

# **FBAR** **Report of Foreign Bank and Financial Accounts**



IRS LARGE BUSINESS AND  
INTERNATIONAL DIVISION

## Background

---

- Form TD F 90–22.1, The Report of Foreign Bank and Financial Accounts (FBAR), is required when a U.S. Person has a financial interest in or signature authority over one or more foreign financial accounts with an aggregate value greater than \$10,000

April 8, 2003, IRS delegated authority over FBAR

IRM first issued in 2005 for Law 2007 for procedures

## History

---

- Bank Secrecy Act (BSA) enacted in 1970
- Codified primarily in Title 31
- Overall Title 31 responsibility delegated to the Financial Crimes Enforcement Network (FinCEN) by Secretary of Treasury

April 8, 2003, IRS delegated authority over FBAR

IRM first issued in 2005 for Law 2007 for procedures

## History

---

- FinCEN's mission is to enhance U.S. national security, deter and detect criminal activity, and safeguard financial systems from abuse by promoting transparency in the U.S. and international financial systems
- In April 2003, FinCEN delegated FBAR examination and enforcement authority to the IRS

April 8, 2003, IRS delegated authority over FBAR

IRM first issued in 2005 for Law 2007 for procedures

## New FBAR Regulations

---

- FinCEN published new FBAR regulations in February 2011 (Effective March 28, 2011)
- Title 31 regulations were renumbered from 31C.F.R. Part 103 to 31 C.F.R. Chapter 10
- Applies to reports filed for calendar year 2010 and future calendar years
- Revised FBAR Form released January 2012
  - Form Instructions follow the revised regulations
- FinCEN to require electronic filing in 2013

April 8, 2003, IRS delegated authority over FBAR

IRM first issued in 2005 for Law 2007 for procedures

## Statutory Authority

---

- 31 U.S.C. § 5314(2)
  - Requires a
    - resident or citizen of the United States,
    - or a person in and doing business in the United States,
  - to keep records and /or file reports (eg FBARs)
  - when making transactions or maintaining a relationship with a foreign financial agency

## Statutory Authority

---

- 31 U.S.C. § 5321(a)(5)
  - establishes civil penalties for violations of the FBAR reporting and recordkeeping requirements

## Statute of Limitations

---

- 31 U.S.C. 5321(b)(1) states that a civil penalty may be assessed at any time before the end of the six year period beginning on the date of the transaction with respect to which the penalty is assessed
- The date of the transaction for report filing violations is June 30<sup>th</sup> of the year following the calendar year for which the foreign financial account should be reported
  - The statute of limitations runs even if no FBAR is filed
  - Therefore, 2004 and prior FBARs statutes have expired (2005 will expire on 6/30/12)



# Regulatory Authority

---

- 31 C.F.R § 1010.306
  - FBAR must be filed by June 30 for foreign financial accounts exceeding more than \$10,000 in the previous calendar year
    - Filed when it is received in Detroit, not when it is postmarked
    - Note: There is no statutory or regulatory provision for extending time for filing FBARs
    - No FBAR reporting required if the aggregate value of the accounts does not exceed \$10,000
- 31 C.F.R. § 1010.350
  - establishes the requirement to file the FBAR
- 31 C.F.R. § 1010.420
  - FBAR record-keeping

# FBAR Case Procedures

---

- **Related Statute Memorandum (Form 13535)**
  - A related statute determination is a good faith determination with respect to the present case, that the apparent FBAR violation was in furtherance of an apparent Title 26 violation.
  - A related statute determination is necessary to allow the examiner to use the information obtained from a Title 26 examination in the FBAR examination.
  - Without a related statute determination, Title 26 information cannot be used in the Title 31 FBAR examination. Any such use could subject the persons making the disclosure to penalties for violating the disclosure provisions protecting Title 26 return information.
  - The Related Statute Memorandum (RSM) also serves as an input document for the FBAR database maintained at the Detroit Computing Center.

## FBAR Case Procedures

---

- **FMD - FBAR Monitoring Document (Form 13536)**
  - The examiner is required to update the FMD as needed and forward the updated FMD to the Detroit Computing Center to the the database up to date.
    - Report entity information
    - Power of Attorney
    - Exam Information (agent, time on case, date exam started and completed)
    - SOL information

# FBAR Case Procedures

---

- **Statute Extension**
  - Title 26 statute of limitations do not apply to FBAR cases
  - Statute is 6 years from date of violation
  - FBAR statute runs even if no FBAR return filed
  - OVDI 2011 provided TPs with statute extension form
  - Title 31 does not require IRS to sign extension form but we have been countersigning them for OVDI

## FBAR Penalty

---

- Examiner determination
  - Warning Letter (Letter 3800)
    - FBAR violation but penalty not warranted
  - Penalty Warranted
    - Non willful penalty
    - Willful penalty
    - Manager written approval required
    - Counsel recommendation required

## Applicable BSA Penalties

---

- 31 U.S.C. § 5321(a)(5)(B) – Non-willful FBAR Penalty
  - FBAR Non-willful Penalty – \$10,000
- 31 U.S.C. § 5321(a)(5)(C) – Willful FBAR Penalty
  - FBAR Willful Penalty – greater of \$100,000 or 50% of highest aggregate amount
- 31 U.S.C. § 5322(b) Criminal Penalty
  - \$500,000 fine, 10 year imprisonment or both

## **IRM 4.26.16.4**

---

- The statutory penalty computations provide a ceiling on the FBAR penalty
- The Service has determined that if a person meets 4 threshold conditions then the person may be subject to less than the maximum (ceiling) FBAR penalty

## Mitigation Threshold 4 Conditions

---

1. No history of criminal tax or BSA convictions for 10 prior years as well as no history of past FBAR penalty assessments
2. No funds were from an illegal source or used to further a criminal purpose
3. The person cooperated during the examination and,
4. The Service did not sustain a civil fraud penalty against the person for an underpayment for the year in question due to the failure to report income related to any amount in a foreign account

16

(1) When the person does not meet the threshold conditions for mitigation (see IRM 4.26.16.4.6.1), then the mitigation guidelines found in the Exhibits to this IRM section should not be used.



# Mitigation Non-willful Penalty

<u>Aggregate Balance</u>	<u>Penalty is</u>
< \$50,000	\$500/violation – limited to \$5,000
\$50,000 - \$250,000	Greater of \$5,000 or 10% of highest aggregate balance
> \$250,000	\$10,000

## Mitigation – Willful Penalty

Level	Aggregate Balance	Penalty is (% of account as of June 30)
I	< \$50,000	greater of \$1,000 per violation or 5% of the maximum account balance
II	\$50,000 to \$250,000	greater of \$5,000 per violation or 10% of the maximum account balance
III	\$250,000 - \$1,000,000	greater of 10% of the maximum account balance during the calendar year for each Level III account or 50% of the closing balance in the account as of the last day for filing the FBAR .
IV	> \$1,000,000	greater of \$100,000 or 50% of the closing balance in the account as of the last day for filing the FBAR.

## IRM 4.26.16.4

---

- Penalties should be asserted only to promote compliance with the FBAR reporting and recordkeeping requirements
- Examiners should exercise their discretion and consider whether the issuance of a warning letter and the securing of delinquent FBARs, rather than the assertion of a penalty, will achieve the desired result of improving compliance in the future
- No penalty should be imposed if non-compliance is due to reasonable cause

## FBAR FAQs

---

1. Does a Title 26 violation have to have a nexus to the foreign bank accounts before you can obtain an RSM?
  - Generally yes. The RSM is a good-faith determination that there was an FBAR violation and it was in furtherance of a Title 26 violation

## FBAR FAQs

---

2. Do I have to have Title 26 controls on a year to proceed with an RSM for an FBAR penalty case?
  - You do not need Title 26 controls on a year to pursue an FBAR case. You could have controls on the 2008 year and do an RSM for 2006, 2007 & 2008.

## FBAR FAQs

---

3. Can the non-filing of a tax information return (Form 5471) be considered a Title 26 violation for the requirement for an RSM?
  - The nonfiling of a tax information return would be considered a Title 26 violation for purposes of an RSM but the determination must be in a good faith that the FBAR violation was in furtherance of a Title 26 violation...not just that there was a Title 26 violation.

## FBAR FAQs

---

4. Does the Title 26 violation have to result in additional tax owed before an RSM can be solicited (i.e. a TP with an NOL where the potential unreported income is less than the loss)?
  - The Title 26 violation does not have to result in an tax deficiency. It will still be necessary to make a good faith determination that the FBAR violation was in furtherance of a Title 26 violation.

## FBAR FAQs

---

5. If the agent controls the 2008 year, can they request bank statements for prior years if they only have an FBAR exam for those years
  - There is no requirement that the FBAR examination be for the same year as the tax examination. If an RSM was obtained, the bank statements for the earlier years can be requested.



## FBAR FAQs

---

5. (cont'd) Does the agent have to use a Title 31 summons per IRM 4.26.17.5.3(1)?
  - A Title 26 summons may be used. RM4.26....states that the examiner must use a Title 31 summons in FBAR examinations that do not have concurrent Title 26 examinations. IRC 7602(b) permits the use of a Title 26 summons for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws (this would include FBAR violations).

## FBAR FAQs

---

6. Is the negative inference as a result of pleading the 5<sup>th</sup>, specifically regarding whether the taxpayer had a foreign bank account, enough to obtain an RSM?
  - For civil tax and FBAR examinations, a negative inference can be inferred when someone invokes the 5<sup>th</sup> amendment right against self incrimination. Counsel states that this would be enough to support a good faith related statute determination.

## Summary

---

- FBAR regulations now 31 CFR Chapter 10
- An RSM is necessary to allow the examiner to use the information obtained from a Title 26 examination in the FBAR examination
- The FBAR Monitoring Document (FMD) should be updated as needed and forward the updated FMD to the Detroit Computing Center
- FBAR SOL runs if the FBAR is filed or not
- FBAR violations require either a warning letter or FBAR penalty per IRM 4.26.16.4(3)

# **FBAR** **Report of Foreign Bank and Financial Accounts**



IRS LARGE BUSINESS AND  
INTERNATIONAL DIVISION