PURPOSE

(1) This transmits new IRM 4.26.16, Bank Secrecy Act, Report of Foreign Bank and Financial Accounts (FBAR).

BACKGROUND

(1) This is a completely new section of IRM 4.26.

(2) IRS was delegated enforcement and assessment authority for the Report of Foreign Bank and Financial Accounts in 2003. Procedures have been developed to implement this delegation.

(3) The Report of Foreign Bank and Financial Accounts procedures are found in IRM 4.26.17.

NATURE OF MATERIAL

(1) This section provides guidance to the field regarding the law used in civil compliance examinations for the Foreign Bank and Financial Account Report (FBAR)

EFFECT ON OTHER DOCUMENTS

This section supersedes the Memorandum SB/SE 2004–1, which has served as interim guidance until the Internal Revenue Manual (IRM) was revised to include these procedures. This section should be read together with Section 4.26.17 report of Foreign Bank and Financial Accounts (FBAR) Procedures for a complete understanding of FBAR law and procedures.

AUDIENCE

Intended audience is field compliance personnel in the Small Business/Self Employed (SB/SE) division, and can be referenced by all other operating divisions.

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4.26.16
Report of Foreign Bank and Financial Accounts (FBAR)

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4.26.16.1
(07-01-2008)
FBAR Law Overview

(1) The Report of Foreign Bank and Financial Accounts, TD F 90–22.1, (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. If a report is required, certain records must also be kept.

(2) In April 2003, the IRS was delegated civil enforcement authority for the FBAR.

(3) IRM 4.26.16 covers FBAR law. FBAR procedures are covered in IRM 4.26.17.

4.26.16.2
(07-01-2008)
FBAR Authorities

(1) FBAR issues can be researched at:

a. 31 U.S.C. § 5314 the United States Code,
b. 31 C.F.R. Part 103, the Code of Federal Regulations, and
c. Instructions to the FBAR.

(2) FBAR relevant authorities are listed on the SB/SE FBAR web site at *http://sbse.web.irs.gov/FR/BSA/ProgTechGuidance.htm#fbar*. If additional research sources are needed:

a. Statutory material may be found using commercial legal research services on the IR web home page research center. This is preferable to using the official version of the United States Code because the web site is updated more frequently.
b. Regulations may be found using commercial legal research services or at *http://www.gpoaccess.gov/ecfr*. The Electronic Code of Federal Regulations (ECFR) is updated frequently.
c. The best source for the most current version of the FBAR and its instructions is IRS Forms and Publications at *http://publish.no.irs.gov/catlg.html*

(3) The public can obtain the FBAR and instructions as follows:

a. On the internet at *http://www.irs.gov*.
b. In some libraries and IRS Forms Distribution centers.

4.26.16.2.1
(07-01-2008)
FBAR Statutory Authority

(1) Statutory authority for the FBAR is 31 U.S.C. § 5314.

(2) Section 5314 directs the Secretary of the Treasury to require 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 when making transactions or maintaining a relationship with a foreign financial agency.

(3) 31 U.S.C. § 5321(a)(5) establishes civil penalties for violations of the FBAR reporting and recordkeeping requirements. See IRM 4.26.16.4 FBAR Penalties for a discussion of penalties.

4.26.16.2.2
(07-01-2008)
FBAR Regulatory Authority

(1) Regulatory authority for the FBAR is 31 C.F.R. §§ 103.24 and 103.27. Section 103.32 provides for FBAR records and Section 103.56 tasks the IRS with FBAR enforcement. Section 103.24 states that each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person) who has a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country must report that relationship to the Commissioner of the Internal Revenue for each year in which the relationship exists. The U.S. person must provide information as specified in the required reporting form.

(2) The FBAR must be filed on or before June 30 for foreign financial accounts aggregating more than $10,000 in the previous calendar year. 31 C.F.R. § 103.27(c)

(3) Any person required to file the FBAR must keep certain records of the account for five years. Records may need to be maintained for a longer period by persons who have been formally charged with a criminal tax violation. 31 C.F.R. § 103.32

(4) The authority to enforce the provisions of 31 U.S.C. § 5314 and 31 C.F.R. §§103.24 and 103.32 has been re-delegated from the Financial Crimes Enforcement Network (FinCEN) to the Commissioner of the Internal Revenue Service by a Memorandum of Understanding (MOU) between FinCEN and IRS. The MOU is referenced in 31 C.F.R. § 103.56(g). This includes authority to:

a. Investigate possible civil violations of these provisions;
b. Assess and collect civil FBAR penalties;
c. Employ the summons power of subpart F of part 103;
d. Issue administrative rulings under subpart G of part 103; and,
e. Take any other action reasonably necessary for the enforcement of these and related provisions, including pursuit of injunctions.

4.26.16.2.3
(07-01-2008)
FBAR Instructional Authority

(1) The instructions for the FBAR provide additional guidance and contain some rules not found in the FBAR statute or regulations. For example, the instructions identify exceptions to the filing requirement for certain corporate officers and employees having signature or other authority over a foreign financial account.

(2) The instructions in some instances are clarified by reference to the regulations. For example, terms in the instructions such as “United States” are defined in the regulations.

4.26.16.3
(07-01-2008)
FBAR Filing Criteria

(1) In order to determine whether or not the FBAR is required, **all** of the following must apply:

a. The filer is a U.S. person;
b. The U.S. person has a financial account(s);
c. The financial account is in a foreign country;
d. The U.S. person has a financial interest in the account or signature or other authority over the foreign financial account; and,
e. The aggregate amount(s) in the account(s) valued in dollars exceed $10,000 at any time during the calendar year.

4.26.16.3.1
(07-01-2008)
U.S. Person

(1) A U.S. person is defined by reference to three sources. 31 U.S.C. 5314 and 31 C.F.R. 103.24 identify persons who may be subject to the FBAR reporting requirement. The FBAR instructions identify a smaller group of persons who must file FBARs than could have been required, under the statute and regulations, to file.

a. “The Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports...” and that “The Secretary may prescribe a rea-

sonable classification of persons subject to or exempt from a requirement under this section or a regulation under this section". 31 U.S.C. § 5314

b. Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person)…shall provide information specified in a reporting form prescribed by the Secretary. 31 C.F.R. § 103.24
c. The instructions to the July 2000 FBAR (the current version) define "United States person" as "a citizen or resident of the United States, a domestic partnership, a domestic corporation or a domestic estate or trust."
d. "United States" includes the states, territories, and possessions of the United States. 31 C.F.R. 133.11(nn)
e. Examiners should use the definition of "United States person" found in the FBAR instructions when determining whether a person has an obligation to file the FBAR.

4.26.16.3.1.1
(07-01-2008)
U.S. Person: Definition

(1) A citizen of the United States has a U.S. birth certificate or naturalization papers. Documents to substantiate citizenship, however, would not normally be requested as part of the FBAR examination.

(2) A "resident" of the United States is a permanent resident. "Permanent resident" is not defined in the FBAR instructions, regulations, or statute. The definition of "resident alien" found in IRC § 7701(b) is not applicable for FBAR purposes. The plain meaning of the term "resident" (in this context, someone who is living in the U.S. and not planning to permanently leave the U.S.) should be used for FBAR examination purposes. Although IRC § 7701(b) is not applicable, an individual can establish that he is not a resident for FBAR purposes if he can show that none of the following three criteria apply:

a. The green-card test - Individuals who at any time during the calendar year have been lawfully granted the privilege of residing permanently in the U.S. under the immigration laws automatically meet the definition of resident alien under the green-card test; or
b. Individuals who are not lawful permanent residents are defined as resident aliens under the substantial-presence test if they are physically present in the U.S. for at least 183 days during the current year, or they are physically present in the U.S. for at least 31 days during the current year and meet the specifications contained in IRC § 7701(b) (3); or
c. The person files a first year election on his income tax return to be treated as a resident alien under IRC § 7701(b) (4).

Therefore, if none of the three criteria listed above apply, then the person is not a resident for FBAR purposes.

(3) For FBAR purposes, the definition of "person" also includes a corporation, trust, or partnership.

a. A certificate of incorporation from a state of the United States establishes that the corporation is a U.S. person.
b. A foreign subsidiary (a subsidiary that is not incorporated in the United States) of a U.S. person is not subject to the FBAR filing requirements under 31 C.F.R. § 103.24. The U.S. parent is, however, considered to have a financial interest in any foreign financial account owned by its subsidiary and will file the FBAR on such an account.

(4) A corporation that owns directly or indirectly more than a 50 percent interest in one or more other entities is permitted to file a consolidated FBAR, on behalf of itself and the other entities. The consolidated report must include a list of the entities. An authorized official of the parent corporation should sign the consolidated report.

4.26.16.3.2
(07-01-2008)
Financial Account

(1) A financial account includes a:

a. Bank account, such as a savings, demand, checking, deposit, time deposit, or any other account maintained with a financial institution or other person engaged in the business of a financial institution. A bank account set up to secure a credit card account is an example of a financial account. An insurance policy having a cash surrender value is an example of a financial account.
b. Securities, securities derivatives, or other financial instruments account.
c. Other financial accounts generally encompass any accounts in which the assets are held in a commingled fund and the account owner holds an equity interest in the fund. A mutual fund account is an example of such an account.
d. Individual bonds, notes, or stock certificates held by the filer are not a financial account.

4.26.16.3.3
(07-01-2008)
Foreign Financial Account

(1) Generally, an account in a foreign country includes all geographical areas located outside the United States.

(2) The location of an account, not the nationality of the financial institution with which the account is held, determines whether the account is in a foreign country. Any financial account (except accounts maintained with a U.S. military banking facility) that is located in a foreign country should be reported, even if the account is held with a branch of a United States financial institution located abroad.

a. The FBAR is not required for an account maintained with a branch, agency, or other office that is located in the United States even though the financial institution itself may be foreign.
b. The United States includes the states of the United States, the District of Columbia, the Indian lands (as defined in the Indian Gaming Regulatory Act), and the territories and insular possessions of the United States. Examples include the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa and the Commonwealth of the Northern Marianna Islands.
c. An account is not considered foreign if held in an institution known as a “United States military banking facility” (or “United States military finance facility”) operated by a United States financial institution designated by the United States Government to serve U.S. Government installations abroad, even if the United States military banking facility is located in a foreign country .

(3) The existence of a foreign financial account may be discovered during an income tax or Bank Secrecy Act (BSA) examination. Examples of such occurrences include:

a. When inspecting a tax return as a part of pre-contact analysis (for example, Form 1040 Schedule B Part III has questions pertaining to foreign accounts).

b. When conducting an income probe performed during an income tax examination.
c. When interviewing a taxpayer.
d. When conducting a BSA examination of a business, such as a money transmitter, that may routinely transmit funds overseas. Note that such businesses may or may not have a financial interest in, or authority over, a financial account located in a foreign country even though they transmit funds to an account overseas.

4.26.16.3.4
(07-01-2008)
Financial Interest

(1) A United States person has a financial interest in each account for which such person is the owner of record or has legal title, whether the account is maintained for his own benefit or for the benefit of others including non-United States persons. If an account is maintained in the name of two persons jointly, or if several persons each own a partial interest in an account, each of those United States persons has a financial interest in that account and, generally, each person must file the FBAR. Under the individual reporting requirement, persons who file a joint tax return must file separate FBARs. In the past however, FinCEN has accepted a single FBAR for an account jointly held by husband and wife. IRS is continuing this practice.

(2) A United States person also has a financial interest in each bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is:

a. a person acting as an agent, nominee, attorney, or in some other capacity on behalf of the U.S. person; or
b. a corporation, whether foreign or domestic, in which the United States person owns directly or indirectly more than 50 percent of the total value of shares of stock; or
c. a partnership, whether foreign or domestic, in which the United States person owns an interest in more than 50 percent of the profits (distributive share of income); or,
d. a trust, whether foreign or domestic, in which the United States person either has a present beneficial interest in more than 50 percent of the assets or from which such person receives more than 50 percent of the current income. :

(3) A bank is not required to file the FBAR to report a financial interest in an international interbank transfer account (commonly called a “nostro” account). This exception appears in 52 Fed. Reg. 11436, 11438 (April 8, 1987).

4.26.16.3.5
(07-01-2008)
Signature or Other Authority Over an Account

(1) A person having signature or other authority over a foreign financial account must file the FBAR even if the person has no financial interest in the account.

(2) A person has signature authority over an account if that person can control the disposition of money or other property in it by delivery of a document containing his signature (or his signature and that of one or more other persons) to the financial institution where the account is maintained. A person has other authority if the person can exercise power comparable to signature authority over an account by communication to the financial institution where the account is maintained, either orally or by some other means.

(3) The following are exceptions to the FBAR reporting requirement:

a. An officer or employee of a bank that is subject to the supervision of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, or the Federal Deposit Insurance Corporation need not file the FBAR reporting that he has signature or other authority over a foreign bank, securities, or other financial account maintained by the bank, if the officer or employee has NO personal financial interest in the account.
b. An officer or employee of a domestic corporation whose equity securities are listed on a national securities exchange or which has assets exceeding $10 million and 500 or more shareholders of record need not file the FBAR concerning his signature or other authority over a foreign financial account of the corporation, if he has NO personal financial interest in the account and he has been advised in writing by the chief financial officer of the corporation that the corporation has filed a current FBAR, which includes that account.
c. An officer or employee of either a domestic subsidiary of a domestic corporation or a foreign subsidiary that is more than 50% owned by a domestic corporation which has securities listed on a national securities exchange or which has assets exceeding $10 million and 500 or more shareholders of record, need not report that he has signature or other authority over a foreign financial account of the subsidiary if he has NO personal financial interest in the account and has been advised in writing by the chief financial officer of the parent corporation that the corporation has filed a current FBAR which includes that account.
d. An employee or officer of a wholly owned domestic subsidiary of a domestic parent corporation whose equity securities are listed on a national securities exchange or which has assets exceeding $10 million and 500 or more shareholders of record, need not file the FBAR concerning his signature or other authority over a foreign financial account of another domestic or foreign subsidiary of the same domestic parent if he has NO personal financial interest in the account and has been advised in writing by the chief financial officer of the parent corporation that the corporation has filed a current FBAR which includes that account.

4.26.16.3.6
(07-01-2008)
Account Valuation

(1) The FBAR is required for each calendar year during which the aggregate amount(s) in the account(s) exceeded $10,000 valued in U.S. dollars at any time during the calendar year. The maximum value of an account is the largest amount of currency and non-monetary assets that appear on any quarterly or more frequent account statement issued for the applicable year. For example, if the statement closing balance is $9,000 but at any time during the year a balance of $15,000 appears on a statement, the maximum value is $15,000.

(2) If periodic account statements are not issued, the maximum account asset value is the largest amount of currency and non-monetary assets in the account at any time during the year.

(3) Convert foreign currency by using the official exchange rate in effect at the end of the year in question for converting the foreign currency into U. S. dollars. In valuing currency of a country that uses multiple exchange rates, use the rate that would apply if the currency in the account were converted into U. S. dollars at the close of the calendar year. The official Treasury Reporting Rates of Exchange for the previous quarter year can be obtained at *http://fms.treas.gov/intn.html#rates* or by calling the Department of the Treasury, Financial Management Service International Funds Team at (202)

874-7994. As these rates are published quarterly, the rates should be accessed during the first quarter of the following year to obtain the previous December 31 valuation. The rates posted on the FMS website are the current exchange rates. Historical exchange rates will be needed to determine the value in a foreign account in prior years. For historical exchange rates, call FMS at (202) 874-8001 or (202) 874-8004. These phone numbers may be subject to change. Check the FMS website (*http://www.fms.treas.gov*) for the most current information.

(4) The value of stock, other securities, or other non-monetary assets in an account reported on the FBAR is the fair market value at the end of the calendar year, or if withdrawn from the account earlier in the year, at the time of the withdrawal.

(5) If the filer had a financial interest in more than one account, each account is valued separately in accordance with the previous paragraphs.

(6) If a person had a financial interest in one or more but fewer than 25 accounts and is unable to determine whether the maximum value of these accounts exceeded $10,000 at any time during the year, the FBAR instructions state that the person is to complete Part II of the FBAR and if needed, the continuation page(s) for each of these accounts. If the maximum aggregate value of the accounts was not in excess of $10,000, then there would be no FBAR violation if the person did not file the FBAR, whether or not the person knew the value of the accounts at the time the FBAR was due. This is because section 103.27(c) of the Title 31 regulations only requires FBARs to be filed when the value of the accounts exceeds $10,000 during a calendar year. For rules regarding a person with a financial interest in 25 or more accounts, see IRM 4.26.16.3.9.

4.26.16.3.7
(07-01-2008)
Filing

(1) The determination to file the FBAR is made annually. For example, the FBAR may be required to report an account for one year but not for the subsequent years if the aggregate account balances in the subsequent years do not exceed $10,000.

(2) The FBAR must be filed for each year that the person has a financial interest in or authority over the foreign financial account when the balance exceeds the $10,000 threshold.

(3) The FBAR must be filed on or before June 30 each calendar year.

(4) The FBAR is filed by mailing it to the U.S. Department of the Treasury, Post Office Box 32621, Detroit, MI 48232-0621.

(5) The FBAR should not be filed with the filer's federal income tax return.

(6) The FBAR is considered filed when it is received in Detroit, not when it is post-marked.

4.26.16.3.7.1
(07-01-2008)
Filing Extension

(1) Extensions of time to file federal income tax returns do not extend the time for filing FBARs. There is no statutory or regulatory provision specifically granting an extension of time for filing FBARs.

(2) IRC section 7508 Time for performing certain acts postponed by reason of service in combat zone or contingency operation does not grant U.S. persons that are U.S. Armed Forces members any extension to file the FBAR.

4.26.16.3.7.2
(07-01-2008)
Amending a Filed FBAR

(1) The FBAR instructions (for the July 2000 revision of the form) do not address filing amended FBARs. The following instructions may be given to anyone who needs to file an amended FBAR. To amend a previously filed FBAR:

a. Write “Amended” at the top of a new form.
b. Add/correct the information about the account.
c. Staple it to a copy of the original form.
d. Mail the amended FBAR to the filing address shown on the form - Department of the Treasury, Post Office Box 32621, Detroit, MI 48232-0621.

4.26.16.3.7.3
(07-01-2008)
Filing Verification

(1) Filed FBARs are entered onto the Detroit Computing Center’s Currency and Banking Retrieval System (CBRS) database. Filing can be checked by IRS personnel with CBRS passwords.

(2) A CBRS printout of a filed FBAR establishes that any retained FBAR was actually filed and that the retained FBAR has the same information as the filed FBAR. CBRS printouts should be obtained for both the filer’s name and his TIN.

(3) Filers can request verification of the FBARs that they filed 60 days after the date of filing. A request for verification of FBAR filing must be made in writing and should include the filer’s name, Taxpayer Identification Number, and filing period. There is a $5.00 fee for verifying five or fewer forms and a $1.00 fee for each additional form. If copies are needed, the additional fee is $0.15 per copy. Checks or money orders should be made payable to the United States Treasury. The payment should be mailed to:

IRS Detroit Computing Center, P.O. Box 32063, Detroit, MI 48232 Attn.: Verification

4.26.16.3.8
(07-01-2008)
FBAR Recordkeeping

(1) If the FBAR is required, certain records must be retained by the filer. 31 C.F.R. 103.32. Each person having a financial interest in or signature or other authority over any such account must keep the following records:

a. Name in which the account is maintained;
b. Number or other designation of the account;
c. Name and address of the foreign bank or other person with whom the account is maintained;
d. Type of account; and,
e. Maximum value of each account during the reporting period.

(2) Retaining a copy of the FBAR is not required. However, a copy of the current FBAR form contains most of the required information. Additional records that must be retained include the address of the foreign financial institution where the account is maintained and its maximum value (not just a range of values) during the year reported.

(3) The records must be kept for five years and be available at all times for inspection as provided by law. In the computation of the five years, disregard any period beginning with a date on which the taxpayer is indicted or information filed on account of the filing of a false or fraudulent Federal income tax return or failing to file a Federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding.

(4) An examiner should request any retained copies of FBARs as well as the records for the underlying account(s). Note that persons are not required to

keep copies of FBARs filed. Retained FBARs should always be compared to information in the filed FBAR that is recorded in the CBRS database.

4.26.16.3.9
(07-01-2008)
Recordkeeping for Filers Having 25 or More Accounts

(1) Any person who has a financial interest in 25 or more foreign financial accounts can note the number of accounts in item 20 on the current FBAR form and is not required to complete the remainder of Part II. However, the person must provide the information called for in Part II when requested by government authorities.

(2) If a group of entities covered by a consolidated FBAR has a financial interest in 25 or more foreign financial accounts, the reporting corporation only notes that fact on the FBAR. A listing of all the entities which hold the accounts must be attached to the FBAR. The reporting corporation must provide the information called for in Part II for each account when requested by the secretary or his delegate.

4.26.16.4
(07-01-2008)
FBAR Penalties

(1) The IRS has been delegated authority to assess FBAR civil penalties.

(2) There are civil penalties for negligence, pattern of negligence, non-willful, and willful violations.

(3) Whenever there is an FBAR violation, the examiner will either issue the FBAR warning letter, Letter 3800, or determine a penalty. See IRM 4.26.17 for the Letter 3800 procedures .

(4) Penalties should be asserted only to promote compliance with the FBAR reporting and recordkeeping requirements. In exercising their discretion, examiners should 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.

(5) FBAR civil penalties have varying upper limits, but no floor. The examiner has discretion in determining the amount of the penalty, if any. Examiner discretion is necessary because the total amount of penalties that can be applied under the statute can greatly exceed an amount that would be appropriate in view of the violation.

(6) Examiners are expected to exercise discretion, taking into account the facts and circumstances of each case, in determining whether penalties should be asserted and the total amount of penalties to be asserted. Because FBAR penalties do not have a set amount, IRS has developed penalty mitigation guidelines to assist examiners in the exercise of their discretion in applying these penalties. The mitigation guidelines are only intended as an aid for the examiner in determining an appropriate penalty amount. The examiner must still consider whether a warning letter or a penalty amount that is less than what would be called for under the mitigation guidelines would be more appropriate given the facts and circumstances of a particular case. For example, if an individual failed to report the existence of five small foreign accounts with a combined balance of $20,000 for all five accounts but the income from each account was properly reported and the taxpayer made no effort to conceal the existence of the account, it may be more appropriate to issue a warning letter rather than assert penalties under the mitigation guidelines.

(7) FBAR penalties are determined per account, not per unfiled FBAR, for each person required to file. Penalties apply for each year of each violation. As

noted above, however, examiners are expected to exercise discretion, taking into account the facts and circumstances of each case, in determining whether penalties should be asserted and the total amount of penalties to be asserted.

(8) There may be multiple FBAR civil penalty assessments arising from one account. FBAR civil penalties can apply to each person with a financial interest in, or signature or other authority over, the foreign financial account. Thus there may be multiple penalty assessments if there is more than one account owner or if a person other than the account owner has signature or other authority over the foreign account. Each person can be liable for the full amount of the penalty.

4.26.16.4.1
(07-01-2008)
FBAR Penalty Authority

(1) As of April 8th 2003, IRS was delegated the authority to assess and collect FBAR civil penalties. 31 C.F.R. § 103.56(g). The delegation includes the authority to investigate possible FBAR civil violations, provided in Treasury Directive No. 15-41 (Dec. 1, 1992), and the authority to assess and collect the penalties for violations of the reporting and recordkeeping requirements.

(2) When performing these functions, the IRS is not acting under Title 26 but, instead, is acting under the authority of Title 31. Provisions of the Internal Revenue Code generally do not apply to FBARs.

(3) Criminal Investigation has been delegated the authority to investigate possible criminal violations of the Bank Secrecy Act. 31 C.F.R. §103.56(c)(2)

4.26.16.4.2
(07-01-2008)
FBAR Penalty Structure

(1) A civil money penalty may be imposed for an FBAR violation even if a criminal penalty is imposed for the same violation. 31 U.S.C. § 5321(d).

4.26.16.4.3
(07-01-2008)
BSA Negligence Penalties

(1) There are two negligence penalties which apply generally to all BSA provisions. 31 U.S.C. § 5321(a)(6)

a. A negligence penalty up to $500 may be assessed against a business for any negligent violation of the BSA, including FBAR violations.
b. An additional penalty up to $50,000 may be assessed for a pattern of negligent violations.

(2) Generally, these two negligence penalties only apply to trades or businesses, not to individuals. The FBAR penalties under section 5321(a)(5) and the FBAR warning letter, Letter 3800, should be adequate to address most FBAR violations that are identified. The FBAR warning letter may be issued in the cases where the revenue agent determines none of the 5321(a)(5) FBAR penalties are warranted. If the revenue agent believes, however, that assertion of a section 5321(a)(6) negligence penalty is warranted in a particular case, the revenue agent should contact a Bank Secrecy Act Program Analyst for guidance.

4.26.16.4.3.1
(07-01-2008)
Negligence

(1) Actual knowledge of the reporting requirement is not required to find negligence. If a financial institution or nonfinancial trade or business exercising ordinary business care and prudence for its particular type of business should have known about the FBAR filing and record keeping requirements, failure to file or maintain records is negligent. Therefore, standards of practice for a particular type of business are relevant in determining whether someone committed a negligent violation of 31 U.S.C. § 5314. If the failure to file the

FBAR or to keep records is due to reasonable cause, and not due to the negligence of the person who had the obligation to file or keep records, the negligence penalty should not be asserted.

(2) Negligent failure to file does NOT exist when, despite the exercise of ordinary business care and prudence, the business was unable to file the FBAR or keep the required records.

(3) Use general negligence principles in determining whether or not to apply the negligence penalty. Treas. Reg. 1.6664-4, Reasonable Cause and Good Faith Exception to § 6662 penalties, may serve as useful guidance in determining the factors to consider. Although this tax regulation does not apply to FBARs, the information it contains may still be helpful in determining whether the FBAR violation was due to reasonable cause and not due to negligence.

4.26.16.4.3.2
(07-01-2008)
BSA Simple Negligence Penalty

(1) The $500 simple negligence penalty applies only to financial institutions for violations occurring prior to October 27, 2001. 31 U.S.C. § 5321(a) (6) (A). For violations occurring after October 26, 2001, the negligence penalty applies to all businesses.

(2) Currently, regulation 31 C.F.R. § 103.57(h) does not reflect the statutory change making the penalty applicable to all businesses. However, section 5321(a)(6)(A) provides the authority to assert the penalty against any business for violations occurring after October 26, 2001.

4.26.16.4.3.3
(07-01-2008)
BSA Simple Negligence Penalty - Application to Financial Institutions

(1) The simple negligence penalty of 31 C.F.R. 103.57(h) applies to financial institutions as they are defined in the regulations at 31 C.F.R. 103.11(n) for violations occurring prior to October 27, 2001.

(2) These financial institutions are defined to include “each agent, agency, branch, or office within the United States of any person doing business, whether or not on a regular basis or as an organized business concern, in one or more of following capacities:”

- A bank (except bank credit card systems);
- A broker or dealer in securities;
- A money services business as defined in 31 C.F.R. 103.11 (uu);
- A telegraph company;
- A casino or card club;
- A person subject to supervision by any state or federal bank supervisory authority; or,
- A futures commission merchant or an introducing broker in commodities.

4.26.16.4.3.4
(07-01-2008)
BSA Simple Negligence Penalty Amount

(1) For each negligent violation of any requirement of the Bank Secrecy Act committed after October 27, 1986, a civil penalty may be assessed not to exceed $500.

(2) Generally, the full amount of this $500 penalty is assessed. Although 31 U.S.C. 5321(a)(6) permits discretion to assert a lower amount, there are no mitigation guidelines for this penalty.

4.26.16.4.3.5
(07-01-2008)
BSA Pattern of Negligence Penalty

(1) 31 U.S.C. § 5321(a)(6)(B) provides for a civil money penalty of not more than $50,000 on a business that engages in a pattern of negligent BSA violations including violations of the FBAR rules. This penalty is in addition to any $500 negligence penalty.

(2) The pattern of negligence penalty has applied to financial institutions since 1986. For violations occurring after October 26, 2001, the penalty applies to all trades or businesses. This penalty does not apply to individuals.

(3) For purposes of determining the pattern of negligence penalty, use the definitions in 31 C.F.R. § 103.11(n) for the term "financial institution" and not the definition of "financial institution" in 31 U.S.C. § 5312(a)(2).

4.26.16.4.3.6
(07-01-2008)
BSA Pattern of Negligence Penalty - Amount

(1) If any trade or business engages in a pattern of negligent violations of any provision [including the FBAR requirements] of the BSA, a civil penalty of not more than $50,000 may be imposed. This is in addition to the simple negligence $500 penalty. 31 U.S.C. § 5321(a)(6)(B) The examiner is given discretion to determine the penalty amount up to the $50,000 ceiling.

(2) There are no mitigation guidelines for this penalty. The pattern of negligence penalty should only be asserted in egregious cases.

4.26.16.4.4
(07-01-2008)
Non-Willfulness Penalty

(1) For violations occurring after October 22, 2004, a new penalty applies to individuals as well as businesses. 31 U.S.C. § 5321(a)(5)(A). A penalty, not to exceed $10,000, may be imposed on any person who violates or causes any violation of the FBAR filing and recordkeeping requirements.

(2) The penalty should not be imposed if:

a. The violation was due to reasonable cause, and
b. The balance in the account was properly reported on an FBAR. This means that the examiner must receive the delinquent FBARs from the nonfiler in order to avoid application of the non-willfulness penalty.

(3) The ceiling allows the examiner discretion in determining the penalty. Mitigation guidelines have been developed as a guide to examiners in asserting the appropriate non-willfulness penalty amount. See the discussion of the mitigation guidelines below. See Exhibit 4.26.16-1 through 4. As with the FBAR penalty for willful violations, examiners are to use discretion, taking into account the facts and circumstances of each case, in determining whether a warning letter or penalties that are less than the total amounts provided for in the mitigation guidelines are appropriate. The sole purpose for the FBAR penalties is to serve as a tool to promote compliance with respect to the FBAR reporting and recordkeeping requirements.

(4) A filing violation occurs on June 30th of the year following the calendar year to be reported (that is, on the due date for filing the FBAR).

(5) A recordkeeping violation occurs on the date when the records are requested by the IRS examiner if the records are not later provided.

4.26.16.4.5
(07-01-2008)
FBAR Willfulness Penalty

(1) There are two different statutory ceilings for willful penalty violations of the FBAR requirements, depending on whether or not the violation occurred before October 23, 2004. As stated previously, a filing violation occurs on June 30th of the year following the calendar year to be reported. A recordkeeping violation occurs on the date when the records are requested by the IRS examiner if the records are not provided.

(2) Because the willfulness penalty statute has a substantial ceiling amount, IRS has developed guidelines for the exercise of the examiner's discretion in arriving at the amount of a willfulness penalty.

4.26.16.4.5.1
(07-01-2008)
FBAR Willfulness Penalty - Authority

(1) A civil money penalty may be imposed on any person who willfully violates or causes any violation of any provision of section 5314 (the FBAR requirements). 31 U.S.C. § 5321(a)(5)(A)

(2) The ceiling applicable for violations occurring before October 23, 2004 is the greater of an amount (not to exceed $100,000) equal to the balance in the account at the time of the violation or $ 25,000.

(3) For violations occurring after October 22, 2004 the ceiling is the greater of $100,000 or 50% of the balance in the account at the time of the violation.

(4) At the time of this writing, the regulations at 31 C.F.R. § 103.57 have not been revised to reflect the change in the willfulness penalty ceiling. However, the statute is self-executing and the new penalty ceilings apply.

4.26.16.4.5.2
(07-01-2008)
FBAR Willfulness Penalty - Application

(1) The willfulness penalty applies to any person who has willfully violated the FBAR reporting or recordkeeping provisions.

(2) It applies to individuals as well as financial institutions and non-financial trades or businesses for all years.

4.26.16.4.5.3
(07-01-2008)
FBAR Willfulness Penalty - Willfulness

(1) The test for willfulness is whether there was a voluntary, intentional violation of a known legal duty.

(2) A finding of willfulness under the BSA must be supported by evidence of willfulness.

(3) The burden of establishing willfulness is on the Service.

(4) If it is determined that the violation was due to reasonable cause, the willfulness penalty should not be asserted.

(5) Willfulness is shown by the person's knowledge of the reporting requirements and the person's conscious choice not to comply with the requirements. In the FBAR situation, the only thing that a person need know is that he has a reporting requirement. If a person has that knowledge, the only intent needed to constitute a willful violation of the requirement is a conscious choice not to file the FBAR.

(6) Under the concept of "willful blindness", willfulness may be attributed to a person who has made a conscious effort to avoid learning about the FBAR reporting and recordkeeping requirements. An example that might involve willful blindness would be a person who admits knowledge of and fails to answer a question concerning signature authority at foreign banks on Schedule

B of his income tax return. This section of the return refers taxpayers to the instructions for Schedule B that provide further guidance on their responsibilities for reporting foreign bank accounts and discusses the duty to file Form 90-22.1. These resources indicate that the person could have learned of the filing and recordkeeping requirements quite easily. It is reasonable to assume that a person who has foreign bank accounts should read the information specified by the government in tax forms. The failure to follow-up on this knowledge and learn of the further reporting requirement as suggested on Schedule B may provide some evidence of willful blindness on the part of the person. For example, the failure to learn of the filing requirements coupled with other factors, such as the efforts taken to conceal the existence of the accounts and the amounts involved may lead to a conclusion that the violation was due to willful blindness. The mere fact that a person checked the wrong box, or no box, on a Schedule B is not sufficient, by itself, to establish that the FBAR violation was attributable to willful blindness.

(7) Willfulness can rarely be proven by direct evidence, since it is a state of mind. It is usually established by drawing a reasonable inference from the available facts. The government may base a determination of willfulness in the failure to file the FBAR on inference from conduct meant to conceal sources of income or other financial information. For FBAR purposes, this could include concealing signature authority, interests in various transactions, and interests in entities transferring cash to foreign banks.

(8) The following examples illustrate situations in which willfulness may be present:

a. A person admits knowledge of, and fails to answer, a question concerning signature authority over foreign bank accounts on Schedule B of his income tax return. When asked, the person does not provide a reasonable explanation for failing to answer the Schedule B question and for failing to file the FBAR. A determination that the violation was willful likely would be appropriate in this case.
b. A person files the FBAR, but omits one of three foreign bank accounts. The person had closed the omitted account at the time of filing the FBAR. The person explains that the omission was due to unintentional oversight. During the examination, the person provides all information requested with respect to the omitted account. The information provided does not disclose anything suspicious about the account, and the person reported all income associated with the account on his tax return. The willfulness penalty should not apply absent other evidence that may indicate willfulness.
c. A person filed the FBAR in earlier years but failed to file the FBAR in subsequent years when required to do so. When asked, the person does not provide a reasonable explanation for failing to file the FBAR. In addition, the person may have failed to report income associated with foreign bank accounts for the years that FBARs were not filed. As with example a. above, a determination that the violation was willful likely would be appropriate in this case.
d. A person received a warning letter informing him of the FBAR filing requirement, but the person continues to fail to file the FBAR in subsequent years. When asked, the person does not provide a reasonable explanation for failing to file the FBAR. In addition, the person may have failed to report income associated with the foreign bank accounts. As with examples a. and c. above, a determination that the violation was willful likely would be appropriate in this case.

4.26.16.4.5.4
(07-01-2008)
FBAR Willfulness Penalty - Evidence

(1) Documents that may be helpful in establishing willfulness include:

a. Copies of documents from the administrative case file (including the Revenue Agent Report) for the income tax examination that show income related to funds in a foreign bank account was not reported.
b. A copy of the signed income tax return with Schedule B attached (showing whether or not the box pertaining to foreign accounts is checked or unchecked).
c. Copies of statements for the foreign bank account.
d. Notes of the examiner's interview with the foreign account holder/taxpayer about the foreign account.
e. Any documents that would support fraud (see IRM 4.10.6.2.2 for a list of items to consider in asserting the fraud penalty).
f. Correspondence with the account holder's tax preparer that may address the FBAR filing requirement.
g. Documents showing criminal activity related to the non-filing of the FBAR (or non-compliance with other BSA provisions).
h. Promotional material (from the promoter or offshore bank).
i. Statements for debit or credit cards from the offshore bank (which could show if the account holder was using funds from the offshore account to cover everyday living expenses in a manner that would conceal the source of the funds).
j. Printouts from CBRS that show that the FBAR was not filed.
k. Copies of any FBARs (or CBRS printouts of FBARs) that were previously filed by the account holder.
l. Copies of tax returns (or RTVUEs/BRTVUs) for at least three years prior to the opening of the offshore account and for all years after the account was opened. (To show any significant drop in reportable income after the account was opened, three years prior to the opening of the account would be requested in order to give the examiner a better idea of what the account holder typically would have reported as income prior to opening the foreign account).
m. Copies of Information Document Requests with items that were not provided by the account holder highlighted and explanations given as to why the requested information was not provided.
n. Copies of debit or credit card agreements and fee schedules with the foreign bank (which may show a significantly higher cost than typically associated with cards from domestic banks).
o. Copies of debit and credit card statements prior to the opening of the foreign account (to show that the account holder did or did not routinely use such cards for everyday living expenses, keeping in mind these statements may be difficult to obtain if the foreign account was opened many years ago).
p. Copies of any investment management or broker's agreement and fee schedules with the foreign bank (which may show significantly higher costs than costs associated with domestic investment management firms or brokers).
q. The account holder's written explanation of why the FBAR was not filed (if the account holder wishes to provide such a statement). Otherwise, note in the workpapers whether the account holder was given an opportunity to provide such a statement.
r. Copies of any previous warning letters issued to the account holder.
s. Copies of any prior Revenue Agent Reports that may show a history of noncompliance.

t. An explanation, in the workpapers, as to why the examiner believes that the account holder's failure to file the FBAR was willful.
u. Two sets of cash Ts (a reconciliation of the taxpayer's sources and uses of funds) with one set showing any unreported income in foreign accounts that was identified during the examination and the second set excluding the unreported income in foreign accounts.

4.26.16.4.5.5 (07-01-2008)
FBAR Wilfulness Penalty - Calculation

(1) For violations occurring prior to October 23, 2004, a penalty up to the greater of $25,000 or the amount in the account (up to $100,000) may be asserted for willfully violating the FBAR requirements, 31 U.S.C. § 5321 (a)(5).

(2) For violations occurring after October 22, 2004, a willfulness penalty may be imposed up to the greater of $100,000 or 50% of the amount in the account at the time of the violation, 31 U.S.C. § 5321 (a)(5).

(3) There may be both a reporting and a recordkeeping violation regarding each account. The amount of the penalty is calculated per account and per violation. There is no reduction in the amount of the account due to multiple financial interests in the account. For example, the entire balance of an account owned by two persons is the amount used to calculate the amount of the penalty for each. The value of the account is not reduced by half because there are two owners. But see sections 4.26.16.4(3) and (4).

(4) The date of a filing violation is June 30th of the year following the calendar year for which the accounts are being reported. This date is the last possible day for filing the FBAR so that the close of the day with no filed FBAR represents the first time that a violation has occurred. The amount [balance] in the account at the close of June 30th is the amount to use in calculating the filing violation.

(5) The date that the examiner first requests records is the date of the violation for failure to keep records. The date of the violation should be tied to the date of the request, and not a later date to avoid the taxpayer manipulating the amount in the account after receiving a request for records. The balance in the account at the close of the day on which the records are first requested is the amount to use in calculating the recordkeeping penalty violation.

4.26.16.4.5.6 (07-01-2008)
FBAR Wilfulness Penalty Amount - Mitigation Inapplicable

(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.

(2) For violations occurring prior to October 23, 2004:

a. Small Accounts: For cases when the balance in the account, as of the due date for filing the FBAR (or, if the violation is for failure to keep required records, as of the date the Service first requests the records), does not exceed $25,000, then the penalty is $25,000. This $25,000 penalty is available, for example, when the account has been closed by the following June 30th and the balance is zero.
b. Large Accounts: For cases when the balance in the account, as of the due date for filing the FBAR (or, if the violation is for failure to keep required records, as of the date the Service first requests the records) exceeds $25,000, then the maximum penalty is the lesser of: $100,000 or the

balance in the account, as of the due date for filing the FBAR (or, if the violation is for failure to keep required records, as of the date the Service first requests the records).

(3) For violations occurring after October 22, 2004:

a. Small Accounts: For cases when the balance in the account, as of the due date for filing the FBAR (or, if the violation is for failure to keep required records, as of the date the Service first requests the records), does not exceed $ 100,000, then the penalty is $100,000. This $100,000 penalty is available, for example, when the account has been closed by the following June 30th and the balance is zero.
b. Large Accounts: For cases when the balance in the account, as of the due date for filing the FBAR (or, if the violation is for failure to keep required records, as of the date the Service first requests the records) exceeds $100,000, then the penalty is 50% of the balance in the account on that date. This is the maximum penalty for these accounts.

4.26.16.4.6
(07-01-2008)
Mitigation

(1) The statutory penalty computation provides a ceiling on the FBAR penalty. The actual amount of the penalty is left to the discretion of the examiner.

(2) The Service has adopted guidelines to promote consistency by Service employees in exercising this discretion for similarly situated persons.

(3) FBAR cases closed under the Last Chance Compliance Initiative (LCCI) use different mitigation guidelines from those used for other FBAR cases. See Exhibit 4.26.16-1. through 4.

4.26.16.4.6.1
(07-01-2008)
Mitigation Threshold Conditions

(1) For most FBAR cases, the Service has determined that if a person meets four threshold conditions then the person may be subject to less than the maximum FBAR penalty depending on the amounts in the person's accounts. There are four threshold conditions which vary slightly depending on the date of the violation.

(2) For violations occurring prior to October 23, 2004, the four threshold conditions are:

a. The person has no history of past FBAR penalty assessments;
b. No money passing through any of the foreign accounts associated with the person was from an illegal source or used to further a criminal purpose;
c. The person cooperated during the examination (i.e., the Service did not have to resort to a summons to obtain non-privileged information; the taxpayer responded to reasonable requests for documents; meetings, and interviews; or the taxpayer back-filed correct reports); and,
d. 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.

(3) For violations occurring after October 22, 2004, the first condition was expanded to add no history of criminal tax or BSA convictions for the preceding ten years as well as no history of past FBAR penalty assessments. Otherwise, the four conditions are the same.

4.26.16.4.6.2
(07-01-2008)
Mitigation of the Non-willful FBAR Penalty

(1) IRS has developed penalty mitigation guidelines for the computation of the non-willfulness penalty regarding FBAR violations occurring after October 22, 2004. See Exhibit 4.26.16-2.

(2) The same mitigation threshold requirements apply as discussed above in this Section.

(3) There are three penalty levels depending on the highest amount in the account during the period for which the FBAR should have been filed.

(4) If the aggregate balance of all accounts held during the year does not exceed $50,000, then the penalty for each violation is $500, not to exceed a total of $5,000 in penalties.

(5) If the aggregate balance of the accounts is over $50,000, but less than $250,000, the penalty is, per violation, the lesser of $5,000 or ten per cent of the highest balance in the account during the year for which the account should have been reported.

(6) For violations regarding an account exceeding $250,000, the penalty per violation is the statutory maximum of $10,000.

4.26.16.4.6.3
(07-01-2008)
Mitigation Levels for Willful FBAR Penalties

(1) If the person satisfies the four threshold conditions for general mitigation, then the mitigation guidelines apply.

(2) The mitigation guidelines for willful violations occurring prior to October 23, 2004 provide for four levels of mitigation. See Exhibit 4.26.16-1.

a. Level I Willful Violations Occurring Before October 23, 2004 - A Level I penalty applies if the maximum aggregate balance for all required but unreported foreign accounts does not exceed $20,000. For Level I cases, the penalty will be 5% of the maximum balance during the calendar year for each of the unreported foreign accounts that should have been reported.
b. Level II Willful Violations Occurring Before October 23, 2004 - A Level II penalty applies if the Level I penalty does not apply and the maximum balance during the year for a required but unreported foreign account is not more than $250,000. The balance in each account is analyzed separately to determine the applicable penalty for that account. For an account that falls within Level II, the penalty will be 10% of the maximum balance during the year for each of the unreported foreign accounts that should have been reported. Thus, the maximum Level II penalty is $25,000 per account.
c. Level III Willful Violations Occurring Before October 23, 2004 – A Level III penalty applies if the maximum balance during the year for an unreported foreign account that should have been reported is greater than $250,000 but not more than $1 million. The balance in each account is analyzed separately to determine the applicable penalty for that account. For an account that falls within Level III, the penalty will be the lesser of: (a) 10% of the maximum amount of the foreign account that should have been reported, or (b) the amount in the account as of the last day for filing the FBAR, unless this amount is less than $25,000, in which case the penalty is $25,000.
d. Level IV Willful Violations Occurring Before October 23, 2004 - A Level IV penalty applies if the maximum balance during the year for an unreported foreign account that should have been reported was greater than $1 million. The balance in each account is analyzed separately to determine

the applicable penalty for that account. For Level IV, the penalty will be the lesser of: (a) $100,000 or (b) the amount in the account as of the last day for filing the FBAR, unless this amount is less than $25,000, in which case the penalty is $25,000.

(3) Mitigation guidelines for willfulness penalties occurring after October 22, 2004:

a. Level I Willful Violations Occurring After October 22, 2004 - If the maximum aggregate balance for all accounts to which the violations relate did not exceed $50,000, Level I applies to all accounts . Determine the maximum balance during the calendar year for each account. Add the various maximums to find the maximum aggregate balance. The Level I penalty is the greater of $1,000 per violation or 5% of the maximum account balance during the calendar year for each Level I account.
b. Level II Willful Violations Occurring After October 22, 2004 - If Level I does not apply and if the maximum account balance to which the violations relate at any time during the calendar year did not exceed $250,000, Level II applies to that account. The Level II penalty assessed for each account is the greater of $5,000 per violation or 10% of the maximum account balance during the calendar year for each Level II account .
c. Level III Willful Violations Occurring After October 22, 2004 - If the maximum account balance to which the violations relate at any time during the calendar year exceeded $250,000 but did not exceed $1,000,000, Level III applies to that account. The Level III penalty assessed for each account is the 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 .
d. Level IV Willful Violations Occurring After October 22, 2004 - If the maximum account balance to which the violations relate at any time during the calendar year exceeded $1 million, Level IV, the statutory maximum, applies to that account. The Level IV penalty is the statutory maximum applied to each account. It is the greater of $100,000 or 50% of the closing balance in the account as of the last day for filing the FBAR.

4.26.16.4.6.4
(07-01-2008)
FBAR Penalty - LCCI Mitigation Guideline Conditions

(1) The penalty mitigation guidelines for cases closed under the Last Chance Compliance Initiative (LCCI) are different from the general mitigation guidelines.

(2) For violations occurring prior to October 23, 2004, there are two criteria, both of which must be met, for application of the LCCI mitigation guidelines:

a. The person must meet all of the conditions necessary to qualify for the Last Chance Compliance Initiative, and
b. The person must not have been previously assessed the FBAR penalty.

(3) For violations occurring after October 22, 2004, there are four conditions necessary for application of the LCCI mitigation guidelines:

a. The person meets all of the conditions necessary to qualify for the Last Chance Compliance Initiative;
b. The person has no history of criminal tax or BSA convictions for the preceding ten years and has no history of prior FBAR penalty assessments;

c. No money passing through any of the foreign accounts associated with the person was from an illegal source or used to further a criminal purpose; and,
d. The person cooperated during the examination.

(4) Generally, the FBAR penalty is only asserted for one year in LCCI cases.

(5) One of the conditions for the LCCI initiative is that the FBAR penalty must be fully paid when asserted. If it is not fully paid, the taxpayer has not met the conditions for LCCI and the case becomes a general FBAR case with penalties for all years.

4.26.16.4.6.5
(07-01-2008)
FBAR Penalty - LCCI Mitigation Levels

(1) There are two mitigation levels in LCCI cases for violations occurring prior to October 23, 2004. Both levels depend on the highest aggregate balance on the same day for all unreported accounts. This calculation differs from the way the general rule aggregation is calculated. Under the general rule, if one account is closed and all the funds are transferred to a new account both accounts are included in the aggregate amount, even though it is the same cash. Under the LCCI calculation, the amount would only be included once, because it is not available in each account on the same day.

(2) Once the conditions have been met, the level of mitigation for violations occurring before October 23, 2004 are determined as follows:

a. Persons are eligible for Level I if the aggregate highest balance on the same day for all unreported accounts during the year of examination was less than $20,000. The Level I mitigated penalty is 5% of the maximum balance during the calendar year for each of the unreported foreign accounts that should have been reported.
b. Persons are eligible for Level II if the highest aggregate balance on the same day for all unreported accounts was equal to or greater than $20,000. The mitigated penalty for Level II is 10% of the maximum balance during the calendar year for each of the unreported foreign accounts that should have been reported, up to the regulatory limits.

(3) For violations occurring after October 22, 2004, there are mitigation levels for each willful and non-willful violation. Each depends on the LCCI aggregate amount which is arrived at differently than the pre-October 22, 2004 cases. The maximum balance at any time during the calendar year for each account is determined. Then the various maximums are added to find the maximum aggregate balance.

(4) There are three levels of LCCI mitigated penalties for non-willful (NW) violations occurring after October 22, 2004:

a. Level I Non-Willful Violations After October 22, 2004 - If the maximum aggregate balance for all accounts to which the violations relate did not exceed $50,000 at any time during the year, the Level I NW mitigated penalty applies. The Level I NW penalty is $500 for each violation, not to exceed an aggregate penalty of $5,000 for all violations.
b. Level II Non-Willful Violations After October 22, 2004 - If Level I NW penalty does not apply and if the maximum balance of the account to which the violations relate at any time during the calendar year did not exceed $250,000, Level II NW penalty applies to that account. The Level II

NW Penalty is $5,000 for each Level II NW account violation, not to exceed ten per cent of the maximum balance in the account during the year .

c. Level III Non-Willful Violations After October 22, 2004 - If Level I NW penalty does not apply and if the maximum balance of the account to which the violations relate at any time during the calendar year was more than $250,000, the Level III NW penalty applies to that account. The Level III NW penalty is $10,000 for each Level III NW account violation, the statutory maximum for non-willful violations.

(5) There are four levels of LCCI FBAR mitigated willfulness penalties applicable to violations occurring after October 22, 2004 :

a. Level I Willful Violations after October 22, 2004 - If the maximum aggregate balance for all accounts to which the violations relate did not exceed $50,000, Level I applies to all accounts. Determine the maximum balance at any time during the calendar year for each account that involves violations. Add the various maximums to find the maximum aggregate balance. The Level I mitigated penalty is the greater of $1,000 per violation or 5% of the maximum balance during the calendar year for each Level I account.

b. Level II Willful Violations after October 22, 2004 - If Level I does not apply and if the maximum balance of the account to which the violations relate at any time during the calendar year did not exceed $250,000, Level II applies to that account. The Level II penalty assessed for each account is the greater of $5,000 per violation or 10% of the maximum balance during the calendar year for each Level II account .

c. Level III Willful Violations After October 22, 2004 - If the maximum balance of the account to which the violations relate at any time during the calendar year exceeded $250,000 but did not exceed $1,000,000, Level III applies to that account. The Level III penalty assessed for each account is the greater of 10% of the maximum amount during the year for each Level III account or 50% of the closing balance in the account as of the last day for filing the FBAR .

d. Level IV Willful Violations After October 22, 2004 - If the maximum balance of the account to which the violations relate at any time during the calendar year exceeded $1 million, Level IV, the statutory maximum, applies to that account. The Level IV penalty assessed for each account is the greater of $100,000 or 50% of the closing balance in the account as of the last day for filing the FBAR .

4.26.16.4.7
(07-01-2008)
FBAR Penalties - Examiner Discretion

(1) The examiner may determine that the facts and circumstances of a particular case do not justify asserting a penalty. If there was an FBAR violation but the examiner determines that a penalty is not appropriate, the examiner should issue the FBAR warning letter, Letter 3800.

(2) When a penalty is appropriate, IRS has established penalty mitigation guidelines to aid the examiner in applying penalties in a uniform manner. The examiner may determine that a penalty under these guidelines is not appropriate or that a lesser penalty amount than the guidelines would otherwise provide is appropriate or that the penalty should be increased (up to the statutory maximum). The examiner must make such a determination with the written approval of the examiner's manager and document the decision in the workpapers.

(3) Factors to consider when applying examiner discretion may include, but are not limited to, the following:

a. Whether compliance objectives would be achieved by issuance of a warning letter;
b. Whether the person who committed the violation had been previously issued a warning letter or has been assessed the FBAR penalty;
c. The nature of the violation and the amounts involved; and,
d. The cooperation of the taxpayer during the examination.

(4) Given the magnitude of the maximum penalties permitted for each violation, the assertion of multiple penalties and the assertion of separate penalties for multiple violations with respect to a single FBAR form, should be considered only in the most egregious cases.

Exhibit 4.26.16-1 (07-01-2008)
Pre-October 23, 2004 Normal FBAR Civil Penalty Mitigation Guidelines

The Willfulness Penalty (31 U.S.C. § 5321(a)(5)) and Mitigation:

Section 5321(a)(5) of the Bank Secrecy Act generally provides for a civil penalty of up to the amount in the account at the time of the violation (but no more than $100,000) for a willful violation of the FBAR reporting and recordkeeping requirements. The time of the violation for failing to file a report is the end of the due date for filing the report. Although section 5321 sets the maximum amount for the penalty, the Secretary may assess a lower amount. The Service has established guidelines for imposing the FBAR penalty in an amount below the maximum amount in cases where, generally, the person has not engaged in criminal conduct, does not have prior FBAR penalty assessments, and is cooperating with the Service.

The criteria for qualifying for mitigation of the FBAR civil penalty are:

1. No history of past FBAR penalty assessments;
2. No money in the foreign account was from an illegal source or used for a criminal purpose (based on available information – the revenue agent is not required to conduct a criminal investigation);
3. The person is cooperating with the Service; and,
4. A civil fraud penalty was not asserted against the person for an underpayment of tax that was connected to the person's failure to file the FBAR.

The maximum FBAR penalty is limited to the amount in the foreign account at the time of the violation up to $100,000, except in cases where the maximum amount in the account at the time of the violation was less than $25,000 (in which case the maximum penalty amount is $25,000). The mitigation guidelines are based on the maximum amount in the account during the year in question.

Mitigation Guidelines for Pre-October 23, 2004 (Four Levels Based on the Amount in the Foreign Account):

Level I - If the highest aggregate balance for all unreported accounts does not exceed $20,000, the penalty is 5% of the maximum balance during the year for each of the unreported accounts.

Level II - If the maximum balance of an unreported account does not exceed $250,000, the penalty is 10% of the maximum amount during the year for each unreported account. The maximum Level II penalty is $25,000.

Level III - If the maximum balance of an unreported account is greater than $250,000 but does not exceed $1 million, the penalty is the lesser of:

a. 10% of the maximum amount in each unreported account during the year, or
b. The amount in the account as of the last day for filing the FBAR, unless this amount is less than or equal to $25,000 (in which case the penalty is $25,000, the maximum penalty in such cases, under section 5321).

Level IV - If the maximum balance of an unreported account is greater than $1 million, The amount of the penalty is the lesser of:

a. $100,000 for each unreported account or
b. The amount in the account as of the last day for filing the FBAR unless this amount is less than $25,000 (in which case the penalty is $25,000).

Exhibit 4.26.16-2 (07-01-2008)

Normal FBAR Penalty Mitigation Guidelines for Violations Occurring After October 22, 2004

The Bank Secrecy Act (BSA) allows the Secretary of the Treasury some discretion in determining the amount of penalties for violations of the FBAR reporting and record keeping requirements. There is a penalty ceiling but no minimum amount. This discretion has been delegated to the FBAR examiner.

- The examiner may determine that the facts and circumstances of a particular case do not justify a penalty.
- If there was an FBAR violation but no penalty is appropriate, the examiner should issue the FBAR warning letter, Letter 3800.

When a penalty is appropriate, IRS has established penalty mitigation guidelines so that the penalties determined through the examiner's discretion are uniform. The examiner may determine that:

- A penalty under these guidelines is not appropriate, or
- A lesser amount than the guidelines would otherwise provide is appropriate.

The examiner must make this determination with the written approval of the examiner's manager. The examiner's workpapers must document the circumstances that make mitigation of the penalty under these guidelines appropriate . To qualify for mitigation, the person must meet four criteria:

1. The person has no history of criminal tax or BSA convictions for the preceding ten years and has no history of prior FBAR penalty assessments;
2. No money passing through any of the foreign accounts associated with the person was from an illegal source or used to further a criminal purpose;
3. The person cooperated during the examination; and,
4. IRS did not determine a 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

Normal FBAR Penalty Mitigation Guidelines for Violations Occurring After October 22, 2004 - Per Person Per Year

Non-Willful (NW) Penalties	
To Qualify for Level I-NW - Determine Aggregate Balances	If the maximum aggregate balance for all accounts to which the violations relate did not exceed $50,000 at any time during the year, Level I – NW applies to all violations. Determine the maximum balance at any time during the calendar year for each account. Add the individual maximum balances to find the maximum aggregate balance.
Level I-NW Penalty is	$500 for each violation, not to exceed an aggregate penalty of $5,000 for all violations.
To Qualify for Level II-NW - Determine Account Balance	If Level I-NW does not apply and if the maximum balance of the account to which the violations relate at any time during the calendar year did not exceed $250,000, Level II-NW applies to that account.
Level II-NW Penalty is	$5,000 for each Level II-NW account violation, not to exceed 10% of the maximum balance in the account during the year
To Qualify for Level III-NW	If Level I-NW does not apply and if the maximum balance of the account to which the violations relate at any time during the calendar year was more than $250,000, Level III-NW applies to that account.
Level III-NW is	$10,000 for each Level III-NW account violation, the statutory maximum for non-willful violations.

Exhibit 4.26.16-2 (Cont. 1) (07-01-2008)
Normal FBAR Penalty Mitigation Guidelines for Violations Occurring After October 22, 2004

Willfulness Penalties	
To Qualify for Level I - Determine Aggregate Balances	If the maximum aggregate balance for all accounts to which the violations relate did not exceed $50,000, Level I applies to all accounts . Determine the maximum balance at any time during the calendar year for each account. Add the individual maximum balances to find the maximum aggregate balance.
Level I Penalty is	The greater of $1,000 per violation or 5% of the maximum balance during the year of the account to which the violations relate for each violation.
To Qualify for Level II – Determine Account Balance	If Level I does not apply and if the maximum balance of the account to which the violations relate at any time during the calendar year did not exceed $250,000, Level II applies to that account .
Level II Penalty is per account	The greater of $5,000 per violation or 10% of the maximum balance during the calendar year for each Level II account .
To Qualify for Level III	If the maximum balance of the account to which the violations relate at any time during the calendar year exceeded $250,000 but did not exceed $1,000,000, Level III applies to that account .
Level III Penalty is per account.	The greater of (a) or (b): (a) 10% of the maximum balance during the calendar year for each Level III account, or (b) 50% of the closing balance in the account as of the last day for filing the FBAR .
To Qualify for Level IV	If the maximum balance of the account to which the violations relate at any time during the calendar year exceeded $1 million, Level IV, the statutory maximum, applies to that account.
Level IV Penalty is per account the statutory maximum	The greater of (a) or (b): (a) $100,000, or (b) 50% of the closing balance in the account as of the last day for filing the FBAR.

Exhibit 4.26.16-3 (07-01-2008)

Last Chance Compliance Initiative (LCCI) Penalty Mitigation Guidelines for FBAR Violations Occurring before October 23, 2004

LCCI FBAR Mitigation Penalty Level Calculation

Calculate the aggregate highest balance on the same day **during the tax year under examination for all unreported accounts.**

- **If the amount is less than $20,000, use the level 1 guideline below.**
- **If the amount is $20,000 or more, use the level 2 guidelines below.**

LCCI FBAR Level 1 Mitigation Penalty Calculation

(To be used when the highest balance for all unreported accounts is less than $20,000).

Step 1 - Calculate "preliminary mitigation penalty" amount:

For each account, multiply the maximum value of the account during the year of examination by 5%.

Step 2 - Determine "maximum limits" of the penalty:

For each account, determine the great of: a) the amount (not to exceed $100,000) equal to the balance in the account at the time of the violation (the opening balance of the account on 7/1 of the subsequent year), or b) $25,000.

Note: This is the statutory maximum limit to any FBAR penalty.

Step 3

Compare the amount calculated in Step 1 to the amount determined in step 2.

Step 4

If the amount calculated in Step 1 is **less than** the amount determined in step 2, then asses the amount calculated in Step 1.

Step 5

If the amount calculated in Step 1 is **greater than** the amount determined in step 2, then assess the amount determined in step 2.

LCCI FBAR Level 2 Mitigation Penalty Calculation (To be used when the highest balance for all unreported accounts is at least $20,000)

Exhibit 4.26.16-3 (Cont. 1) (07-01-2008)

Last Chance Compliance Initiative (LCCI) Penalty Mitigation Guidelines for FBAR Violations Occurring before October 23, 2004

Step 1 - Calculate "preliminary mitigation penalty" amount:

For each account, multiply the maximum value of the account during the year of examination by 10%.

Step 2 - Determine "maximum limits" of the penalty:

For each account, determine the greater of a) the amount (not to exceed $100,000) equal to the balance in the account at the time of the violation (the opening balance of the account on 7/1 of the subsequent year), or b) $25,000.

Note: This is the statutory maximum limit to any FBAR penalty.

Step 3

Compare the amount calculated in Step 1 to the amount determined in step 2.

Step 4

If the amount calculated in step 1 is **less than** the amount determined in Step 2, then assess the amount calculated in Step 1.

Step 5

If the amount calculated in Step 1 is **greater than** the amount determined in Step 2, then assess the amount determined in Step 2.

Exhibit 4.26.16-4 (07-01-2008)

Last Chance Compliance Initiative (LCCI) Penalty Mitigation Guidelines for FBAR Violations Occurring After October 22, 2004.

The Bank Secrecy Act (BSA) allows the Secretary of the Treasury some discretion in determining the amount of penalties for violations of the FBAR reporting and record keeping requirements. There is a penalty ceiling but no minimum amount. This discretion has been delegated to the FBAR examiner.

- The examiner may determine that the facts and circumstances of a particular case do not justify a penalty.
- If there was an FBAR violation but no penalty is appropriate, the examiner should issue the FBAR warning letter, Letter 3800.

When a penalty is appropriate, IRS has established penalty mitigation guidelines so that the penalties determined through the examiner's discretion are uniform. The examiner may determine that:

- A penalty under these guidelines is not appropriate, or
- A lesser amount than the guidelines provide is appropriate.

The examiner must make this determination with the written approval of the examiner's manager. The examiner's workpapers must document the circumstances that make mitigation of the penalty under these guidelines appropriate.

To qualify for mitigation, the person must meet all four criteria:

1. The person must meet all of the conditions necessary to qualify for the Last Chance Compliance Initiative (LCCI);
2. The person has no history of criminal tax or BSA convictions for the preceding ten years and has no history of prior FBAR penalty assessments;
3. No money passing through any of the foreign accounts associated with the person was from an illegal source or used to further a criminal purpose; and,
4. The person cooperated during the examination.

As a part of the LCCI program, the FBAR penalty is only imposed for the same year that the fraud penalty is asserted under the LCCI guidelines. The FBAR penalty must be paid in full at the time of the LCCI agreement.

Last Chance Compliance Initiative (LCCI) Penalty Mitigation Guidelines for FBAR Violations Occurring After October 22, 2004	
Non-Willful (NW) Penalties	
To Qualify for Level I-NW – Determine Aggregate Balances	If the maximum aggregate balance for all accounts to which the violations relate did not exceed $50,000 at any time during the year, Level I–NW applies to all violations. Determine the maximum balance at any time during the calendar year for each account. Add the individual maximum balances to find the maximum aggregate balance.
Level I-NW Penalty is	$500 for each violation, not to exceed an aggregate penalty of $5,000 for all violations.
To Qualify for Level II-NW – Determine Account Balance	If Level I-NW does not apply and if the maximum balance of the account to which the violations relate at any time during the calendar year did not exceed $250,000, Level II-NW applies to that account.
Level II-NW Penalty is	$5,000 for each Level II-NW account violation, not to exceed ten per cent of the maximum balance in the account during the year

Exhibit 4.26.16-4 (Cont. 1) (07-01-2008)

Last Chance Compliance Initiative (LCCI) Penalty Mitigation Guidelines for FBAR Violations Occurring After October 22, 2004.

Last Chance Compliance Initiative (LCCI) Penalty Mitigation Guidelines for FBAR Violations Occurring After October 22, 2004	
Non-Willful (NW) Penalties	
To Qualify for Level III-NW	If Level I-NW does not apply and if the maximum balance of the account to which the violations relate at any time during the calendar year was more than $250,000, Level III-NW applies to that account.
Level III-NW is	$10,000 for each Level III-NW account violation, the statutory maximum for non-willful violations.
Willfulness Penalties	
To Qualify for Level I - Determine Aggregate Balances	If the maximum aggregate balance for all accounts to which the violations relate did not exceed $50,000, Level I applies to all accounts . Determine the maximum balance at any time during the calendar year for each account. Add the individual maximum balances to find the maximum aggregate balance.
Level I Penalty is	The greater of $1,000 per violation or 5% of the maximum balance of the account during the year to which the violations relate for each violation.
To Qualify for Level II – Determine Account Balance	If Level I does not apply and if the maximum balance of the account to which the violations relate at any time during the calendar year did not exceed $250,000, Level II applies to that account .
Level II Penalty is per account	The greater of $5,000 per violation or 10% of the maximum balance during the calendar year for each Level II account .
To Qualify for Level III	If the maximum balance of the account to which the violations relate at any time during the calendar year exceeded $250,000 but did not exceed $1,000,000, Level III applies to that account .
Level III Penalty is per account:	The greater of (a) or (b): (a) 10% of the maximum amount during the year for each Level III account or (b) 50% of the closing balance in the account as of the last day for filing the FBAR.
To Qualify for Level IV	If the maximum balance of the account to which the violations relate at any time during the calendar year exceeded $1 million, Level IV, the statutory maximum, applies to that account.
Level IV Penalty is the statutory maximum.	The greater of (a) or (b): (a) $100,000 or (b) 50% of the closing balance in the account as of the last day for filing the FBAR.