
FBAR Case Procedure Guide

Supplement to the
Quiet Disclosure Training
May, 2013



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Preparing the RSM

- The delegated official determines whether the FBAR violations are in furtherance of a Title 26 violation
- Currently, the delegated official is the territory manager (future guidance may change the delegated official)
- Send the RSM to the delegated official
 - Separate RSM for each owner of a joint account
 - Separate RSM for each year (the RSM will become the input document to track the FBAR case in Detroit)
 - A brief memorandum of facts should accompany the RSM
 - At this point the FBAR penalty case file consists of the RSM (or RSMs) and the memorandum of facts



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The first step in the FBAR case process is to secure a related statute determination so you can use Title 26 information in the Title 31 FBAR penalty case. The delegated official, currently your territory manager, determines whether the apparent FBAR violations are in furtherance of a Title 26 violation. Absent such a determination, the disclosure guidelines under Title 26 prevent you from using Title 26 information for Title 31 purposes. Since you discovered the potential FBAR violation during an income tax examination, you need the related statute determination to start an FBAR penalty investigation.

Send the related statute memorandum to the delegated official. Prepare a separate RSM for each owner of a joint account. You also need a separate RSM for each year because the RSM becomes the input document to track the FBAR case at the Detroit Computing Center. In most cases you should attach to the RSM a brief memorandum that outlines the facts the case so the delegated official can make an informed related statute determination.

At this point the FBAR penalty case file consists of the RSM (or RSMs) and the memorandum of facts.

The Delegated Official and the RSM

- If the delegated official determines the FBAR violation was in furtherance of a Title 26 violation
 - Signs the RSM, checks the appropriate box, and returns the penalty case to the examiner
 - The examiner starts the FBAR penalty investigation
 - Title 26 information may be used in the FBAR penalty case
- If the delegated official determines the FBAR violation was not in furtherance of a Title 26 violation
 - Signs the RSM, checks the appropriate box, and returns the penalty case to the examiner
 - The examiner includes the RSM in the Title 26 case
 - The FBAR penalty case is terminated



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If the delegated official determines the FBAR violation was in furtherance of a Title 26 violation, the delegated official signs the RSM, checks the appropriate box to indicate the decision, and returns the penalty case file to you to start the FBAR penalty investigation. You may now use Title 26 information in the FBAR penalty case.

If the designated official determines the FBAR violation was not in furtherance of a Title 26 violation, the designated official signs the RSM, checks the appropriate box, and returns the penalty file case to you. You include the RSM in the Title 26 case and terminate the FBAR penalty case. This ends your FBAR responsibilities.

Starting the FBAR Penalty Case

- FAX or email the RSM to the Detroit Computing Center
- The Detroit Computing Center inputs each case into an FBAR database to monitor FBAR penalty statutes
- Place the original RSM and the FAX transmission report in the FBAR penalty case
- FBAR cases are not on AIMS
- Establish the FBAR case on ERCS (MFT C6, activity code 545)
- Must have signed related statute memorandum before placing the FBAR case on ERCS



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Once the designated official makes a related statute determination, you need to fax or email the related statute memorandum to the Detroit Computing Center.

The Detroit Computing Center inputs each case into an FBAR database and starts to monitor FBAR penalty assessment statutes.

Create a separate FBAR penalty case file and place the original RSM and the FAX transmission report in the FBAR penalty case file.

FBAR cases are not on AIMS.

Follow local procedures to establish each FBAR penalty case on ERCS, using MFT C6 and activity code 545.

Since ERCS contains Title 26 information, and is used to track Title 26 examinations, do not establish FBAR cases on ERCS until after the designated official signs the related statute memorandum.

FBAR Monitoring Document

- Download Form 13536, *Foreign Bank and Financial Accounts Report Monitoring Document (FMD)* from the Intranet
- Complete the entity information and examination sections
- Complete a separate FMD for each year
- FAX (or email) the FMD to Detroit
- As necessary, update the information on the FMD and FAX the updated FMD to Detroit
- A final FMD will be sent to Detroit when the FBAR penalty case is closed
- Information needed for reporting to Congress



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Next, download Form 13536, *Foreign Bank and Financial Accounts Report Monitoring Document (FMD)*, from the Forms and Publications website on the IRS Intranet.

Complete the entity and examination information sections of the form and fax or email the form to Detroit; as with the related statute memorandum, complete a separate FBAR monitoring document for each year. It is better to fax or email both the RSM and the initial FMD at the same time.

As necessary, you will update the information on the FMD and fax or email the updated FMD to Detroit so the FBAR penalty case database has the most current information. At the conclusion of the FBAR penalty investigation you will send a final FMD to Detroit when you close the FBAR penalty case.

The Detroit database is the source of information used to prepare statutory-required FBAR reports for Congress, so it is important that the database contains the most current information regarding the status of all FBAR penalty investigations.

Detroit FAX and Email Information

- FAX: (313) 234-2278
- Email address: *SBSE BSA COMPLIANCE-FBAR PENALTY COORDINATOR
 - Use secure email
 - Digitally sign electronic documents (may need to add signature field to the document), or scan paper documents to a PDF file
 - E-Fax to yourself to convert paper documents to PDF filed



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This slide contains the fax number and email address for Detroit.

The fax number is 313-234-2278.

The email address is *SBSE BSA COMPLIANCE-FBAR PENALTY COORDINATOR.

All email messages to Detroit should be sent using secure email. Detroit will accept digitally-signed related statute memoranda and FBAR monitoring documents. The current versions of these forms do not have electronic signature fields, so you will need to add an electronic signature field to the form. You may also scan the paper documents into a PDF file and send the PDF file to Detroit. If you do not have a scanner, to convert the document to a PDF file e-fax the document to yourself.

FBAR Case Statute Controls

Reserved for future guidance



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Reserved for future guidance on statute controls for FBAR cases.

FBAR Statute Extensions

- The penalty assessment statute is 6 years from the due date of the FBAR
- The FBAR due date is June 30 of the following year
- The statute remains the same regardless of whether the taxpayer files the FBAR or not
- Special FBAR statute extension; contact Counsel for the current version of the form
- Paragraph 35 of IRS Delegation Order 25-13 (April 11, 2012) delegates to group managers the authority to sign FBAR statute extensions
- Form 872 does not extend the FBAR statute



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The FBAR penalty assessment statute is six years from the due date of the FBAR, and the due date of the FBAR is June 30 of the following year.

The six-year statute is the same regardless of whether the taxpayer filed the FBAR on time, filed late, or did not file the FBAR.

The taxpayer may extend the FBAR penalty assessment statute by signing a special FBAR statute extension. Currently there is no published form to extend FBAR penalty assessment statutes. Contact Counsel to secure a copy of the current FBAR statute extension document.

Paragraph 35 of IRS Delegation Order 25-13 (April 11, 2012) delegates to group managers the authority to sign FBAR penalty statute extensions.

Form 872, which is used to extend assessment statutes in Title 26 cases, does not extend the FBAR penalty assessment statute.

Statute Extension Processing

- The taxpayer or the representative may sign the statute extension
- Retain the original in the FBAR case file
- Prepare statute package for Detroit (fax or email):
 - Updated FBAR monitoring document (write-in the new statute date)
 - Copy of FBAR statute extension
 - Copy of FBAR power of attorney (only where the representative signed the statute extension)



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Either the taxpayer or the authorized representative may sign the FBAR statute extension.

Keep the original statute extension in the FBAR penalty case file.

Prepare a statute update package for Detroit to update their database. The package includes an updated FBAR monitoring document, a copy of the signed statute extension, and where the representative signed the FBAR statute extension, a copy of the FBAR power of attorney.

Note that the current version of the FBAR monitoring document does not have a field for the statute date, so you have to write the new statute date in a blank area of the form.

FBAR Power of Attorney

- May only use Form 2848 after the delegated official signs the related statute memorandum
- Form 2848, line 3:
 - Column 1: "FBAR Examination"
 - Column 2: "TD F 90-22.1"
 - Column 3: the relevant calendar years
- Date-stamp the original Form 2848 and retain it in the FBAR penalty case
- Send to the CAF unit if it covers income tax matters
- Update the power of attorney section of the FMD and email or fax it to the (do not send the power of attorney to Detroit)



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Form 2848 is a power of attorney form for Title 26 income tax cases. You may use Form 2848 for FBAR penalty cases only after the delegated official signs the related statute memorandum.

You need to secure a separate power of attorney for the FBAR case. On line 3 of Form 2848, the document must state that the power of attorney relates to FBAR penalties by showing "FBAR Examination" in column 1, "TD F 90-22.1" in column 2, and listing each relevant calendar year in column 3.

The power of attorney may covers both FBAR and income tax matters. Where the power of attorney covers income tax matters, send the document to the CAF unit following the normal procedures.

When you receive the FBAR power of attorney, date-stamp the original Form 2848 and retain it in the FBAR penalty case file. You also need to update the power of attorney section on the FBAR monitoring document, Form 13536. After updating the FMD, email fax it to the Detroit Computing Center for input into the database. Do not send the power of attorney to the Detroit Computing Center.

Delinquent FBARs

- Date stamp original delinquent FBARs
- Across the top write in red “Secured by Exam”
- Make a copy the delinquent FBARs with the date stamp and annotation; place the copies in the FBAR penalty case file
- Using Form 3210, send original FBARs to:

Certified U.S Mail:

IRS – CTR Operations
Edit and Error
Resolution Mailroom
P.O. Box 32621
Detroit, MI 48232-0115

United Parcel Service:

IRS – Detroit Computing Center
Attention: FBAR Coordinator Roylyn Lapko
985 Michigan Ave.
Detroit, MI 48226



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You must process all delinquent FBARs that you receive. Date stamp the original FBAR and write across the top of the form, in red ink, “Secured by Exam.”

Make a copy of the date-stamped and annotated FBAR and place the copy in the FBAR penalty case file.

Using Form 3210, mail the original delinquent FBARs to the Detroit Computing Center. The address for certified U.S. mail is IRS, CTR Operations, Edit and Error Resolution Mailroom, P.O. Box 32621 Detroit, MI 48232.

The address for United Parcel Service (UPS) packages is IRS Detroit Computing Center, Attention: FBAR Coordinator Roylyn Lapko, 985 Michigan Ave. Detroit, MI 48226.

FBAR Check Processing

- Do not process the FBAR payments on Form 3244-A
- Make a copy of the check for the case file
- Send to the Detroit Computing Center using Form 3210:
 - Copy of Form 13449 (the original remains in the case file)
 - Copy of the power of attorney, if the representative signed Form 13449
 - Original check (paper clip to Form 13449; do not staple)

Certified U.S Mail:

United Parcel Service:

IRS
P.O. Box 33115
Detroit, MI 48232-0115

IRS – Detroit Computing Center
Attention: FBAR Coordinator Roylyn Lapko
985 Michigan Ave.
Detroit, MI 48226



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Do not use Form 3244-A to process FBAR penalty checks.

Make a copy of the original check and retain the copy of the check in the FBAR penalty case file.

Send the following documents to the Detroit Computing Center using Form 3210 to track receipt of the package:

- a copy of the signed Form 13449; retain the original Form 13449 in the FBAR penalty case file; Form 13449 is the FBAR penalty agreement form
- if the representative signed Form 13449, a copy of the FBAR power of attorney
- the original check, paper-clipped to the copy of Form 13449; do not staple the check to the form

The address for certified U.S. mail is IRS, P.O. Box 33115, Detroit, MI 48232-0115.

The address for United Parcel Service (UPS) deliveries is IRS. Detroit Computing Center, attention FBAR coordinator Roylyn Lapko, 985 Michigan Ave., Detroit, MI 48226.

DCC Addresses for Closed Cases

Send closed FBAR penalty cases to the Detroit Computing Center using Form 3210 (UPS preferred due to lower cost):

Certified U.S Mail:

IRS
P.O. Box 33113
Detroit, MI 48232-0113

United Parcel Service:

IRS – Detroit Computing Center
Attention: FBAR Coordinator Roylyn Lapko
985 Michigan Ave.
Detroit, MI 48226

Do not send appealed cases to Detroit



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Except for appealed cases, using Form 3210, the group manager sends all closed FBAR penalty case files to the Detroit Computing Center. The preferred method to ship the FBAR cases is the United Parcel Service (UPS) due to the lower shipping costs for packages that weigh 13 ounces or more.

The UPS address is Internal Revenue Service, Detroit Computing Center, attention FBAR coordinator Roylyn Lapko, 985 Michigan Ave., Detroit, MI 48226.

To send the case by certified U.S. Mail, the address is IRS P.O. Box 33113, Detroit, MI 48232-0113.

Do not send appealed cases to Detroit.

Working the FBAR Penalty Case

- RGS FBAR penalty lead sheet
- FBAR time charged to the case
- Gather evidence to arrive at a conclusion regarding the appropriate penalty
- Prepare summary memorandum to explain FBAR violations



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RGS has an FBAR penalty lead sheet that contains the FBAR penalty case procedures. Although the lead sheet does not contain all of the current FBAR procedures, this lead sheet is a very helpful reminder of the steps that you need to take in an FBAR penalty investigation.

Charge your time directly to the FBAR penalty case.

Be sure to place all evidence gathered during the FBAR penalty investigation in the FBAR penalty case file. The FBAR penalty case file is separate from the Title 26 case files. We will talk more about the FBAR penalty case file later in this presentation.

The FBAR penalty case will include a summary memorandum that you prepare at the end of the penalty investigation to explain the FBAR violations and the proposed FBAR penalties, if any. We will cover the penalty memorandum later in this presentation.

FBAR Penalty Determination

- At the conclusion of the FBAR penalty investigation the group manager and examiner determine the appropriate FBAR penalty
 - Is mitigation appropriate?
 - Willful or non-willful
 - How many FBAR penalties to assert?
- Consult FBAR coordinator
- Consult fraud technical advisor for willful penalties
- FBAR penalty mitigation examples at end of this presentation



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At the conclusion of the FBAR investigation the group manager and examiner determine the appropriate FBAR penalty to propose, if any. Part of this decision will be whether to compute the FBAR penalties using the FBAR mitigation guidelines found in the IRM, whether willful or non-willful penalties are appropriate, and how many FBAR penalties to propose.

The local FBAR coordinator can assist the group manager with this determination, as can the fraud technical advisor.

At the end of this presentation we will cover the FBAR mitigation guidelines, including examples of mitigated FBAR penalty computations.

FBAR Penalty Summary Memorandum

- The group manager and the examiner determine the penalty
- Counsel reviews all FBAR penalty proposals to determine whether the evidence supports the proposed penalty
- Prepare a memorandum for Counsel to summarize the evidence that supports the proposed FBAR penalty (bullet or narrative form)
- Do not use the FBAR lead sheet
- For cases where the person contests the FBAR penalty assessment, may be used in the court proceedings



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At the conclusion of the FBAR penalty investigation, if you propose an FBAR penalty, Counsel reviews your proposed FBAR penalties to determine whether the evidence you gathered is sufficient to sustain the penalties. It is the group manager and the examiner who determine the appropriate FBAR penalties to propose; the role of Counsel is to review the penalty decision and to provide an opinion on whether the evidence supports the proposed penalty.

To assist Counsel in this task you prepare a memorandum to summarize the evidence you gathered. This memorandum can be in either bullet or narrative form, or a combination of the two forms. Often it is better to summarize the evidence using bullets, and then to use a narrative to explain how the evidence supports the proposed penalty assessments.

Do not use the FBAR lead sheet as a substitute for the penalty memorandum.

In the event the IRS assesses the FBAR penalties, and the person contests the assessments, the FBAR penalty memorandum will assist with preparing the case for trial.

Role of the FBAR Coordinator

- Involve early in the process
- Assists with administrative and case-development issues
- Assists with penalty determinations
- Reviews Counsel memorandum for completeness
- Verifies penalty computation
- Assists with resolving conflicts with Counsel



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There are one or more FBAR coordinators in each Examination Area. The primary role of the FBAR coordinator is to assist you with FBAR cases, including both administrative and case-development issues.

It is important to involve an FBAR coordinator as early as possible in the investigation. The FBAR coordinator can assist you and your manager with evaluating the evidence to determine whether there is sufficient evidence to support the proposed FBAR penalty.

The FBAR coordinator reviews your Counsel penalty memorandum to make sure there is a complete discussion of all relevant evidence. The FBAR coordinator also verifies the accuracy of the computation of the proposed FBAR penalty.

The FBAR coordinator also assists with resolving cases where Counsel does not agree with FBAR penalty proposed by you and your manager.

Role of the Fraud Technical Advisor

- Leverage fraud experience to develop willful FBAR penalty cases
- Assists with evaluating whether the evidence shows willfulness
- Assists with criminal referrals
- Reviews Counsel memorandum for completeness



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You should leverage the experience of the fraud technical advisor to assist you with developing willful FBAR cases. The fraud technical advisor help evaluate whether there is sufficient evidence to support a willful FBAR penalty. The fraud technical advisor also can assist with identifying cases that warrant a criminal referral, not only for the income tax violations but also for related FBAR violations.

The fraud technical advisor reviews the FBAR memorandum to Counsel for completeness.

FBAR Penalty Case Workpapers

- FBAR penalty case separate from the income tax cases
- Include copies of relevant Title 26 information, including information to show tax deficiencies
- Organized and indexed workpapers are easier to follow, particularly if the penalty case goes to trial



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The FBAR penalty case file is separate from the related income tax examinations or other Title 26 penalty cases. The FBAR penalty case and the income tax cases may follow separate processing paths so it is important to include in the FBAR penalty case copies of all the relevant information from the Title 26 case files, including information to show the amounts of the tax deficiencies, if any, related to the undisclosed accounts.

As with all cases, well organized and indexed workpapers are easier to follow. Also keep in mind that, if the FBAR penalty case goes to trial, your FBAR workpapers will be a very important part of the government's FBAR penalty case.

The FBAR Penalty Case File

- Signed Related Statute Memorandum
- FBAR Monitoring Document
- Fax transmittal or copy of email to show when the initial FMD sent to Detroit
- Original Power of Attorney for FBAR penalties
- Copies of delinquent FBARs
- FBAR workpapers, including activity record and FBAR lead sheet



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The separate FBAR penalty case file contains the following documents:

The Related Statute Memorandum signed by the designated official.

The FBAR Monitoring Document.

The Fax transmittal to show the date you sent the first FBAR Monitoring Document to Detroit (or a printed copy of the email message for electronic documents).

The original Power of Attorney for the FBAR penalties.

Copies of delinquent FBARs secured during the penalty investigation.

FBAR workpapers, including the activity record and the FBAR lead sheet.

The FBAR Penalty Case File, cont'd.

- Penalty memorandum
 - Summary memorandum (no FBAR penalties)
 - Penalty memorandum to Counsel, and response from Counsel
- As necessary, other FBAR documents
 - FBAR statute extension
 - Letter 3800 (FBAR warning letter)
 - Form 13449 , penalty assessment agreement
 - Copy of check to pay FBAR penalties (original sent to Detroit for processing), and the Form 3210
 - Letter 3709 (FBAR 30-day letter)
 - Request for Appeals conference



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The FBAR penalty case file also contains a penalty memorandum. For cases where you do not propose FBAR penalties, which includes cases where there were no violation or cases where you issued an FBAR warning letter, a memorandum to summarize the penalty investigation and to explain the results.

For cases where you propose to assert an FBAR penalty, the file contains the FBAR penalty memorandum to Counsel and Counsel's response.

The file may also contain other various FBAR penalty documents, depending upon the disposition of the case. The other documents could include:

- The original FBAR statute extension;
- A copy of the FBAR warning letter, Letter 3800;
- The original FBAR penalty agreement form, Form 13449;
- A copy of the check to pay the FBAR penalty assessment and the Form 3210; you sent the original check to Detroit for processing;

A copy of Letter 3709 (FBAR 30-day letter);
The taxpayer's request to appeal the FBAR penalties.

FBAR Penalty Memorandum

- Required for all penalty cases
- Summarizes the FBAR penalty investigation
 - Summarize the evidence
 - Analyze the evidence
 - Interpret the evidence
 - Discuss reasonable cause
 - Draw conclusions
 - Compute FBAR penalties
- Memorandum is from the group to Counsel to request advice on whether the evidence supports the penalty (willful or non-willful)



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You prepare an FBAR penalty memorandum where you propose an FBAR penalty. This memorandum explains the FBAR penalty investigation and the results. The memorandum should summarize the evidence contained in the FBAR case file, analyze the evidence, interpret the evidence, discuss whether the taxpayer had reasonable cause for violations, and compute the penalties.

If the taxpayer indicated that he had reasonable cause for the violation, such a statement must be included in the memorandum and you must address any points raised by the taxpayer. If the taxpayer did not provide a statement of reasonable cause, either try to anticipate what his position could be, or point to specific evidence you gathered that shows the taxpayer did not have reasonable cause for the FBAR violation.

The memorandum is from the examination group to Counsel to request advice on whether the evidence supports the proposed FBAR penalty, either willful or non-willful.

FBAR Penalty Memorandum, cont'd.

- If sending to Counsel, do not use the FBAR lead sheet
- Attach documents as necessary
 - ◊ Required attachments vary by Counsel
 - ◊ Contact local Counsel for preference
- Reviewed by
 - ◊ Fraud technical advisor (willful penalties only)
 - ◊ FBAR coordinator (all penalties)



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The FBAR penalty memorandum must be a formal memorandum to Counsel and Counsel will provide you a written reply. Therefore, do not use the FBAR lead sheet as a substitute for this memorandum: prepare a separate, formal memorandum

Where necessary, attach supporting documents to the memorandum. Prior to sending the memorandum to Counsel, you or your manager should discuss with Counsel what documents to include with, or attach to, the FBAR penalty memorandum.

Prior to sending the memorandum to Counsel the FBAR coordinator needs to review it. The fraud technical advisor only reviews the penalty memorandum where you propose willful FBAR penalties.

FBAR Procedures – No Violation

- Prepare summary memorandum to explain findings (FBAR lead sheet is acceptable)
- Appropriate where there were no FBAR violations
- Discuss the decision with the FBAR coordinator
- Close the case
 - Update FBAR monitoring document
 - Update ERCS
 - Send closed case to Detroit
- Follow the FBAR Warning Letter closing procedures were there are FBAR violations but no FBAR penalties



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For cases where there are no FBAR violations, prepare a summary memorandum to explain your findings. If the FBAR lead sheet contains such a summary of findings, the examiner does not have to prepare a separate memorandum.

You and your manager should discuss your decision with the FBAR coordinator.

To close the FBAR case, complete the FBAR monitoring document to show the disposition of the case, update ERCS, assemble the FBAR case file, and send the closed case to Detroit.

In all cases where there are FBAR violations but no penalties, you have to send the taxpayer and an FBAR Warning letter.

FBAR Procedures – Warning Letter

- FBAR violations but no FBAR penalties
- Prepare summary memorandum (FBAR lead sheet acceptable)
 - Address reasonable cause
 - Explain penalty decision
- Discuss case with the FBAR coordinator (document)
- Send L-3800 (FBAR warning letter)
- Retain a copy of L-3800 in the case file
- Close the case
 - Update FBAR monitoring document
 - Update ERCS
 - Send closed case to Detroit



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For cases where there are FBAR violations but you did not assess FBAR penalties, you have to send an FBAR warning letter to the taxpayer.

Prepare a summary memorandum to explain your findings. If the FBAR lead sheet contains such a summary of findings, you do not have to prepare a separate memorandum. The memorandum (or the FBAR lead sheet) must explain the taxpayer's reasonable cause for the violation and you did not propose FBAR penalties.

You and your manager should discuss the case with the FBAR coordinator. The FBAR coordinator reviews the case summary memorandum to ensure you explained your decision not to assert FBAR penalties. While your manager makes the final decision whether to assert penalties, you and your manager should consider concerns or issues raised by the FBAR coordinator; document in the case activity record your discussion with the FBAR coordinator.

Send Letter 3800, *Warning Letter Respecting Foreign Bank and Financial Accounts report Apparent Violations*, to the taxpayer. This

letter lists the FBAR violations discovered during the penalty investigation.

Retain a copy of the Letter 3800 in the case file.

To close the FBAR case, complete the FBAR monitoring document to show the disposition of the case, update ERCS, assemble the FBAR case file, and send the closed case to Detroit.

FBAR Procedures – Penalty Proposed

- Send FBAR summary memorandum to Counsel
- Counsel reviews all proposed FBAR penalty assessments
 - Has 45 days to provide written legal advice
 - Does not determine a penalty amount
- Group manager must approve all FBAR penalties in writing
- Send FBAR penalty package
 - Letter 3709 (30-day letter for FBAR penalties)
 - Form 13449 (agreement to assess FBAR penalties)
 - Notice 1330 (FBAR penalty payments by check)



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Counsel reviews all proposed FBAR penalty assessments.

Counsel has 45 days to provide written legal advice regarding the proposed FBAR penalty assessments, although for more complex cases they may need additional time. The role of Counsel is to review the evidence to determine whether the evidence supports your proposed FBAR penalty. Counsel will not determine the amount of the FBAR penalty for you.

Prior to sending the FBAR penalty package, your group manager must approve the FBAR penalties in writing.

After Counsel reviews the proposed FBAR penalty, you send the FBAR penalty package to the taxpayer. The FBAR penalty package consists of:

- Letter 3709, *FBAR Penalty Letter*
- Form 13449, *Agreement to Assessment and Collection of Penalties Under 31 U.S.C. 5321(a)(5) and 5321(a)(6)*
- Notice 1330, *Information on Making FBAR Penalty Payment by*

Check

FBAR Procedures – Agreed Case

- Taxpayer signs Form 13449 to agree to the FBAR penalty assessment
- Separate check for the FBAR penalties
- Special processing procedures for checks to pay FBAR penalties
- Close the case
 - Update FBAR monitoring document
 - Update ERCS
 - Send to closed case to Detroit
- The Detroit Computing Center
 - Assesses the FBAR penalties
 - Sends the notice of the assessment
 - Forwards the case for collection



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To agree with the FBAR penalty assessments the taxpayer signs Form 13449 and returns it to you, preferably with payment. The taxpayer must send a separate check to pay the FBAR penalties. The Detroit Computing Center processes FBAR penalty checks.

To close the FBAR case, complete the FBAR monitoring document to show the disposition of the case, assemble the FBAR case file, update ERCS, and send the closed case to Detroit.

The Detroit Computing Center assesses the FBAR penalties, sends the notice of the assessment to the taxpayer, and, if necessary, forwards the case for collection.

FBAR Procedures – Unagreed Case

- An unagreed FBAR case is where the taxpayer fails to respond to L-3709
- Close the case
 - Update FBAR monitoring document
 - Update ERCS
 - Close the case to Detroit
- Detroit assesses the penalty, sends notice of assessment, and forwards the case for collection



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An unagreed FBAR penalty case is where the taxpayer fails to respond to the FBAR 30-day letter, Letter 3709.

To close the FBAR case, complete the FBAR monitoring document to show the disposition of the case, update ERCS, and close the case to Detroit.

The Detroit Computing Center assesses the FBAR penalties, sends the notice of the assessment to the taxpayer, and forwards the case for collection.

Pre-Assessment FBAR Appeals

- Taxpayer must file a protest within 30 days of Letter 3709 (retain the case for 15 days past the 30-day due date)
- Appeals requires 180 days on assessment statute
- Update the FMD and send it to address for closed cases (check the Disposition box “Case Closed with Penalty to Appeals”)
- Close the case through Technical Services directly to Appeals (**not to Detroit**)
 - FBAR cases are coordinated issue cases in Appeals
 - Attach Form 3198 to the case file, identify the case is an FBAR case, list the FBAR penalty years, and the related income tax cases
 - Enter UIL 9999.99.01 on the transmittal letter and Form 3198
 - Where possible, send the unagreed income tax and FBAR penalty cases at the same time



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To appeal the FBAR penalties, the taxpayer must file a protest within 30 days of Letter 3709. You should allow an additional 15 days past the deadline to receive the protest from the taxpayer.

Appeals requires at least 180 days remaining on the FBAR penalty assessment statute. The taxpayer must sign the FBAR penalty statute extension, otherwise the taxpayer will not have pre-assessment appeal rights.

Updates the FBAR monitoring document and check the Disposition box “Case Closed with Penalty to Appeals.” After updating the FBAR monitoring document, your manager sends a copy to the Detroit Computing Center at the same address as for closed FBAR penalty cases.

Assemble the FBAR penalty case file for closing and update ERCS. Following local procedures, your manager sends the appealed FBAR penalty case file through Technical Services directly to Appeals. **Do not send appealed FBAR penalty cases to Detroit.**

FBAR cases are coordinated issue cases in Appeals. Attach Form 3198 to the outside of the FBAR case file. On Form 3198 indicate that the case is an FBAR case, list the years for which there are proposed FBAR penalties, and list the related income tax cases, including any Title 26 penalty cases. Write UIL 9999.99.01 on Form 3198 so the Appeals officer knows to contact the Appeals FBAR Coordinator prior to starting the case.

Where possible, send to Appeals all unagreed income tax and FBAR cases at the

same time.

Post-Assessment Appeals

- The taxpayer responds to Letter 3709 and requests an Appeals conference but refuses to sign the FBAR penalty statute extension (less than 180 days on the penalty assessment statute)
- Where the proposed FBAR penalties exceed \$100,000, once assessed Appeals has limited authority to settle the case (31 U.S.C. 3711; 31 C.F.R. sections 902.1 and 902.2)
- Where the propose penalties exceed \$100,000, the group manager must advise taxpayer of this provision and document this contact in the FBAR case activity record



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The taxpayer only has post-assessment appeal rights where the taxpayer responds to Letter 3709 and requests an Appeals conference but refuses to sign the FBAR penalty statute extension. Appeals will not accept an FBAR penalty case with less than 180 days on the penalty assessment statute, so for these cases you first have the Detroit Computing Center assess the FBAR penalties prior to sending the FBAR penalty case to Appeals.

Under Section 3711 of Title 31, and the related Title 31 regulation section 5.1, only the Department of Justice may compromise a debt that exceeds \$100,000. Therefore, where the proposed FBAR penalties exceed \$100,000, and the taxpayer refused to sign the FBAR statute extension but requested an Appeals conference, prior to assessing the FBAR penalty your manager shall contact the taxpayer or his representative to explain that Appeal has limited authority to settle the case. Your manager shall document this contact on the activity record in the FBAR penalty case.

Post-Assessment Appeals, cont'd.

- To assess the FBAR penalties, send the following documents to the Detroit Computing Center:
 - Copy of the FMD (check the Disposition box "Case Closed with Penalty to Appeals")
 - Unsigned Form 13449 showing the penalty assessment for the year with less than 180 days on the assessment statute
 - A statement that the FBAR penalty case is being forwarded to Appeals
- Email (preferred) or FAX the documents to Roylyn Lapko:
 - Roylyn.Lapko@irs.gov
 - FAX: (313) 234-2278
- The group manager must email the documents or attach a statement that he approved the penalty assessment



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If the taxpayer refuses to sign the statute extension, then you have to assess the FBAR penalties prior to sending the case to Appeals.

You send the following documents to the Detroit Computing Center: a copy of the FBAR monitoring document (be sure to check the Disposition box "Case Closed with Penalty to Appeals" prior to sending the document to Detroit), a copy of the unsigned Form 13449 showing the penalty assessment for the year or years with less than 180 days on the assessment statute, and a statement that you will forward the FBAR penalty case to Appeals after Detroit assesses the FBAR penalties.

Email is the preferred method to send the assessment information to Detroit. Using secured email, your manager sends the documents to Roylyn.Lapko@irs.gov.

Your manager may also FAX the documents directly to Roylyn Lapko; her FAX number is (313) 234-2278.

our manager must email the documents to Detroit, or provide you with a statement to attach to your email, or the FAX, that states the group manager approves the penalty assessment.

Post-Assessment Appeals, cont'd.

- Detroit **only** immediately assesses the FBAR penalty for the short-statute year
- Detroit faxes to the originating group:
 - a copy of the FBAR penalty assessment document
 - a copy of the balance due letter sent to the taxpayer
- Send the FBAR penalty case to appeals through Technical Services (must include the assessment documents from Detroit)



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After receiving the documents from the group, the Detroit Computing Center immediately assesses the FBAR penalty. Detroit will assess only FBAR penalties with less than 180 days on the statute..

After assessing the FBAR penalty, Detroit faxes to the originating group a copy of the FBAR penalty assessment document and a copy of the balance due letter sent to the taxpayer; you must include both of these documents in the FBAR penalty case file to be sent to Appeals,. You cannot close the FBAR penalty case until Detroit sends these documents because Appeals will reject it without these documents.

Your group manager sends the FBAR penalty case to Appeals through Technical Services.

Post-Assessment Appeals, cont'd.

FBAR cases are coordinated issue cases in Appeals

Attach Form 3198 to the case file

- identify the case is an FBAR case
- list the FBAR penalty years
- identify the FBAR penalty years already assessed
- list related income tax cases
- Enter UIL 9999.99.01



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FBAR cases are coordinated issue cases in Appeals. Attach Form 3198 to the outside of the case file. On Form 3198 indicate that the case is an FBAR case, list the years for which there are proposed FBAR penalties, identify the years where Detroit already assessed the FBAR penalties, and list the related income tax cases, including Title 26 penalty cases. Your group manager needs to enter UIL 9999.99.01 on Form 3198 so the Appeals officer knows to contact the Appeals FBAR Coordinator prior to starting the case.

Post-Assessment Appeals, cont'd.

- Appeals package may include both pre-assessment and post-assessment penalty cases
- If possible, send all cases to Appeals at the same time, including unagreed income tax cases
- Update ERCS
- Close the case through Technical Services directly to Appeals (**not to Detroit**)



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The cases sent to Appeals may include both pre-assessment and post-assessment FBAR penalty cases; if possible, you should send all cases, including related unagreed income tax cases, to Appeals at the same time.

Assemble the FBAR penalty case file for closing and update ERCS. Following local procedures, send the appealed FBAR penalty case file through Technical Services directly to Appeals. Do not send appealed FBAR penalty cases to Detroit.

FBAR Statutes – Other Issues

- Government has burden to prove the FBAR penalty
- Develop a strategy to address a year where the FBAR statute may become an issue
- Not appropriate to assess a penalty if there is not enough evidence to sustain the penalty in court
- Options:
 - Secure statute extension
 - Close case with no action and continue FBAR penalty investigation for subsequent-year violations
 - Complete FBAR penalty case before the statute expires
- Allow 90 days to assess an FBAR penalty
 - 60 days for Counsel to review the proposed penalty
 - 30 days for Detroit to assess the penalty



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As in all penalty cases, the government has the burden of proof in an FBAR penalty case. For FBAR penalty cases where the assessment statute is going to expire within 180 days, you, your manager, the FBAR coordinator, and the fraud technical advisor need to develop a strategy to address the statute issue. It is not appropriate to assess a penalty for a short-statute year if there is not enough evidence to sustain the penalty in court.

The obvious way to deal with a short statute is to secure an extension of the assessment statute. Depending upon the current progress and status of the investigation there are two other options for short-statute FBAR cases: close the year with no action and continue the FBAR penalty investigation for subsequent-year violations, or close the FBAR penalty with or without a penalty assessment.

Counsel still must approve all short-statute penalty assessments. Therefore, where your manager decides to assess the FBAR penalty, you must start the penalty process at least 90 days before the statute expiration date. The 90-day period allows 60 days for Counsel to review the proposed penalty and 30 days for Detroit to make the

penalty assessment.

FBAR Statutes – Other Issues, cont'd.

- Risk-based question: allow the FBAR statute to expire to allow the examiner to secure additional evidence to assert an appropriate penalty in a subsequent year
- FBAR coordinator and fraud technical advisor can assist with making this decision
- Do not assess non-willful penalty if there are indications of willfulness where a willful penalty could be sustained for a subsequent-year violation
- **Important: must solicit statute extension**
- Additional guidance to be issued



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If the facts of the case warrant, it is acceptable to close an FBAR penalty year with no action where the assessment statute is about to expire, the taxpayer will not extend the penalty assessment statute, and there is not sufficient evidence to sustain an FBAR penalty.

The decision to close a short-statute FBAR case with no action is a risk-based decision made by your group manager after considering all of the facts of the case. The question that needs to be answered is whether to allow the FBAR statute expire to allow your time to secure additional evidence to assert an appropriate penalty in a subsequent year. The FBAR coordinator and the fraud technical advisor are available to assist you and your manager with this decision.

It is not appropriate to assess a non-willful penalty, just to take some action before the penalty statute expires, if there are indications of willfulness where, if you had more time to complete the penalty investigation, there is a good chance that you could assert a willful penalty for a subsequent-year violation.

Prior to making a decision to close the FBAR penalty case with no

action, you must solicit an FBAR statute extension.

Additional guidance on this decision is being developed and will be issued when approved.

IRS FBAR Resources

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



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There are many resources available within the IRS to assist you with FBAR questions.

IRM 4.26.16 (07-01-2008 revision), *Report of Foreign Bank and Financial Accounts (FBAR)*, contains a summary of the FBAR law as well as the criteria to assert FBAR penalties.

IRM 4.26.17 (05-05-2008 revision), *Report of Foreign Bank and Financial Accounts (FBAR) Procedures*, has the procedures to conduct Title 31 examinations.

The FBAR penalty lead sheet in RGS is a good reference that summarizes much of the information that is in the Internal Revenue Manual. The current RGS FBAR Penalty lead sheet is the March 2012 revision.

Chief Counsel has attorneys assigned to each Examination Area that specialize in FBAR reporting and penalty issues.

The area FBAR coordinators and fraud technical advisors are also available to assist you.

FBAR Coordinators by Area (May 2013)

(b) (6)



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Here are the FBAR coordinators, by Examination Area, as of May 2013.

SB/SE FBAR Resources

(b) (6)



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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:

(b) (6)



FBAR Penalty Mitigation

- The amount of the penalty is left to the discretion of the group manager and examiner
- The mitigation guidelines promote consistency
- Use the penalty mitigation guidelines to compute all FBAR penalties
- Where appropriate, may deviate from the guidelines but must document the workpapers
- See IRM 4.26.16.4.6 and Exhibit 4.26.16-2



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The FBAR mitigation guidelines allow you to determine the appropriate FBAR penalty to assert based upon the facts and circumstances of the case.

The IRS adopted the FBAR mitigation guidelines to promote consistency by examiners and group managers when exercising their discretion for similarly-situated persons subject to possible FBAR penalties, so where appropriate examiners should use the penalty mitigation guidelines to compute FBAR penalties.

Examiners may deviate from the guidelines where the facts of the case warrant either a lesser or greater penalty amount than the amount of the penalty computed using the mitigation guidelines. Where an examiner believes it is appropriate to deviate from the mitigation guidelines, the examiner must document the reasons for the deviation in the workpapers for the FBAR penalty case.

The FBAR penalty mitigation guidelines are in IRM 4.26.16.4.6 and IRM Exhibit 4.26.16-2.

FBAR Penalty Mitigation Criteria

- Penalty mitigation is available to persons that meet all of the following:
 1. No history of criminal tax or BSA convictions for the preceding 10 years, and no prior FBAR penalty assessments
 2. No illegal sources of income in the foreign accounts
 3. Person cooperated during the examination
 4. No fraud penalty against the person for an underpayment of income tax for the year in question due to the failure to report income related to any amount in a foreign account
- Written approval of group manager



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FBAR penalty mitigation is available to any person that meets all of the following requirements:

There is no history of past criminal tax or BSA convictions for the preceding ten years, and no prior FBAR penalty assessments.

No illegal sources of income are in, or passed through, any of the person's foreign accounts.

The person cooperated during the examination.

The IRS did not sustain a civil fraud penalty against the person for an underpayment of tax for the year in question due to the failure to report income related to any amount that was in the foreign account.

The group manager must approve, in writing, all FBAR penalty assessments, including mitigated FBAR penalties.

Level 1 Mitigation – Willful Penalties

- Maximum aggregate balance for all accounts to which the violations relate did not exceed \$50,000
 - Compute the maximum balance for each account during the calendar year
 - Add the individual maximum balances to arrive at the aggregate balance
- Penalty is greater of \$1,000 per violation or 5% of the maximum balance in the account
- If a person qualifies for Level 1 mitigation, apply the penalty computation to all accounts



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Level 1 willful FBAR penalty mitigation applies to persons where the maximum aggregate balance for all accounts to which the violations relate did not exceed \$50,000. To compute the aggregate balance of all accounts, first compute the maximum balance for each account during the calendar year, and then add together the maximum balance of each account to arrive at the aggregate balance.

The Level 1 willful FBAR penalty is greater of \$1,000 per violation or 5% of the maximum balance in the account.

If a person meets the criteria for Level 1 willful FBAR penalty mitigation, the Level 1 penalty computation applies to all accounts. Level 2 and greater willful FBAR penalty mitigation, where you will determine a separate penalty mitigation level for each account.

Level 1 Willful Mitigation Example

- Facts: for 2011 the person failed to report three accounts
- Facts: maximum balance of each account:
 - Account 1: \$40,000
 - Account 2: \$3,000
 - Account 3: \$950
 - Maximum aggregate balance: \$43,950
- Level 1 willful FBAR penalty per account:
 - Account 1: \$2,000 ($\$40,000 \times 5\%$)
 - Account 2: \$1,000
 - Account 3: \$1,000
 - Total FBAR penalty: \$4,000



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Here is an example of a Level 1 willful FBAR penalty mitigation for three accounts, the aggregate balance of which does exceed \$50,000.

The facts of the case are that for 2011 a person failed to report all three of his foreign accounts. The maximum balance of account number 1 was \$40,000, the maximum balance of account number 2 was \$3,000, and the maximum balance of the account number 3 was \$950. The maximum aggregate balance, which is determined by adding together the maximum balance of each of the three accounts, is \$43,950. Since the maximum aggregate balance for this person did not exceed \$50,000, and assuming the person meets all four mitigation criteria, Level 1 willful FBAR penalty mitigation is appropriate.

Under the Level 1 FBAR penalty mitigation guidelines, the FBAR penalty is the greater of \$1,000 per violation or five percent of the maximum balance of each account. In our example, the penalty for account number 1 is \$2,000, which is five percent of the \$40,000 maximum balance. The penalty for account number 2 is \$1,000, which is greater than five percent of maximum balance of the account (five percent of \$3,000 is \$150). The penalty for account number 3 is also \$1,000, which is greater than five percent of maximum balance of the account (five percent of \$950 is \$47.50).

Therefore, in this example, the total FBAR penalties using the Level 1 mitigation guidelines is \$4,000.

Level 2 Mitigation – Willful Penalties

- Level 1 willful mitigation does not apply (aggregate balance exceeds \$50,000)
- Maximum balance in the account to which the violation relates did not exceed \$250,000
- Penalty is the greater of
 - ♦ \$5,000 per violation, or
 - ♦ 10% of the maximum balance in the account



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Level 2 willful FBAR penalty mitigation could apply to accounts held by a person that does not qualify for Level 1 willful mitigation because the maximum aggregate balance for all accounts to which the violations relate exceeded \$50,000.

The person qualifies for Level 2 willful FBAR penalty mitigation for each account to which a violation relates, if the maximum balance in that account during the calendar year did not exceed \$250,000.

The Level 2 willful FBAR penalty is the greater of \$5,000 per violation or 10% of the maximum balance in the account.

Level 2 Willful Mitigation Example

- Facts: for 2011 the person failed to report three accounts
- Facts: maximum balance of each account:
 - Account 1: \$55,000
 - Account 2: \$13,000
 - Account 3: \$2,000
 - Maximum aggregate balance: \$70,000
- Level 2 willful FBAR penalty per account:
 - Account 1: \$5,500 (\$55,000 x 10%)
 - Account 2: \$5,000
 - Account 3: \$5,000
 - Total FBAR penalty: \$15,500



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Here is an example of Level 2 willful FBAR penalty mitigation.

The facts of the case are that for 2011 a person failed to report all three of his foreign accounts. The maximum balance of account number 1 was \$55,000, the maximum balance of account number 2 was \$13,000, and the maximum balance of the account number 3 was \$2,000. The maximum aggregate balance, which is determined by adding together the maximum balance of each of the three accounts, is \$70,000. Since the maximum aggregate balance for this person exceeded \$50,000 the person does not meet the criteria for Level 1 willful FBAR penalty mitigation. Assuming the person meets all four mitigation criteria, Level 2 willful FBAR penalty mitigation is appropriate for each of the three accounts because the maximum balance of each account does not exceed \$250,000.

Under the Level 2 FBAR penalty mitigation guidelines, the FBAR penalty is the greater of \$5,000 per violation or ten percent of the maximum balance of each account. In our example, the penalty for account number 1 is \$5,500, which is ten percent of the \$55,000 maximum balance. The penalty for account number 2 is \$5,000, which is greater than ten percent of the maximum balance of the account (ten percent of \$13,000 is \$1,300). The penalty for account number 3 is also \$5,000, which is greater than ten percent of the maximum balance of the account (ten percent of \$2,000 is \$200).

Therefore, in this example, the total FBAR penalties using the Level 2 mitigation guidelines is \$15,500.

Level 3 Mitigation – Willful Penalties

- Level 1 willful mitigation does not apply (aggregate balance exceeds \$50,000)
- Maximum balance in the account to which the violation relates exceeds \$250,000 but did not exceed \$1,000,000
- Penalty is the greater of
 - 10% of the maximum balance in the account, or
 - 50% of the closing balance in the account as of the last day for filing the FBAR (June 30 of the following year)



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Level 3 willful FBAR penalty mitigation could apply to accounts held by a person that does not qualify for Level 1 willful mitigation because the maximum aggregate balance for all accounts to which the violations relate exceeded \$50,000.

The person qualifies for Level 3 willful FBAR penalty mitigation for each account to which a violation relates if the maximum balance in that account during the calendar year was greater than \$250,000 but did not exceed \$1,000,000.

The Level 3 willful FBAR penalty is the greater of 10 percent of the maximum balance in the account, or 50 percent of the closing balance in the account as of the last day for filing the FBAR, which is June 30 of the following year.

Notice that under willful Level 3 mitigation the FBAR penalty could be the statutory maximum penalty.

Level 3 Willful Mitigation Example

- Facts: for 2011 the person failed to report two accounts
- Facts: the accounts balances are as follows:
 - Account 1: \$875,000 maximum balance
 - Account 1: \$935,000 balance on June 30, 2012
 - Account 2: \$40,000 maximum balance
 - Maximum aggregate balance: \$915,000
- Willful FBAR penalty mitigation per account:
 - Account 1: \$467,500 ($\$935,000 \times 50\%$)
 - Account 2: \$5,000 (Level 2 mitigation applies to this account)
 - Total FBAR penalty: \$472,500



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Here is an example of Level 3 willful FBAR penalty mitigation.

The facts of the case are that for 2011 a person failed to report both of his foreign accounts. The maximum balance of account number 1 was \$875,000, and the balance on June 30, 2012 was \$915,000. The maximum balance of account number 2 was \$40,000. The maximum aggregate balance, which is determined by adding together the maximum balance of both accounts, is \$975,000. The maximum aggregate balance for this person exceeded \$50,000, so the person does not meet the criteria for Level 1 willful FBAR penalty mitigation. Assuming the person meets all four mitigation criteria, willful FBAR penalty mitigation is appropriate for both of the accounts.

For account number 1, Level 3 willful FBAR mitigation applies because the maximum balance of the account is greater than \$250,000 but did not exceed \$1,000,000. Under Level 3 willful mitigation, the penalty is the greater of 10 percent of the maximum balance of the account, which in our example is \$87,500, or 50 percent of the balance on the date of violation, which in our example is \$467,500. Remember that the due date of the FBAR is June 30 of the following year. For account number 1, the Level 3 willful penalty is the greater of \$87,500 or \$467,500, so the penalty is \$467,500.

The maximum balance of account number 2 is \$40,000. Since the maximum balance of this account did not exceed \$250,000, the appropriate mitigation level for this account is Level 2. Under the willful Level 2 FBAR penalty mitigation guidelines, the FBAR penalty is the greater of \$5,000 or ten percent of the maximum balance of the account. In our example, the penalty for account number 2 is \$5,000, which is greater than ten percent of maximum balance of the account (ten percent of \$40,000 is \$4,000).

We computed the penalty for account number 1 using the Level 3 guidelines, and we computed the penalty for account number 2 using the Level 2 guidelines. Therefore, in this example, the total willful FBAR penalties using the mitigation guidelines is \$472,500.

Level 4 Mitigation – Willful Penalties

- Level 1 willful mitigation does not apply (aggregate balance exceeds \$50,000)
- Maximum balance in the account exceeded \$1,000,000
- Penalty is the greater of
 - ♦ \$100,000, or
 - ♦ 50% of the closing balance in the account as of the last day for filing the FBAR (June 30 of the following year)



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Level 4 willful mitigation could apply to accounts held by a person that does not qualify for Level 1 willful mitigation because the maximum aggregate balance for all accounts to which the violations relate exceeded \$50,000.

The Level 4 willful FBAR penalty computation applies to each account where the maximum balance exceeded \$1,000,000.

The Level 4 willful FBAR penalty is the greater of \$100,000 or 50 percent of the closing balance in the account as of the last day for filing the FBAR, which is June 30 of the following year.

A Level 4 willful FBAR penalty is the statutory maximum willful FBAR penalty.

Level 4 Willful Mitigation Example

- Facts: for 2011 the person failed to report two accounts
- Facts: the accounts balances are as follows:
 - Account 1: \$1,370,000 maximum balance
 - Account 1: \$1,260,000 balance on June 30, 2012
 - Account 2: \$1,760,000 maximum balance
 - Person closed account 2 on March 16, 2012
 - Maximum aggregate balance: \$3,130,000
- Level 4 willful FBAR penalty per account:
 - Account 1: \$630,000 ($\$1,260,000 \times 50\%$)
 - Account 2: \$100,000
 - Total FBAR penalty: \$730,000



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Here is an example of Level 4 willful FBAR penalty mitigation.

The facts of the case are that for 2011 a person failed to report both of his foreign accounts. The maximum balance of account number 1 was \$1,370,000, and the balance on June 30, 2012 was \$1,260,000. The maximum balance of account number 2 was \$1,760,000, and the person closed account number 2 on March 16, 2012. The maximum aggregate balance, which is determined by adding together the maximum balance of both accounts, is \$3,130,000. The maximum aggregate balance for this person exceeded \$50,000, so the person does not meet the criteria for Level 1 willful FBAR penalty mitigation. Assuming the person meets all four mitigation criteria, willful FBAR penalty mitigation is appropriate for both of the accounts.

For account number 1, Level 4 willful FBAR mitigation applies because the maximum balance of the account exceeded \$1,000,000. Under Level 4 willful mitigation, the penalty is the greater of \$100,000 or 50 percent of the balance on the date of violation. For account 1, the balance of the date of the violation, which is June 30, 2012, was \$1,260,000, so the Level 4 penalty for this account is 50 percent of \$1,260,000, which is \$630,000.

The maximum balance of account number 2 was \$1,760,000. Level 4 willful FBAR mitigation applies to account number 2 because the maximum balance of the account exceeded \$1,000,000. Since the person closed account number 2 before the due date of the 2011 FBAR, the balance of the account on June 30, 2012 is zero. As a result, the Level 4 willful FBAR penalty is \$100,000, which is the greater of \$100,000 or 50 percent of the balance in the account on June 30, 2012.

Therefore, in this example, the total willful FBAR penalties using the mitigation guidelines is \$730,000.

Level 1 Mitigation – Nonwillful Penalty

- Maximum aggregate balance for all accounts to which the violations relate did not exceed \$50,000
 - Compute the maximum balance for each account during the calendar year
 - Add the individual maximum balances to arrive at the aggregate balance
- Penalty is \$500 per violation not to exceed an aggregate penalty of \$5,000 for all violations
- If a person qualifies for Level 1 mitigation, the penalty computation is applied to each account (maximum of 10 penalties)



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Now we will cover the FBAR mitigation guidelines for non-willful FBAR penalties. As we go through the non-willful FBAR mitigation guidelines you should notice the guidelines are very similar to the willful FBAR penalty mitigation guidelines we just covered.

A person still must meet the four mitigation criteria we previously discussed. Level 1 non-willful FBAR penalty mitigation applies where the maximum aggregate balance of all the accounts to which the violations relate did not exceed \$50,000 at any time during the year. To compute the maximum aggregate balance of all accounts, first compute the maximum balance for each account during the calendar year, and then add together the maximum balance of each account to arrive at the maximum aggregate balance.

The Level 1 non-willful FBAR penalty is greater of \$500 per violation, not to exceed an aggregate penalty of \$5,000 for all violations.

If a person meets the criteria for Level 1 non-willful FBAR penalty mitigation, the \$500 Level 1 penalty applies to each account. Under Level 1 mitigation you cannot assert more than ten \$500 penalties because the maximum aggregate penalty is \$5,000.

Just like under willful penalty mitigation guidelines, you will apply Level 2 and greater non-willful FBAR penalty mitigation to each account.

Level 1 non-willful FBAR penalty mitigation is not that complicated, so there is no example of Level 1 non-willful FBAR penalty mitigation.

Level 2 Mitigation – Nonwillful Penalty

- Level 1 non-willful mitigation does not apply (aggregate balance exceeds \$50,000)
- Maximum balance in the account to which the violation relates did not exceed \$250,000
- Penalty is the lesser of
 - ♦ \$5,000 per violation, or
 - ♦ 10% of the maximum balance in the account



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Level 2 non-willful mitigation could apply to accounts held by a person that does not qualify for Level 1 mitigation because the maximum aggregate balance for all accounts to which the violations relate exceeded \$50,000.

The person qualifies for Level 2 non-willful FBAR penalty mitigation for each account to which a violation relates, if the maximum balance in that account during the calendar year did not exceed \$250,000.

The Level 2 non-willful FBAR penalty is the lesser of \$5,000 per violation or 10% of the maximum balance in the account.

When we discussed the Level 2 willful mitigation, the penalty was the **greater of** \$5,000 or 10 percent of the value of the account. Notice that the Level 2 non-willful mitigation penalty is the **lesser of** \$5,000 or 10 percent of the balance in the account.

Level 2 Non-willful Mitigation Example

- Facts: for 2011 the person failed to report three accounts
- Facts: maximum balance of each account:
 - Account 1: \$55,000
 - Account 2: \$13,000
 - Account 3: \$2,000
 - Maximum aggregate balance: \$70,000
- Level 2 non-willful FBAR penalty per account:
 - Account 1: \$5,000
 - Account 2: \$1,300 (\$13,000 x 10%)
 - Account 3: \$200
 - Total FBAR penalty: \$6,500



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Here is an example of Level 2 non-willful FBAR penalty mitigation. We are going to use the same facts as we used in the Level 2 willful FBAR penalty example to allow you to compare the two penalty computations.

The facts of the case are that for 2011 a person failed to report all three of his foreign accounts. The maximum balance of account number 1 was \$55,000, the maximum balance of account number 2 was \$13,000, and the maximum balance of the account number 3 was \$2,000. The maximum aggregate balance, which is determined by adding together the maximum balance of each of the three accounts, is \$70,000. Since the maximum aggregate balance for this person exceeded \$50,000 the person does not meet the criteria for Level 1 non-willful FBAR penalty mitigation. Assuming the person meets all four mitigation criteria, Level 2 non-willful FBAR penalty mitigation is appropriate for each of the three accounts because the maximum balance of each account does not exceed \$250,000.

Under the Level 2 FBAR non-willful penalty mitigation guidelines, the FBAR penalty is the lesser of \$5,000 per violation or ten percent of the maximum balance in each account. In our example, the penalty for account number 1 is \$5,000, because ten percent of the \$55,000 maximum balance in the account, which is \$5,500, exceeds \$5,000. The penalty for account number 2 is \$1,300, because ten percent of the maximum balance of the account is less than \$5,000 (ten percent of \$13,000 is \$1,300). The penalty for account number 3 is \$200, which is ten percent of the maximum balance in the account (ten percent of \$2,000 is \$200).

Therefore, in this example, the total FBAR penalties using the Level 2 non-willful mitigation guidelines is \$6,500.

Level 3 Mitigation – Nonwillful Penalty

- Level 1 non-willful mitigation does not apply (aggregate balance exceeds \$50,000)
- Maximum balance in the account to which the violation relates exceeded \$250,000
- Penalty is \$10,000 per violation (statutory maximum)



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Level 3 non-willful penalty mitigation could apply to accounts held by a person that does not qualify for Level 1 mitigation because the maximum aggregate balance for all accounts to which the violations relate exceeded \$50,000.

Level 3 non-willful penalties apply where the maximum balance in that account during the calendar year exceeded \$250,000.

The Level 3 non-willful FBAR penalty is the statutory maximum penalty, which is \$10,000.

Level 3 Non-willful Penalty Example 1

- Facts: for 2011 the person failed to report two accounts
- Facts: the accounts balances are as follows:
 - Account 1: \$875,000 maximum balance
 - Account 1: \$935,000 balance on June 30, 2012
 - Account 2: \$40,000 maximum balance
 - Maximum aggregate balance: \$915,000
- Level 3 non-willful FBAR penalty per account:
 - Account 1: \$10,000 (statutory maximum)
 - Account 2: \$4,000 (Level 2 mitigation applies to this account)
 - Total FBAR penalty: \$14,000



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Here is an example of Level 3 non-willful FBAR penalty mitigation. The facts of this example are the same as the facts in the example for Level 3 willful FBAR penalty example to allow you to compare the two penalty computations.

The facts of the case are that for 2011 a person failed to report both of his foreign accounts. The maximum balance of account number 1 was \$875,000, and the balance on June 30, 2012 was \$935,000. The maximum balance of account number 2 was \$40,000. The maximum aggregate balance, which is determined by adding together the maximum balance of both accounts, is \$915,000. The maximum aggregate balance for this person exceeded \$50,000, so the person does not meet the criteria for Level 1 non-willful FBAR penalty mitigation. Assuming the person meets all four mitigation criteria, non-willful FBAR penalty mitigation is appropriate for both of the accounts.

For account number 1, Level 3 non-willful FBAR penalty mitigation applies because the maximum balance of the account is greater than \$250,000. The Level 3 non-willful penalty is the statutory maximum, which is \$10,000.

The maximum balance in account number 2 was \$40,000. Since the maximum balance of this account did not exceed \$250,000, the appropriate mitigation level is Level 2. Under the non-willful Level 2 FBAR penalty mitigation guidelines, the FBAR penalty is the lesser of \$5,000 or ten percent of the maximum balance in the account. In our example, the penalty for account number 2 is \$4,000, because ten percent of maximum balance of the account (ten percent of \$40,000 is \$4,000) is less than \$5,000.

We computed the penalty for account number 1 using the Level 3 guidelines, and we computed the penalty for account number 2 using the Level 2 guidelines. Therefore, in this example, the total non-willful FBAR penalties using the mitigation guidelines is \$14,000.

Level 3 Non-willful Penalty Example 2

- Facts: for 2011 the person failed to report two accounts
- Facts: the accounts balances are as follows:
 - Account 1: \$1,370,000 maximum balance
 - Account 1: \$1,260,000 balance on June 30, 2012
 - Account 2: \$1,760,000 maximum balance
 - Person closed account 2 on March 16, 2012
 - Maximum aggregate balance: \$3,130,000
- Level 3 non-willful FBAR penalty per account:
 - Account 1: \$10,000 (statutory maximum)
 - Account 2: \$10,000 (statutory maximum)
 - Total FBAR penalty: \$20,000



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Here is another example of Level 3 non-willful penalty computations. The facts in this example are the same as the facts for the Level 4 willful FBAR penalty mitigation example that we previously covered.

The facts of the case are that for 2011 a person failed to report both of his foreign accounts. The maximum balance of account number 1 was \$1,370,000, and the balance on June 30, 2012 was \$1,260,000. The maximum balance of account number 2 was \$1,760,000, and the person closed account number 2 on March 16, 2012. The maximum aggregate balance, which is determined by adding together the maximum balance of both accounts, is \$3,130,000. The maximum aggregate balance for this person exceeded \$50,000, so the person does not meet the criteria for Level 1 non-willful FBAR penalty mitigation. Assuming the person meets all four mitigation criteria, non-willful FBAR penalty mitigation is appropriate for both of the accounts.

For account number 1, the Level 3 non-willful FBAR penalty applies because the maximum balance of the account is greater than \$250,000. The Level 3 non-willful penalty is the statutory maximum, which is \$10,000.

For account number 2, the Level 3 non-willful FBAR penalty applies because the maximum balance of the account is greater than \$250,000. The Level 3 non-willful penalty is the statutory maximum, which is \$10,000.

The total non-willful FBAR penalties is \$20,000.

Note that the non-willful FBAR penalty is not based upon the account balance, so the account balance on the due of the FBAR is not a relevant factor when computing the non-willful FBAR penalty.