
Quiet Disclosure FBAR Investigations



Quiet Disclosure FBAR Materials

- This PowerPoint presentation
- The FBAR section of the Quiet Disclosure Workshop Guide
- Quiet Disclosure FBAR Penalty Procedure Guide (PowerPoint)
- Quiet Disclosure FBAR Investigative Techniques Guide (PowerPoint)
- FBAR ERCS Guide



What is FBAR

- FBAR is the acronym for the Foreign Bank and Financial Account Report, Form TD F 90.22-1
- Not an IRS form (TD = Treasury Department)
- FBAR refers to both the form itself and the civil penalties for failing to file the form



Statutory Authority

- The general authority for the Secretary of the Treasury to require U.S. persons to keep records and file reports of their transactions with foreign financial agencies is Title 31, §5314
- The specific filing requirement for the FBAR is contained in the regulations for the Bank Secrecy Act, Treasury Regulations 31 CFR 1010.350 (formerly 31 CFR 103.24)



FBAR Resources

- IRM 4.26.16 (Rev. 07-01-2008), *Report of Foreign Bank and Financial Accounts (FBAR)*
- IRM 4.26.17 (Rev. 05-05-2008), *Report of Foreign Bank and Financial Accounts (FBAR) Procedures*
- RGS FBAR Penalty lead sheet (Rev. 03-2012)



FBAR Basics

- IRS examiners investigate civil FBAR violations, and assess and collect FBAR penalties
- Due date is June 30 of the year following the reporting year (calendar-year reporting)
- Filed with the Detroit Computing Center (DCC), also known as the Enterprise Computing Center (ECC)
- FBAR are filed when received by DCC



FBAR Statutory Penalties

- The monetary penalty may not exceed \$10,000 per violation
- Where the violation is willful, the penalty is the greater of \$100,000 or 50% of the balance in the account on the date of violation
- The date of violation is the due date of the FBAR
- No penalty if there is reasonable cause for violation and the person files correct FBARs



FBAR Penalty Assessment Statute

- FBAR penalty assessment statute is six years from the due date, even if no FBAR is filed
 - Example: 2006 FBAR was due June 30, 2007, so the FBAR penalty statute expires June 30, 2013
- Special statute extension for FBAR penalties
- DO NOT use Form 872



FBAR Penalty Local Resources

- FBAR Coordinators
- Fraud Technical Advisors
- Counsel Attorneys



FBAR Penalty Case Summary

1. Discover a potential FBAR violation
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1. Potential FBAR Violation

- The amended or delinquent tax return states or implies a foreign source of the unreported income
- The taxpayer files a delinquent foreign information return
- The taxpayer admitted a violation by filing a delinquent FBAR (check CBRS)



2. The Related Statute Memorandum

- Form 13535 (RSM)
- Necessary to allow Title 26 information to be used in a Title 31 FBAR penalty case
- Until RSM signed, examiners cannot
 - Ask the taxpayer specifically about the FBAR
 - Ask for a copy of the FBAR
 - Request information that only relates to the FBAR penalty
- Currently the territory manager signs the RSM



RSM Basics

- RSM is a good-faith determination that the FBAR violation was in furtherance of a Title 26 violation
- Prepare a separate RSM for each co-owner of a joint account
- Prepare a separate RSM for each year there is a violation



RSM and Title 26 Violations

- Possible Title 26 violations
 - Unreported income related to the foreign account
 - Tax due from activity related to the account
 - Unfiled information returns related to the undisclosed foreign account
- The phrase “furtherance of a Title 26 violation” means at the time of the FBAR violation
- The fact that the taxpayer currently may be in compliance is not relevant



RSM - Amended Return

This taxpayer filed an amended income tax return on [insert date] to correct a previously-filed, inaccurate return that failed to include income from foreign sources. On [insert date] the taxpayer also filed a delinquent FBAR. Based upon the information shown on the amended return there is good-faith belief that the taxpayer's failure to file a timely FBAR was to conceal Title 26 violations that existed up to the time the taxpayer filed the amended return.



RSM - Delinquent Return

This taxpayer filed a delinquent income tax return on [insert date] to report income from foreign sources. On [insert date] the taxpayer also filed a delinquent FBAR. Based upon the information shown on the delinquent return there is good-faith belief that the taxpayer's failure to file a timely FBAR was to conceal Title 26 violations that existed up to the time the taxpayer filed the delinquent return.



RSM - Information Return

This taxpayer filed a delinquent information return on [insert date]. The information on this return relates to an entity that may own, or an activity that may appear in, a foreign bank account. On [insert date] the taxpayer also filed a delinquent FBAR. There is good-faith belief that the taxpayer's failure to file a timely FBAR was to conceal Title 26 violations that existed up to the time when the taxpayer filed the delinquent information return.



FBAR Power of Attorney

- May use Form 2848 after the related statute memorandum is signed
- Form 2848, Line 3 Must specifically designate FBAR matters
 - Column 1: “FBAR Examination”
 - Column 2: TD F 90-22.1”
 - Column 3: the relevant calendar years
- Follow normal processing procedures



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3. FBAR Administrative Controls

- Two separate administrative controls
 - Exam controls on ERCS
 - Title 31 database maintained by DCC
- Establish each year where there is an RSM
- See the ERCS guide for details
 - Establish each FBAR case year on ERCS
 - Input the FBAR penalty statute date
 - Charge time directly to the case



DCC Database Controls

- IRM 4.26.17.3
- FAX or email the RSM to DCC to establish the case on the DCC database
- FBAR Monitoring Document, Form 13536 (FMD) provides information to Detroit:
 - Case name
 - Owner of the foreign account
 - Representative
 - Examination information, including contact information
 - Case Disposition
- Send FMD to Detroit as necessary to update database



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4. Case Investigation

- Was there a duty to file?
- Was there reasonable cause for not filing?
- If no reasonable cause, was the violation willful or nonwillful?
- What amount of penalty is necessary to achieve compliance objectives?



Investigating FBAR Violations

- The goal of the FBAR penalty investigation is to gathering evidence to arrive at a decision regarding the appropriate FBAR penalties
- Consider reasonable cause from the start of the case
 - Request reasonable cause statement on initial IDR
 - For clarity, insist on a written statement
- Many investigations will result in non-willful penalties only because the IRS cannot prove willfulness



Quiet Disclosure FBAR Cases

- Not about taxes
- Likely filed quiet disclosure to avoid penalties
- Penalties are necessary to be fair to those taxpayers who filed voluntary disclosures
- Penalties encourage voluntary compliance
- Representatives likely will argue that compliance already has been achieved
- Situational compliance is not acceptable



Duty to File

- To assert any FBAR penalties, the examiner must prove that there was an FBAR violation
- The examiner must prove each of the statutory requirements to file an FBAR:
 - A U.S. person
 - With a financial interest in, or signature or other authority over
 - Foreign financial accounts
 - The aggregate value of which exceeded \$10,000 at any time during the calendar year



FBAR Reasonable Cause

- Determination of reasonable cause is made based upon the facts and circumstances
- Did the person act in good faith considering experience, knowledge, and education
- See Treasury Regulation §1.6664-4 and IRS Fact Sheet 2011-13 (12-2011)



FBAR Reasonable Cause, cont'd.

- Good faith means no deception
- Good faith reliance upon the advice of a tax professional means
 - The tax professional was a qualified professional
 - Disclosed of the existence of the account
 - Disclosed all relevant facts regarding the account
- The “I thought” argument – is it reasonable?



Willful Actions

- A person who **chose** not to file an FBAR based upon the good faith reliance on the advice of a competent tax professional could have a reasonable explanation for this conscious decision
- Good faith reliance on bad advice from a competent tax professional could be a reasonable explanation
- Deception = Bad Faith, and therefore no reasonable cause
- Remember: there can be no reasonable cause for a **willful violation** of the statute
- Violation = knowledge of duty, and following any advice to violate the law is not a defense



Willful versus Non-Willful Penalty

- The primary difference between willful and non-willful FBAR penalties is the degree of fault by the person
- Willful penalty – voluntary, intentional violation of a known legal duty
- Non-willfull penalty – an involuntary, unintentional violation of a legal duty



Voluntary and Intentional

- No reasonable cause
- Deliberate choices
- A motive to hide the account tends to show violation was deliberate and not accidental
- Absence of motive does not negate willfulness if other evidence shows violation was not accidental or unintentional
- Bad motive is not required



Known Legal Duty

- Direct evidence:
 - Statement by the person that he knew the filing requirements
 - FBAR for a previous year, or incomplete FBAR for current year
 - Prior FBAR compliance action
- Circumstantial evidence
 - Return preparer asked about foreign accounts and person lied
 - Failed to disclose the account or income for many years
 - Person otherwise concealed the account



How to Evaluate Evidence

- Evidence drives the direction of the investigation
- Weigh the evidence as it is gathered
- FBAR coordinators, fraud technical advisors, Counsel, and national office FBAR analysts are available to assist with weighing evidence
- Does circumstantial evidence support willfulness or not?
- The relative meaning and weight may change



Willful or Not?

Factors tending to support a willful penalty

- Opened the foreign bank account
- Owner of, or a financial interest in, the foreign bank account

Factors tending not to support a willful penalty

- Inherited the foreign bank account
- Only signature authority over the foreign bank account



Willful or Not?, cont'd.

Factors tending to support a willful penalty

- Tax non-compliance
- Did not seek advice, or relied upon the advice of a promoter, foreign banker, or other unqualified tax professional

Factors tending not to support a willful penalty

- Tax compliance
- Relied upon the advice of a tax return preparer, a CPA, an attorney, or another qualified tax professional



Willful or Not?, cont'd.

Factors tending to support a willful penalty

- Violations persist after notification of FBAR reporting requirements
- Foreign account **not** disclosed to return preparer

Factors tending not to support a willful penalty

- Full compliance after notification of FBAR reporting requirements
- Foreign account disclosed to return preparer



Willful or Not?, cont'd.

Factors tending to support a willful penalty

- No business reason for the foreign account
- No family or business connection to the foreign country
- An offshore entity owns the account

Factors tending not to support a willful penalty

- Business reason for the foreign account
- Family or business connection to the foreign country
- Person owns the account in his name



Willful or Not?, cont'd.

Factors tending to show willfulness

- Previously-filed FBARs do not include all foreign accounts
- Illegal income in the foreign account
- Participated in an abusive tax avoidance scheme

Factors tending not to support a willful penalty



Break, Please!

Break Time



Definition of Willful – Review

Willfulness is the voluntary, intentional violation of a known legal duty



Willful Blindness

- Willful blindness is a voluntary, intentional, reckless failure to discover a legal duty (willful ignorance, intentional avoidance, blatant ignorance)
 - Prove by circumstantial evidence
 - Evidence subject to different interpretations
- Show the person was in a position to acquire knowledge
- Weakness: Person argues he did not know or even had reason to know that he had to report the account



Willful Blindness, continued

- Key factors
 - Extra-ordinary acts or complexity to conceal the account
 - A desire not to contradict strong beliefs or desires
 - Bad faith
- The examiner must make the case for willful blindness
 - Link the facts
 - Tell a story
 - Argue weight of evidence
 - Failing to report was necessary to carry-out the plan



Willful Blindness – Extraordinary Acts

- Purpose of the account
 - Why not a U.S bank account
 - Cash hoard?
- **Probe any statements by the person about financial privacy**
- Source of the funds in the account
- Steps to conceal the account
 - Create foreign entities (tiered entity structure); Why?
 - Who provided advice?
 - How did the person access the account (travel, wire transfers)?
- Passive beneficiaries have comparably less willfulness



Willful Blindness – Contradict Beliefs

- If the person is not a natural-born U.S. citizen
 - Consider tax system in the country of origin
 - Steps to become familiar with U.S. laws
- Business in foreign countries
- Compliance with state or local laws
- Other indications that show the person objects to disclosing information to the government



Willful Blindness – Bad Faith

- May be related to other reasons to conceal account
- May be able to impeach the person to reduce credibility
- Civil or criminal fraud
- Less than full disclosure of facts to professionals who were in a position to advise the person of his reporting requirements
 - The professional's knowledge of a filing requirement is not relevant
 - Why consult the professional and not be honest?
- Length of time of failure to report the account



Key Investigative Steps

- At a minimum, interview
 - Tax return preparers and other tax professionals
 - The taxpayer
- With indicators of willfulness, interview
 - Financial or investment advisors
 - Business partners
 - U.S. bankers or loan officers
 - Former spouses
- Search the Internet



Return Preparer Interview

- Second most important interview (the taxpayer interview is the most important)
- Focus on the exchange of information
- Request the tax return preparation file; consult Counsel regarding claims of privilege
- Standard business practices
 - New client process
 - Returning client process
 - Tax organizers



Interview the Taxpayer

- The most important interview
- Timing a matter of personal preference
- Consider issuing a summons
- FBAR interview to address
 - The foreign bank account
 - The preparation of the tax return
 - Foreign entity structure, if applicable



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5. Penalty Determination

- Possible Outcomes of an FBAR Penalty Case
 - No violation
 - Violation, no penalties (warning letter)
 - Violation with penalties
- Where there is a violation, must issue a warning letter or assert a penalty
- Do not discuss penalty decision with the taxpayer until Counsel reviews the case



FBAR Civil Penalties

- For willful violations the civil penalty cannot exceed the greater of
 - \$100,000
 - 50% of the balance in the account at the time of the violation (June 30 of the following year)
- For non-willful violations, the penalty cannot exceed \$10,000
- no penalty is imposed if
 - there is reasonable cause, and
 - Taxpayer files correct FBARs



FBAR Civil Penalties, cont'd.

- The statute does not define “violation”
- Example: for three years a person failed to file FBARs to report two accounts each year.
 - 6 violations: one per account per year
 - 3 violations: one per year for the unfiled FBAR
 - 1 violation: one for the entire three-year period
- Flexibility to compute an appropriate non-willful penalty based upon the facts of the case
 - Strong indications of willfulness but cannot prove willfulness
 - Some willful conduct, but not enough to assert willful penalty



FBAR Penalty Mitigation

- IRM 4.26.16.4.6 and Exhibit 4.26.16-2
- May deviate as appropriate
- Penalty mitigation is available to persons that meet all of the following:
 - No history of criminal tax or BSA convictions for the preceding 10 years, and no prior FBAR penalty assessments
 - No illegal sources of income in the foreign accounts
 - Person cooperated during the examination
 - No fraud penalty against the person for an underpayment of income tax for the year in question due to the failure to report income related to any amount in a foreign account



Mitigated FBAR Penalties

- Guidelines define levels of penalties based upon the account balances
 - Willful: Levels I, II, III, and IV
 - Non-willful: Levels I-NW, II-NW, and III-NW
- The Level Is are where the aggregate balance of all accounts does not exceed \$50,000
- Where Level 1 does not apply, compute the penalty per account, based upon the highest balance in the account
- Levels IV and III-NW are the maximum statutory penalties



FBAR Summary Memorandum

- Summarizes the FBAR penalty investigation
 - Summarize the evidence
 - Analyze the evidence
 - Discuss reasonable cause
 - Draw conclusions
 - Show FBAR penalty computation
- Memorandum is from the group to Counsel to request advice on whether the evidence supports the penalty (willful or non-willful)
- Do not use the FBAR lead sheet
- Attach documents as necessary



Memorandum Review

- For willful penalties, a fraud technical advisor must review the memorandum
- The FBAR coordinator must review all penalty memoranda:
 - Reviews the evidence to ensure the memorandum is complete
 - Reviews the penalty computation to verify it is correct
 - Verifies you addressed reasonable cause



Counsel Advice

- Counsel does not compute the penalty
 - Reviews the proposed penalty
 - May recommend an alternative computation
 - May advise to assert a lesser or greater penalty
 - May advise the evidence is not sufficient to sustain the proposed penalty (may identify information additional evidence that may support the proposed penalty)
 - May advise not to assert a penalty
- Group manager has the final authority to determine the appropriate FBAR penalty (FBAR coordinator, FTA, and FBAR analyst can help resolve differences with Counsel)



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6. Close the Case

- Send correspondence to the taxpayer
 - FBAR warning letter (no penalties)
 - FBAR 30-day letter package (penalties)
- Wait for taxpayer to respond (30-day letter only)
- Close the case from the group
 - To Detroit (warning letter, agreed cases, and no-response cases)
 - To Appeals (unagreed appeal cases)



FBAR Penalty Case File

- Separate case file from the income tax case files
- FBAR penalty cases and income tax cases have separate processing pipelines
- FBAR case file must include all relevant information from the income tax files, such as
 - Tax returns
 - Examination report
 - Bank statements
- Consider a separate case file for each FBAR year



Important FBAR Case Procedures

- Unless the taxpayer appeals, close all FBAR cases directly to Detroit
- Send FBAR penalty payments to Detroit
 - Do not post to Master File
 - Do not process on Form 3244-A
- The taxpayer must use a separate check to pay FBAR penalties (may pay multiple FBAR penalties with one check)
- Detroit assesses FBAR penalties
- FBAR penalties are not on Master File



FBAR Penalty Appeals

- Pre-assessment appeal rights
 - Timely response to FBAR 30-day letter
 - At least 180 days on the assessment statute
- Post-assessment, pre-payment appeal rights
 - Timely response to the FBAR 30-day letter with less than 180 days on the assessment statute
 - requested appeal rights after Detroit assessed the penalty
- Only one conference with Appeals
- May appeal collection actions to a U.S. District Court



Questions

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