

Hello. It looks like you're using an ad blocker that may prevent our website from working properly. To receive the best experience possible, please make sure any blockers are switched off and refresh the page.

If you have any questions or need help you can email us

account are required to file an FBAR if the aggregate value of all foreign accounts is more than \$10,000.

Mar. 14, 2023



*By Hanspeter Misteli Reyes, J.D., LL.M.*

In a globalized world, it is common for individuals to hold assets outside the U.S. However, U.S. taxpayers are often unaware that there are special reporting requirements for their non-U.S. based assets leading to substantial penalties. This article will provide a general overview of the current reporting requirements for

Hello. It looks like you’re using an ad blocker that may prevent our website from working properly. To receive the best experience possible, please make sure any blockers are switched off and refresh the page.

If you have any questions or need help you can email us

corresponding year if the aggregate value of all foreign financial accounts is more than \$10,000 (adjusted for inflation annually) at any time during the calendar year.

- **US Person**

A U.S. Person means a citizen or tax resident of the United States, a domestic corporation, domestic partnership, any estate other than foreign estates, U.S. trusts, and any other person not considered a foreign person.

- **Financial Interest**

A U.S. person will have a financial interest when:

- The person is the owner of record or holder of legal title, regardless of whether the account is held for the benefit of a U.S. person or non-U.S. person.
- The person is the owner or holder of legal title but is acting as an agent or attorney or is acting on behalf of the U.S. person concerning that account or has any signatory authority over the account.

- **Financial Account**

Generally, any account located at a financial institution outside the United States is considered a foreign financial account. Financial accounts include bank accounts such as savings and checking accounts and time deposits, and securities accounts, among others. In addition, any foreign securities, interest, or contract held for investment issued by someone not a U.S. person must be reported, including any stock or securities issued by a foreign corporation and partnership interests, among others.

- **Records**

Taxpayers must keep records of the accounts reported for five years, counting from

Hello. It looks like you're using an ad blocker that may prevent our website from working properly. To receive the best experience possible, please make sure any blockers are switched off and refresh the page.

If you have any questions or need help you can email us

requirement is not met. The FBAR filing deadline follows the Federal income tax return filing deadlines.

- **Filing**

Filing of FBARs is made electronically using FinCEN's filing system by completing the FinCEN Form 114 for the reportable year. FBAR returns are filed separately from the taxpayer's federal tax returns.

- **Late filing**

If a taxpayer learns that an FBAR should have been filed but was not, the FBAR filing system allows taxpayers to enter the calendar year they are reporting, including past years. In addition, the system enables the taxpayer to explain the reasons for the late filing or show that it is part of an IRS compliance program.

- **Penalties**

A taxpayer who fails to file FBARs may be subject to monetary civil penalties, criminal penalties (or both) organized by escalating levels of culpability (non-willful or willful). If "reasonable cause" for failing to file an FBAR is shown, the person may be excused from liability. For both willful and non-willful violations, the IRS examiner has the discretion to apply lesser penalty amounts; however, in practice, the IRS examiners have consistently used the statutory maximums.

### **Non-Willful Violations**

In its streamlined filing compliance procedures, the IRS has defined non-willful conduct as conduct that is due to negligence, inadvertence, or mistake resulting from a good faith misunderstanding of the requirements of the law. For non-willful FBAR violations, penalties cannot exceed \$10,000 (adjusted for inflation annually).

The application and scope of FBAR penalties for non-willful conduct have been

Hello. It looks like you're using an ad blocker that may prevent our website from working properly. To receive the best experience possible, please make sure any blockers are switched off and refresh the page.

If you have any questions or need help you can email us

The United States Supreme Court resolved this issue on February 28, 2023 in favor of a per-report approach following the rule of lenity, whereby the Supreme Court has long held that statutes imposing penalties are to be “construed strictly” against the government and in favor of individuals. The Supreme Court argued that the rule exists in part to protect the Due Process Clause promise that “a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.”

### **Willful Violations**

For willful violations, the IRS may impose a maximum penalty of either \$100,000 (adjusted for inflation annually) or 50% of the account balance at the time of the violation, whichever is greater. Unlike non-willful violations, the United States Congress specifically authorized the imposition of per-account penalties in the statute imposing the penalties. The penalty applies to anyone who willfully fails to file a timely FBAR; (ii) files the FBAR with a material omission or misstatement; or (iii) fails to satisfy the recordkeeping requirements by not making or retaining records.

Regarding the imposition of willful violations, the taxpayer in *United States v. Monica Toth* sought to have the Supreme Court rule on whether constitutional protections against excessive fines extend to civil tax penalties under the Eighth Amendment would render the penalties for willful violations of the FBAR filing requirements unconstitutional. The United States District Court for the District of Massachusetts granted summary judgment for the government finding that the full amount of the penalties assessed were properly payable. The United States Court of Appeals for the First Circuit affirmed the District Court decision on April 29, 2022 (33 F. 4<sup>th</sup> 1 (1<sup>st</sup> Cir. 2022)). On January 23, 2023, the United States Supreme Court declined to hear the taxpayer's appeal (No. 22-177). The taxpayer's argument in *Toth* presents a new

approach for challenges to FBAR penalties, but it is difficult to see the approach being

Hello. It looks like you're using an ad blocker that may prevent our website from working properly. To receive the best experience possible, please make sure any blockers are switched off and refresh the page.

If you have any questions or need help you can email us

- **FATCA**

In addition to filing FBARs, taxpayers may also have to report any interests held in any foreign financial assets by filing Form 8938. Taxpayers are required to file Form 8938 if they are considered a Specified Person, have an interest in specified foreign financial assets required to be reported, and the assets' aggregate value exceeds the specified reporting thresholds.

- **Specified Person**

A Specified Person is any U.S. citizen, resident alien, non-resident alien who makes an election to be treated as a resident alien for purposes of filing a joint income tax return and certain domestic entities holding any interest, during any portion of the taxable year, in a foreign financial asset.

- **Specified Foreign Financial Asset**

A specified foreign financial asset ("Specified Asset") is any financial account maintained by a foreign financial institution or other financial assets held for investment that are not an account maintained by a U.S. or financial institution, namely:

- Stocks or securities issued by someone other than a U.S. person.
- Interest in a foreign entity.
- Any financial instrument or contract that has an issuer or counterparty other than a U.S. person.
- **Reporting thresholds**



Thresholds vary for individuals depending on specific circumstances, such as being

Hello. It looks like you're using an ad blocker that may prevent our website from working properly. To receive the best experience possible, please make sure any blockers are switched off and refresh the page.

If you have any questions or need help you can email us

- **Taxpayers living abroad:** U.S. citizens must report Specified Assets if their value exceeds \$200,000 on the last day of the tax year. If a joint return is filed, the value of the Specific Assets must exceed \$400,000 on the last day of the tax year or more than \$600,000 at any time during the year.
- **Domestic entities:** The value of the Specified Assets is more than \$50,000 on the last day of the tax year or more than \$75,000 at any time during the year.
- **Filing**

Form 8938 must be attached to the taxpayer's annual tax income tax return and filed by the due date for the corresponding return.

- **Late filing**

If Form 8938 should have been filed, a taxpayer must make a late filing and may be penalized. No penalty will be imposed if the failure to file is due to a reasonable cause and not willful neglect. However, the taxpayer has the burden of proof to show a reasonable cause claim.

- **Penalties**

If Form 8938 should have been filed, a taxpayer may be subject to a penalty of \$10,000. Failure to file a correct and complete Form 8939 within 90 days after the IRS mails a notice of an additional penalty of \$10,000 is applicable for each 30-day period (or part of that period). The maximum penalty is \$50,000.

====

[Hanspeter Misteli Reyes](#) is an associate in [Greenberg Glusker](#)'s Private Client Services Group

Hello. It looks like you're using an ad blocker that may prevent our website from working properly. To receive the best experience possible, please make sure any blockers are switched off and refresh the page.

If you have any questions or need help you can email us