
FBAR Investigative Techniques Guide

Supplement to the
Quiet Disclosure Training
May, 2013



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FBAR Penalty Investigations

- The goal of the FBAR penalty investigation is to gathering evidence to arrive at a decision regarding the appropriate FBAR penalties
- Many investigations will result in non-willful penalties because the IRS cannot prove willfulness
- The evidence will guide the investigation:
 - If the evidence tends to show willful conduct by the person, continue to gather evidence to prove willfulness
 - If the evidence tends to show non-willfulness, then shift the focus of the investigation to reasonable cause



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The goal of an FBAR penalty investigation is to gather evidence to arrive at a decision regarding the appropriate FBAR penalties. Examiners should try to avoid starting a penalty investigation with the intent of proving a that a specific penalty applies. At the start of the investigation you may have some evidence that tends to show willfulness, or that that tends to show non-willfulness, but until you gather additional information you really do not know with any degree of certainty the appropriate penalty, if any, to assert.

Many FBAR penalty investigations will result in non-willful penalties, not because the person did not act willfully, but because we cannot meet our burden to prove that the person acted willfully.

You need to allow the evidence to guide the investigation. If the evidence tends to show willful conduct by the person, then continue to gather evidence to prove willful FBAR violations; however, if the evidence tends to show non-willfulness, then at some point during the investigation you will shift the focus to evaluating whether the person has reasonable cause for the FBAR violations. At what point you have gathered enough information to make a decision about the direction of the investigation heavily depends upon the facts of the case.

Suggested Approach

- Was there a violation?
 - Duty to file?
 - Reasonable cause?
- What is the appropriate penalty?
 - Was the violation file voluntary and intentional (willful)?
 - Was the violation non-willful?
 - Is a warning letter appropriate?



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Sometimes it is difficult to figure out how to start an FBAR case. The suggested approach to FBAR penalty cases is to ask yourself two basic questions. First, was there a violation? Second, what is the appropriate penalty, if any?

To show there was a violation that could be subject to a penalty, the person had to have both a duty to file and FBAR and the person did not have reasonable cause for the violation.

The amount of the penalty to assert, if any, depends upon whether the violation was voluntary and intentional, in other words a willful violation, or a non-willful violation. For non-willful violations, in some cases it may be more appropriate to issue a warning letter rather than assessing a penalty.

Willfulness and Motive

- Voluntary and intentional
- Question is whether non-filing was deliberate choice
- Bad motive is not required
- A motive to hide the account tends to show not filing was deliberate and not accidental
- But absence of motive does not negate willfulness if other evidence failure was not inadvertent



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Before we move on, a few words on willfulness and motive are appropriate. Willfulness is a voluntary and intentional act. The question is whether the failure to file the FBAR was a deliberate choice by the taxpayer. It is not necessary to show a bad motive to prove willfulness. A motive to conceal the account, for example tax avoidance or evasion, tends to show that not filing the FBAR was deliberate and not accidental; however, the lack of motive does not negate willfulness if there is other evidence that shows the failure to file the FBAR was not inadvertent.

Was there reasonable cause?

- Did some event or condition prevent timely filing?
- Did the taxpayer consult a qualified professional?
- The mere uninformed belief that no FBAR is due, no matter how genuine, is not reasonable cause unless the person makes an inquiry
- Reasonable cause = no penalty; issue the warning letter



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As you are investigating the FBAR penalty case, remember that you must address the issue of reasonable cause. Was there some event, condition, or reason that prevented the person from timely filing the FBAR? Did the person consult a qualified tax professional for advice? Remember that an uninformed belief that no FBAR is due, no matter how genuine or sincere, is not reasonable cause; the person must, in good faith, seek advice or otherwise make an inquiry to have reasonable cause for not filing.

If there is reasonable cause, and the person filed correct FBARs, you cannot assert an FBAR penalty; however, where you discover a violation, even if the violation is due to reasonable cause, you should issue an FBAR warning letter to establish the person's knowledge of the FBAR filing requirement in the event there are future FBAR violations.

Step 1: Prove a Violation Exists

- 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



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The FBAR penalty investigation is a two-step process. First, the examiner needs to prove that the person failed to file the report mandated by the statute. Second, the examiner must determine the appropriate penalty to assert.

To prove that a person failed to comply with the law, the examiner must prove that the person had a reporting requirement under the statute and that the person failed to comply with the statute.

To prove that the person had filing requirement, the examiner must:

Prove the person is a U.S. Person.

Prove the person had a financial interest in, or signature or other authority over one or more accounts.

Prove that each account was a foreign financial account.

Prove the aggregate balance of the foreign financial accounts exceeded \$10,000 at any time during the calendar year.

Step 2: The Appropriate Penalty

- Once the examiner proves there is a statutory violation, the examiner must determine the appropriate penalty to assert, if any
- The burden of proof is on the government
 - To assert a willful penalty, the examiner must prove the person knew of the requirement to file an FBAR and voluntarily, intentionally, failed to file an FBAR
 - To assert a non-willful penalty, the examiner must determine whether the person had reasonable cause for failing to file the FBAR
- The evidence must support the penalty



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Once the examiner proves the person had a statutory reporting requirements and that the person failed to file the FBAR, the examiner must then determine the appropriate penalty to assert, if any.

In all penalty cases, the burden of proof is on the government.

To assert a willful penalty, the examiner must prove the person knew of the requirement to file an FBAR and voluntarily, intentionally, failed to file an FBAR.

To assert a non-willful penalty, the examiner must determine whether the person had reasonable cause for failing to file the FBAR.

The evidence gathered by the examiner must support the proposed penalty assessment.

U.S. Person

Must prove the person is a U.S. Person

- United States passport with photo and passport number
- Statement by person that shows he is a U.S. citizen
- IDRS CC DDBKD has citizenship indicator (code “A”)
- Statement by person that he was U.S. resident for each year
- Proof of presence inside the United States for each year
 - Driver’s license address
 - Addresses on IDRS
 - Voting registration records
 - Witness interviews (return preparer, family members, etc.)



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We need to prove that the person had a requirement to file an FBAR for a specific calendar year. Although this may seem obvious, you need to secure proof that the person was either a U.S. citizen or a resident of the United States during the calendar year. This should not be difficult to prove, but you need something in the case file to prove this simple fact.

A copy of the person’s United States passport, with a photograph of the person and the passport number, is good proof of citizenship. It is better if you made the copy of the passport, but a copy made by a third party may be sufficient.

A statement by the person that shows he is a U.S. citizen, either an admission of citizenship, or a statement about the location of the person’s birth, is acceptable.

IDRS command code DDBKD contains information from the Social Security Administration about the citizenship of the person associated with the Social Security Number; citizenship code “A” means the person is a U.S. citizen.

If the person is not a U.S. citizen, or we cannot prove the person is a U.S. citizen, then we need to prove that the person was a resident of the United States during each year for which there is an FBAR violation. A direct statement by the person about residency status is the best evidence, but other ways to show residency are addresses on a driver’s license, IDRS addresses, voting registration records, and statements by other witnesses, such as the return preparer or family members, about their knowledge of the where the person lived during the relevant years.

Financial Interest/Signature Authority

- Statements made in OVDI disclosures are likely sufficient to prove ownership
- For cases with UBS records, the records should show ownership, although we need to support the UBS records with other evidence
 - Verify signatures on UBS bank documents
- Transfers between the foreign account and a U.S. account may be evidence of a financial interest in the account



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If the person filed a voluntary disclosure, you can use any statements made by the person during the voluntary disclosure verification to support the position that the person owns the foreign accounts, including the voluntary disclosure cover letter, the three-page letter, or any other documents provided by the taxpayer.

In nearly all cases where we have UBS records provided under the tax treaty between the United States and Switzerland, proving a financial interest or signature authority over the account should be not too difficult. You may need to support the UBS records with other evidence, particularly where the UBS records do not include a copy of the person's U.S. passport.

If the UBS records only contain a document with the signature of the person, you may need to provide additional evidence to support the conclusion that the signature on the document belongs to the person. The best way to verify the signature is with a document that we know the person signed, such as prior original U.S. tax returns, a power of attorney, the OVDI cover letter, or a driver's license.

Transfers between the foreign bank account a domestic bank account that you can prove belongs to the person is strong evidence that the person owns both accounts, particularly when the person offers no credible explanation for the transfers.

Foreign Financial Account

- Is the account located outside the United States?
- What is the address of the bank shown on the bank statements or bank documents?
- Are the bank statements and other documents in a foreign language?
- Format of the date
 - DD-MM-YYYY as in Europe?
 - MM-DD-YYYY as in the United States?
- Location of banker



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Yes, this is a serious issue that you must address. Many foreign banks have branches in the United States and these branches are considered to be U.S. banks for FBAR reporting purposes. The fact that a person has a bank account with a foreign is not proof that the bank account is a foreign bank account subject to reporting on an FBAR.

The easiest way to verify the location of the bank account is to inspect the bank records. Is the bank address in bank records, or on the bank statements, located outside the United States?

Are the bank statements or bank documents in a language other than American English?

What is the format of the date? Is the format Day-Month-Year, as used in Europe, or Month-Day-Year as used in the United States?

For treaty cases, if there are banker notes or other notes in the case file, can you determine the location of the parties who wrote the notes? Are the notes in American English? If the notes were written in a

foreign language, or the person who wrote the notes is located outside the United States, it is highly likely that the associated account is a foreign bank account.

Aggregate Balance Exceeds \$10,000

- Compute the maximum balance of each foreign bank accounts
- Where necessary, convert the maximum balance to U.S. Dollars using the appropriate conversion rate
- When proposing to assess the willful penalty, compute the balance of each account on the due date of the FBAR



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The final statutory requirement that you must prove is that the aggregate balance of the foreign accounts exceeded \$10,000 during the calendar year.

Based upon the bank statements you should be able compute the maximum balance of each foreign bank account in the currency of that account and, where necessary, the maximum balance of each account converted into U.S. Dollars.

Add together the maximum balances of all accounts to show that the aggregate balance of the foreign accounts exceeds \$10,000.

Also, for any account subject to FBAR reporting where you intend to assert the willful FBAR penalty, you need to show the balance of that account on June 30 of the year following the reporting year. Just to refresh your memory, the willful FBAR penalty is based upon the value in the account on the date of violation.

Propose an FBAR Penalty

- The examiner and group manager have discretion to propose an appropriate penalty based upon the facts of the case
- Explain deviations from the FBAR mitigation guidelines
- Compute the proposed FBAR penalties



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Once you have shown both that the person had a requirement to file an FBAR and that the person failed to file the FBAR, you need to determine the appropriate penalty. Under the FBAR penalty mitigation guidelines, the examiner and group manager have the discretion to propose an appropriate penalty based upon the specific facts of the case.

Where it is appropriate to deviate from the FBAR mitigation guidelines, the examiner and group manager need to explain the reasons for the deviations, regardless of whether the proposed penalty is an amount that is greater than, or less than, the amount penalty under the FBAR mitigation guidelines.

The examiner must also compute the amount of the proposed penalty.

The rest of this presentation discusses what type of evidence is necessary to sustain both willful and non-willful FBAR penalties.

Willful FBAR Penalties

- The primary difference between willful and non-willful FBAR penalties is the degree of fault by the person
- Willful is a voluntary, intentional violation of a known legal duty
 - Had knowledge of the requirement to file an FBAR
 - Chose not to file the FBAR
- To elevate the violation to willful, need affirmative acts by the person to conceal the account



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There are two FBAR penalties, one for willful violations and one for non-willful violations. The primary difference between willful conduct and non-willful conduct is the degree of fault of the person who failed to file the FBAR.

The general definition for willful is the voluntary, intentional violation or disregard of a known legal duty. Notice that the two important concepts in the definition of willfulness are knowledge and intent.

With respect to FBAR filing requirements, a person acted willfully if he had knowledge of the requirements to file an FBAR and chose not to file the FBAR.

Absent direct proof that the person knew he had to file an FBAR, you will need to identify affirmative acts by the person to conceal the foreign account to elevate the FBAR penalty from non-willful to willful. There mere fact that a person failed to file an FBAR is, by itself, not an indication of willfulness.

Proving Willfulness

- Direct evidence is the best proof of willfulness
 - Person admits to the agent that he knew of the filing requirement but did not file anyway
 - Person admits to a third party that he knew of the filing requirement but did not file anyway
- Circumstantial evidence may infer knowledge
 - Previous FBAR filing, warning letter, penalty assessment
 - Reporting only foreign accounts with low balances or located in non-secrecy countries
 - Need to address other motives for concealing the account
- Not necessary to prove an improper motive



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Willfulness is not easy to prove, and you should not be discouraged if you are unable to prove willfulness. Sometimes the evidence just is not there, and you have to accept that fact and move on.

One way to prove willfulness is if the person tells you that he acted willfully, specifically the person admits that he knew of his requirement to file an FBAR but chose not to file the form. Nearly equally good as this type of statement of intent by the person is a similar statement by the person during a conversation with a third party. Of course you would have to locate and interview this third party, but in both of these statements the person admitted that he knew of his requirement to file an FBAR and he chose not to file the form. This type of evidence is direct evidence because it proves a fact without the need to make an inference.

In very few FBAR penalty investigations will there be direct evidence of willfulness. Instead, you will need to construct your willful penalty case using circumstantial evidence. A piece of circumstantial evidence does not by itself prove a fact; however, circumstantial evidence, when analyzed along with other evidence, may support a conclusion based upon inference and reasoning.

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Willful Blindness

- Willful blindness is a voluntary, intentional, reckless failure to discover a legal duty (willful ignorance, intentional avoidance, blatant ignorance)
 - Rely upon 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 have reason to know that he had to report the account



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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
- In the FBAR penalty memorandum, 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



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The success of a willful blindness case will depend upon three basic factors: first, did the person take extra-ordinary or complex actions to conceal his ownership of the foreign account; second, would disclosing the existence of the account either violate the person's stated reasons for having the account or conflict with strongly-held beliefs; third, taking into account all of the actions of the person, did the person act in bad faith with respect to the foreign account. We are going to discuss these factors in the next few slides. Keep in mind that not all these factors will apply in every case.

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Willful Blindness – Extraordinary Acts

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



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Willful Blindness – Contradict Beliefs

- If the person is not a natural-born U.S. citizen
 - Tax system in the country of origin
 - Steps to take to become familiar with U.S. laws
- Does business in foreign countries?
- Compliance with state or local laws
- Other indications that indicate the person disagrees with disclosing information to the government



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Willful Blindness – Contradict Beliefs

- Conclusions on taxability of income
 - Basis for belief
 - Who consulted (is foreign person qualified)
 - Compare and contrast source of advice with other sources of advice in other areas
 - Second opinions
- Disclose foreign account to return preparer or other tax professional
 - U.S. bank accounts, but not foreign accounts
 - Did return preparer ask about foreign accounts
 - Foreign accounts question on Sch. B, Form 1040



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Willful Blindness – Bad Faith

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



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Return Preparer Interview



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Taxpayer Interview



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SB/SE FBAR Resources

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SB/SE as three senior program analysts within the Abusive Transactions and Technical Issues function, ATTI for short, who specialize in offshore issues, including FBAR penalty investigations:

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