

## IRS Issues New Guidance on FBAR Penalties

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WASHINGTON, D.C. (JUNE 3, 2015)

BY MICHAEL COHN

The Internal Revenue Service has released new guidance on penalties for failing to file a foreign bank account report, capping the maximum percentage of the penalty and providing new requirements for documentation and approval by IRS examiners.

In a **memorandum** last month from three commissioners in charge of various divisions of the IRS, they wrote, "For each year for which it is determined that there was a willful violation, examiners must fully develop and adequately document in the examination workpapers their analysis regarding willfulness."

The guidance noted that the examiner's report should clearly state the years for which it was determined that an FBAR violation was willful. For cases involving willful violations over multiple years, the examiners will recommend a penalty for each year for which the FBAR violation was willful. In most cases, the total penalty amount for all years under examination will be limited to 50 percent of the highest aggregate balance of all unreported foreign financial accounts during the years under examination.

"In such cases, the penalty for each year will be determined by allocating the total penalty amount to all years for which the FBAR violations were willful based upon the ratio of the highest aggregate balance for each year to the total of the highest aggregate balances for all years combined, subject to the maximum penalty limitation in 31 U.S.C. § 5321(a)(5)(C) for each year," said the IRS.

IRS examiners can recommend a penalty that is higher or lower than 50 percent of the highest aggregate account balance of all unreported foreign financial accounts based on the facts and circumstances, according to the guidance, but in no event will the total penalty amount exceed 100 percent of the highest aggregate balance of all unreported foreign financial accounts during the years under examination.

For most cases involving multiple nonwillful violations, examiners will recommend one penalty for each open year, regardless of the number of unreported foreign financial accounts. In those cases, the penalty for each year will be determined based on the aggregate balance of all unreported foreign financial accounts, and the penalty for each year will be limited to \$10,000.

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"For some cases, the facts and circumstances (considering the conduct of the person required to file and the aggregate balance of the unreported foreign financial accounts) may indicate that asserting nonwillful penalties for each year is not warranted," said the guidance. "In those cases, examiners, with the group manager's approval after consultation with an Operating Division FBAR Coordinator, may assert a single penalty, not to exceed \$10,000, for one year only. The examiner's workpapers must support such a penalty determination and document the group manager's approval."

For other cases, the IRS noted that the facts and circumstances (considering the conduct of the person required to file and the aggregate balance of the unreported foreign financial accounts) may indicate that asserting a separate nonwillful penalty for each unreported foreign financial account, and for each year, is warranted. In those cases, examiners, with the group manager's approval after consultation with an Operating Division FBAR Coordinator, can assert a separate penalty for each account and for each year.

"In no event will the total amount of the penalties for nonwillful violations exceed 50 percent of the highest aggregate balance of all unreported foreign financial accounts for the years under examination," said the IRS. "A nonwillful penalty will not be recommended if the examiner determines that the FBAR violations were due to reasonable cause and the person failing to timely file correct and complete FBARs later files correct and complete FBARs."

In an email to clients Monday, Dennis Brager of Brager Tax Law Group in Los Angeles pointed out that there have been previous instances in which the IRS has threatened penalties of 150 percent or more, and the new guidance finally places a limit on the maximum civil penalties. Brager noted that this may have been done, in part, to undercut any argument by taxpayers that the penalty violated the Constitutional prohibition against "excessive fines" raised in a case last year in Florida in which a jury determined a penalty of 150 percent of the value of a taxpayer's Swiss bank account for failing to file an FBAR (see [Florida Man, 87, Owes 150% Record Penalty on Swiss Account](#)).

"If the examiner determines that the conduct was non-willful then in most cases the penalty will be limited to \$10,000 for each year regardless of the number of unreported financial accounts," Brager pointed out. "Previously the IRS position was that it would assert a penalty of \$10,000 per year, per account."

He noted that the guidance also provides a lengthy checklist of the items that must be included in all civil FBAR penalty case files, shown below. A summary memorandum explaining the FBAR violations now needs to be provided to the taxpayer, which Brager observed could prove to be a valuable tool in litigation or in protesting the FBAR penalty to the IRS's Appeals Division.

#### Civil FBAR Penalty Case File Checklist

- Documentation that any required coordination with an Operating Division FBAR Coordinator or a Fraud Technical Advisor has occurred
- For willful cases, Counsel's written advice memorandum
- Form 13536, FBAR Monitoring Document (FMD), providing closing information for the FBAR database. Include copy of e mail or fax transmission report.
- Copy of Letter 3800, Warning Letter Respecting Foreign Bank and Financial Accounts Report Apparent Violations, if applicable
- Copy of Letter 3709, FBAR 30 Day Letter (transmitting the summary memorandum explaining the FBAR violations and Form 13449, Agreement to Assessment and Collection of Penalties Under 31 USC 5321(a)(5) and 5321(a)(6)), if applicable
- Original Form 13449, Agreement to Assessment and Collection of Penalties Under 31 USC 5321(a)(5) and 5321(a)(6), if applicable
- Notice 1330, Information on Making FBAR Penalty Payment by Check
- Original Form 2848, Power of Attorney and Declaration of Representative, if applicable
- Information Document Requests (IDRs) with certified mail receipts, if applicable.
- Copies of any payments
- Copies of other correspondence:
  - o Letter 4265, FBAR Appointment Letter, and
  - o All other case - related correspondence with the account holder

#### Outside of case folder:

- Form 3198, Special Handling Notice for Examination Case Processing
  - o List all related Title 26 income tax and penalty cases.
  - o Include the project code and tracking code for the FBAR penalty case.

#### Additional FBAR information can be found in:

- IRM 4.26.16, Report of Foreign Bank and Financial Accounts (FBAR)

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## 4 Comments

Thank you so much. I will print this for my file.

Posted by: NancyLMorton | June 4, 2015 11:19 AM

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Hi, Nancy. I added the checklist to the end of the article.

Posted by: MikeCohn | June 4, 2015 10:28 AM

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It would be appreciated if the author could provide the "checklist of the items that must be included in all civil FBAR penalty case files" which was referred to in the last paragraph of the article.

Thank you.

Posted by: NancyLMorton | June 4, 2015 10:14 AM

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I remain opposed to the application of the FBAR filing requirement for persons other than U.S. citizens and holders of LPR visas. Applying the FBAR requirement to expatriate workers temporarily present in the U.S. for five years or less constitutes an excessive intrusion that is time consuming and of no value to the U.S.

Posted by: jagrover | June 4, 2015 8:53 AM

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