance, it would have been possible for penalties for nonwillful violations to exceed those for willful violations.
- The Court distinguished the Act's provisions authorizing penalties for willful violations from those authorizing penalties for nonwillful violations, emphasizing that the Act permits penalties on a per-account basis for certain willful violations. The Court explained that by expressly allowing per-account penalties for certain willful violations, Congress indicated that per-account penalties were not available for nonwillful violations.
- The Court declined to decide several other issues concerning penalties under the Bank Secrecy Act, including what, if any, *mens rea* the government must prove to impose a non-willful penalty; whether a person who fails to file a timely report and who later files an inaccurate report would be subject to two penalties or one; and whether violations of the Act's separate recordkeeping requirements accrue on a per-account basis.

The Court's opinion is available [here](#). Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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