Estate & Gift Tax
FBAR Workshop
2013

2013 E&G FBAR Workshop

Report of Foreign Bank and Financial Accounts (FBAR) and Related Penalties

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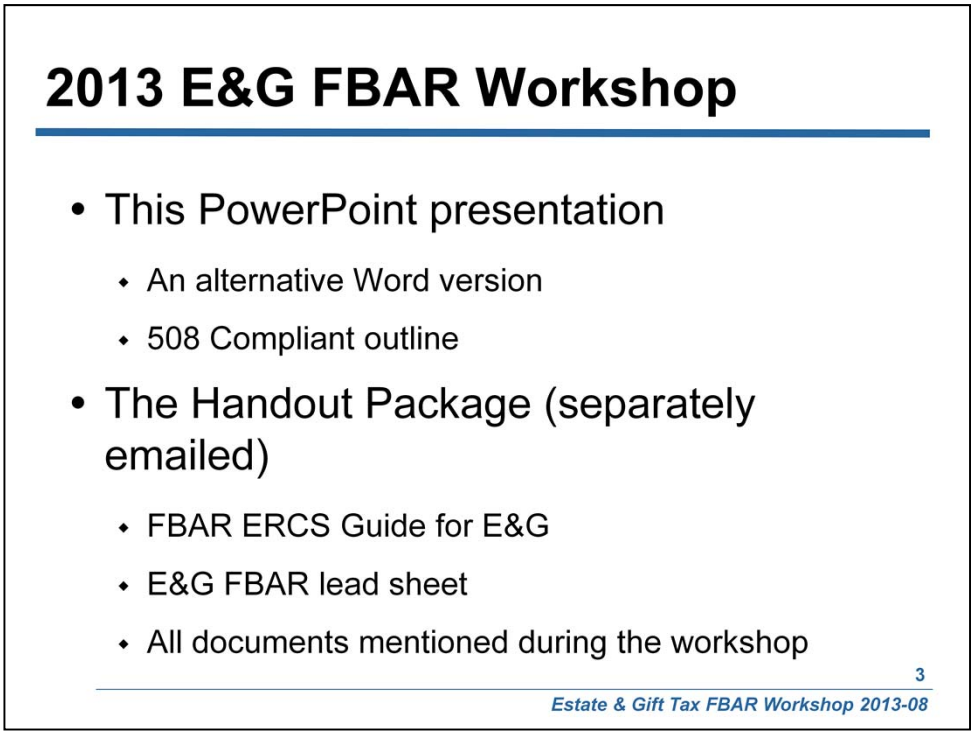
Today we'll be talking about FBAR—the report of Foreign Bank and Financial Accounts, the penalties related to FBARs, and mitigation of those penalties.



In either the PowerPoint or the Word version of this workshop you can print the notes, which I'll be reading from during this presentation.

The documents listed below are in the handout package available on the E&G sharepoint, in the FBAR folder and its subfolders. *As always, check for new versions of forms, letters, and other guidance.

2013 E&G FBAR Workshop folder

- The Estate & Gift Tax FBAR Workshop 2013-08 PowerPoint
- Word version with notes
- The outline of the Workshop
- Other forms, docs, etc. (alpha)(★always check for updates)
    - Consent to extend FBAR statute (requires Counsel involvement)
    - Examiner Guidance—FBAR E-File and Delinquent or Corrected FBARs
    - F4665, Report Transmittal
    - F10509, WebCBRS (CBRS) Information Request

- F13449, Agreement to Assessment and Collection of Penalties
- F13535, FBAR Related Statute Memorandum (RSM)
- F13536, FBAR Monitoring Document (FMD)
- FBAR-ERCS Guide
- FBAR Form TD F 90-22.1
- FBAR Lead Sheet EG
- FBAR regulations 2-2011
- FBAR Sample Opening Letter (use only after RSD)
- FBAR Short Statute Procedures
- L3709, FBAR 30-Day Letter
- L3800, Warning Letter
- L4265, FBAR Appointment Letter
- Notice 1330

Articles and Cases

IRS.gov documents

Links to various resources

Notices and Delegation Orders

FBAR Penalty Case Outline

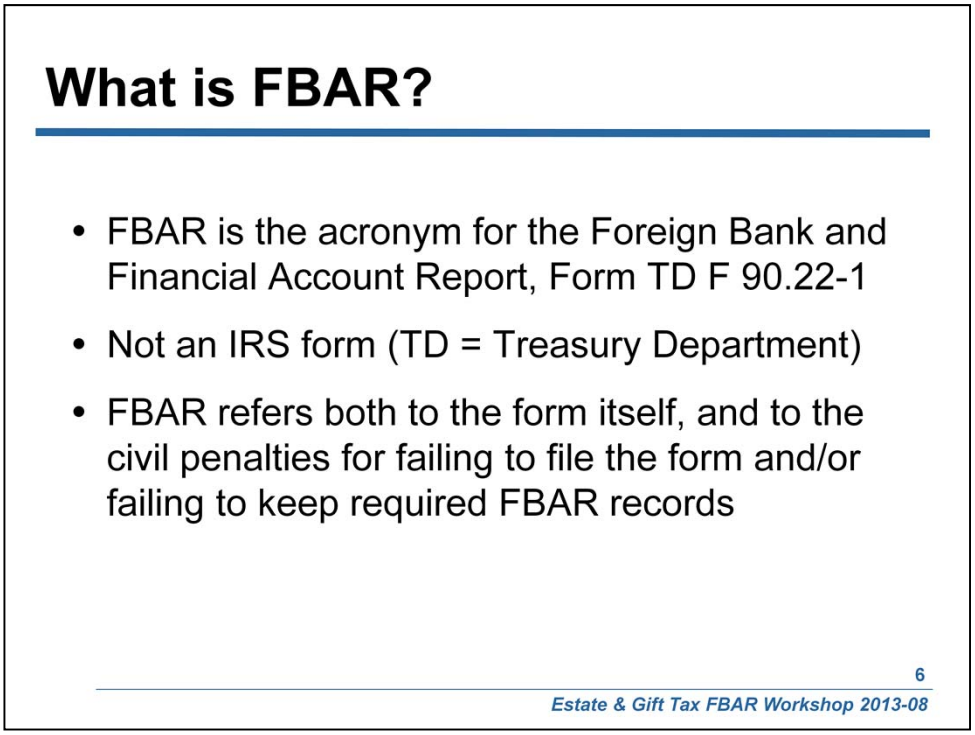
Introductory information

1. Discover a potential FBAR violation
2. Secure a Related Statute Determination (RSD)
3. Establish FBAR administrative controls and set up your FBAR case
4. Investigate the case
5. Determine the appropriate penalty
6. Close the case
7. Appendices

Introductory Information

Before we start, we'll consider:

- What an FBAR is
- The statutory authority for our handling FBARs
- Various resources for FBAR cases
- Some other FBAR basics
- Our FBAR responsibilities



FBAR is a form, the Report of Foreign Bank and Financial Accounts. To find the FBAR form on our Electronic Publishing website, search by catalog number 12996D.

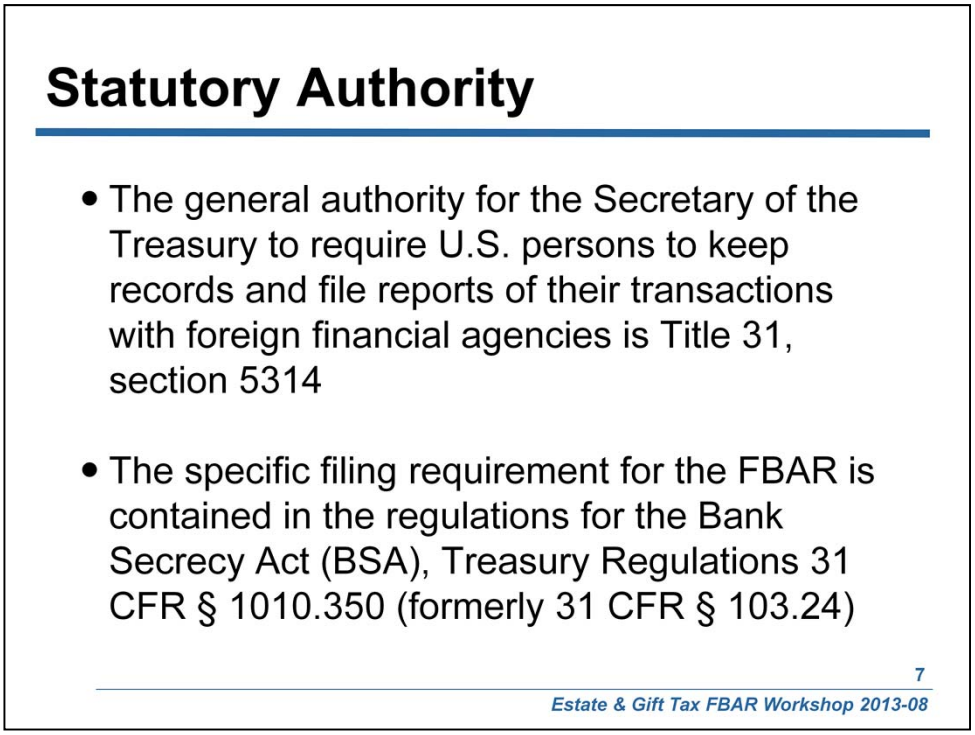
Additional information:

FBARs are due on June 30 following the year in which the reporting requirements were met.

Beginning July 1, 2013, FBARs must be filed electronically through the BSA E-File system at

http://bsaefiling.fincen.treas.gov/main.html

(were formerly filed with ECC in Detroit)



• The Bank Secrecy Act (BSA) requires the filing of a number of reports, including FBARs.

- You can see here that the Bank Secrecy Act is Title 31 of the US Code, and not the Title we're used to working under (Title 26). This is an important distinction. We'll get to that soon.

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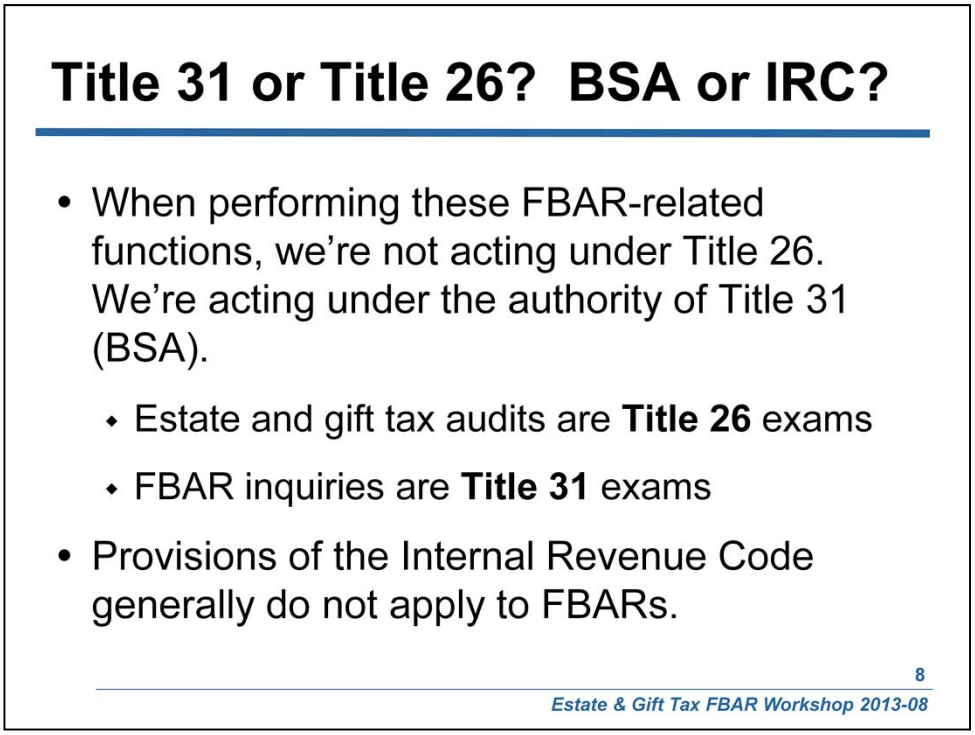
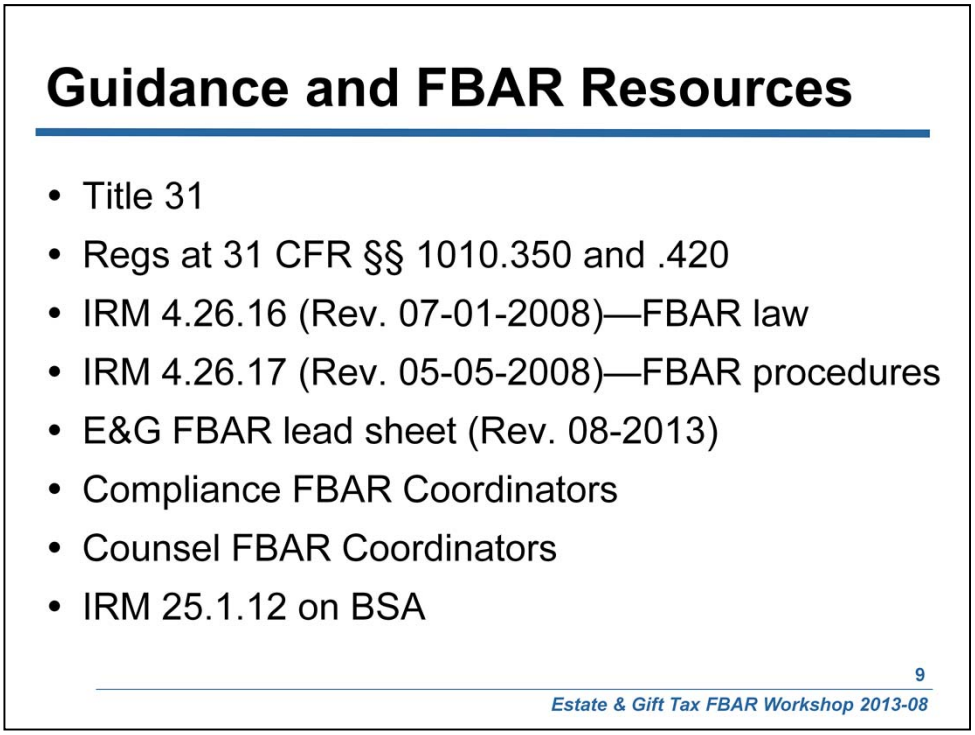
31 U.S.C. § 5314 authorized the Secretary to require residents or citizens of the U.S., or a person in, and doing business in, the U.S., to keep records and/or file reports concerning transactions with a foreign financial agency. This provision reflected congressional concern that foreign financial institutions located in jurisdictions with strict bank secrecy laws were being used to violate or evade domestic criminal, tax, and regulatory requirements.



Information gathered in a Title 26 audit **cannot** be used in a Title 31 inquiry unless there is a Related Statute Determination (RSD) signed by your TM.

We'll get to what you need to do to be able to obtain a Related Statute Determination in Topics 1 and 2 of this presentation.



31 CFR § 1010.350 (formerly § 103.24), establishes the requirement to file the FBAR.

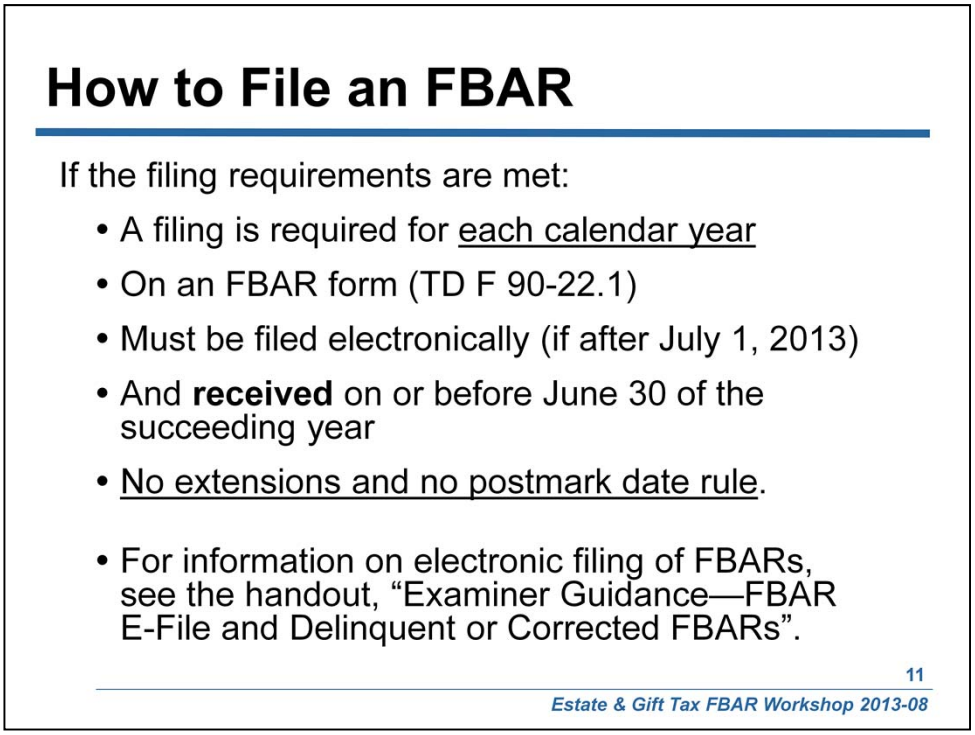
31 CFR § 1010.420 (formerly § 103.32), is for FBAR recordkeeping.

IRM 4.26.16, FBAR Law and Authorities, provides guidance on determining whether a violation was a willful violation and guidance on asserting the FBAR penalty.

IRM 4.26.17, FBAR Procedures, is the source for complete FBAR examination procedures.

FBAR Basics

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



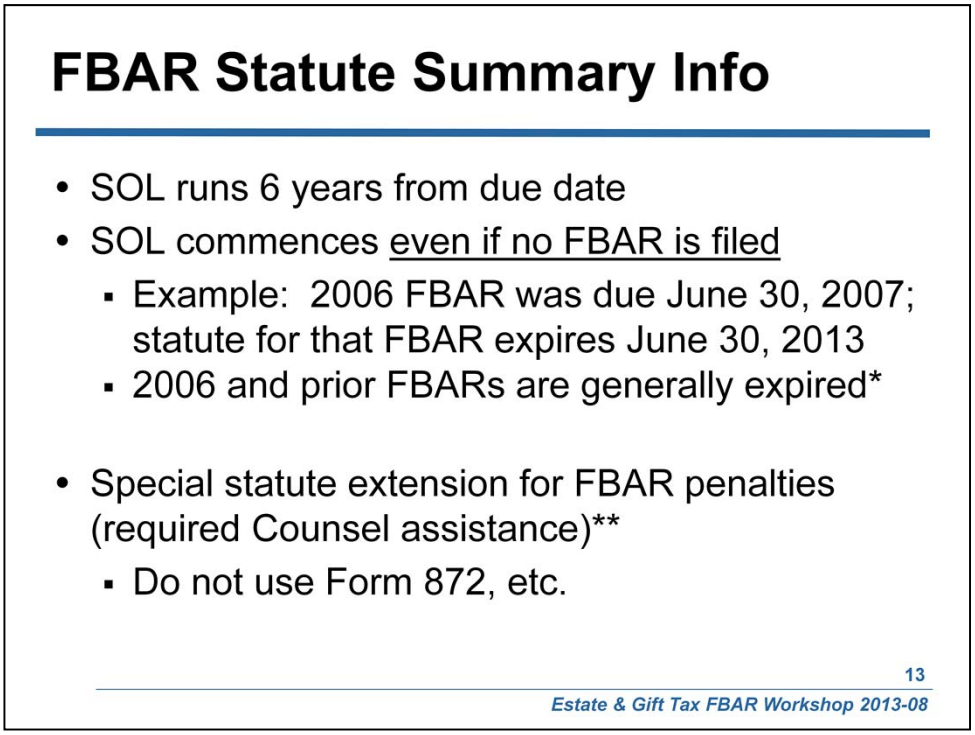
Return has to be actually received by June 30th (so June 30th will be the violation date). There is no mailbox rule for this filing.

There is also no statutory or regulatory provision for extending the time for filing FBARs.

IRC § 7508 (combat zone extensions, etc.) does not grant US Armed Forces members any extension to file the FBAR.

FBAR Statutory Penalties

- The penalty is based on the taxpayer's conduct (willful, non-willful), and the balances in the subject account(s) at certain dates
- For non-willful violations, the monetary penalty may not exceed $10,000 per violation
- Where the violation is willful, the penalty is the greater of $100,000 or 50% of the balance in the account on the date of violation
- The date of violation is the due date of the FBAR
- No penalty if there is reasonable cause for violation and the person files correct or corrected FBARs



• Why do we need to talk about FBAR case statutes so early in this training? Because unlike the tax returns we are used to in E&G, the statute for an FBAR commences even if no FBAR is filed. So, for non-filers, statutes should be considered early in the process.

• An FBAR required to be filed for a 2006 foreign account would have been due on 6/30/2007. Plus 6 years is 6/30/2013.

* 2006 and prior FBARs are generally expired. The exception may be where the case(s) involve a 906 closing agreement(s).

** The FBAR statute extension form requires Counsel assistance and approval, and as such is not available on the Electronic Publishing website. See Counsel to obtain the form Consent to Extend FBAR Statute, for extension/waiver of the FBAR civil penalty statute. Consult Counsel FBAR Coordinators.

• FBAR civil penalty assessment date is the date the **Operations Officer, Cincinnati Compliance Services, CTR Operations** [or

delegate] stamps the assessment certification, Form 13448. You must close FBAR civil penalty cases with sufficient time on the statute to allow processing of the assessment certification, Form 13448.

- As always, you'll document the FBAR penalty statute in your FBAR case's Form 9984 and other related workpapers.

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Related items:

- The statute of limitations on bringing suit to collect the assessment of civil penalties is two years from the date of the assessment or the date of any judgment becomes final in any criminal action under 31 USC § 5322.
- The FBAR **criminal** penalty statute is 5 years from the date the offense was committed.
- The statute of limitation s on FBAR criminal penalties is five years from the date the offense is committed.

See additional statute-related slides in Appendix A.

Statutes for FBAR Penalty Cases

- See 31 USC § 5321(b)(1) and IRM 4.26.17.5.5

- The FBAR civil penalty statute is 6 years from the "transaction date"
  - What is that?

"Transaction Date" for FBAR

- For filing violations: "transaction date" is the FBAR due date (6/30 of the following year)
- For recordkeeping violations the "transaction date" is the date you first request the records required under 31 CRF §§ 1040.420 (formerly 31 CFR 103.32).
  - Required retention is 5 years.

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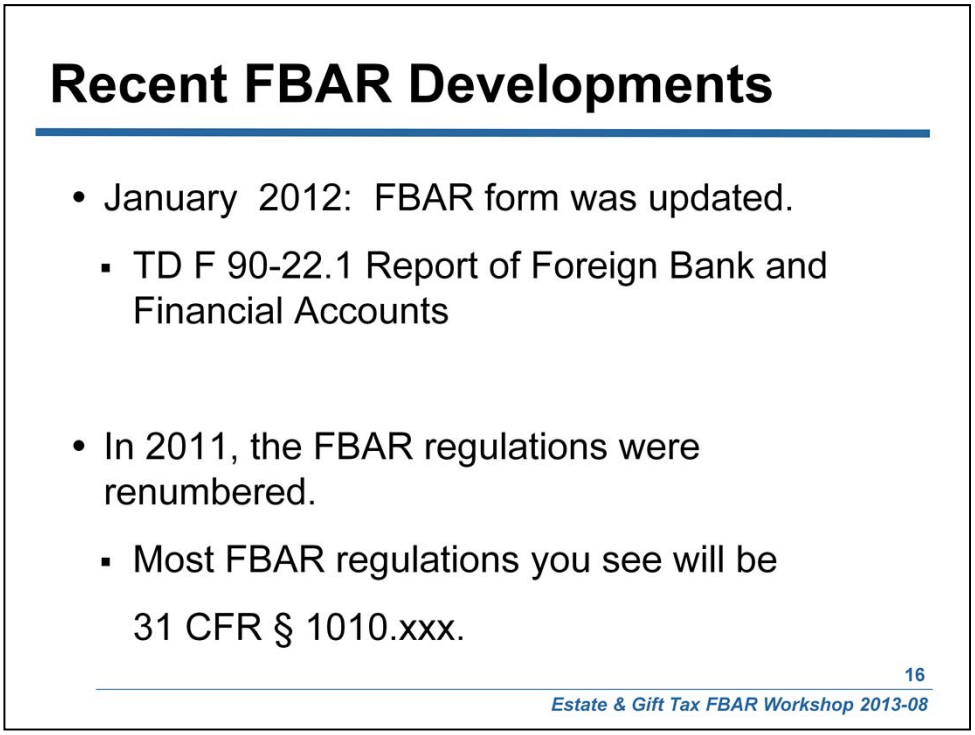
Re bullet 1: Note that the statute for filing violations starts based on the FBAR due date, which means that the commencement of the statute does not require a filing. You can be an FBAR non-filer and your statute, for the purpose of a filing violation, still begins to run.

As we've discussed, there is no statutory or regulatory provision for extending time for filing FBARs.

Re bullet 2: This is why it is crucial that you document your FBAR Form 9984 with these dates.

More on these violation dates later.



Some basic information on recent updates:

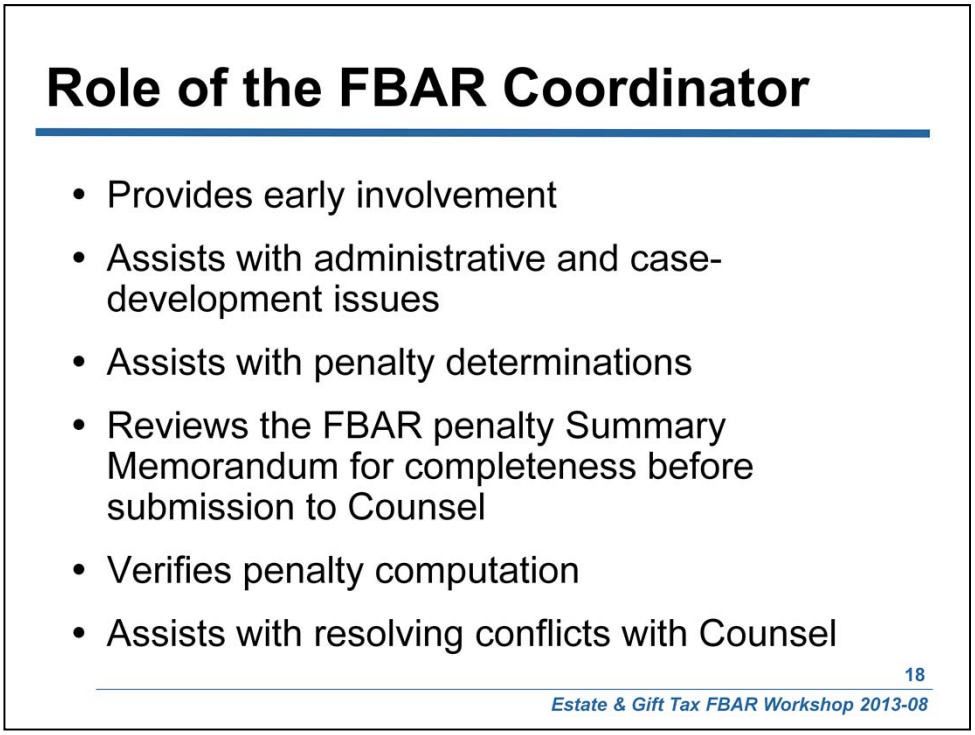
Be aware that the latest FBAR form is dated January 2012.

Also, the FBAR regulations were renumbered in 2011. Throughout this presentation I use the newer regulations citation, but I also have tried to include the former citation in the event any research you do makes reference to the older regulations numbers.

The last several pages of the E&G FBAR lead sheet also provide the former citations for the FBAR regs.

FBAR Penalty Local Resources

- FBAR Coordinators
- Fraud Technical Advisors
- Counsel FBAR Coordinators
  - List is on the E&G sharepoint, in the FBAR folder

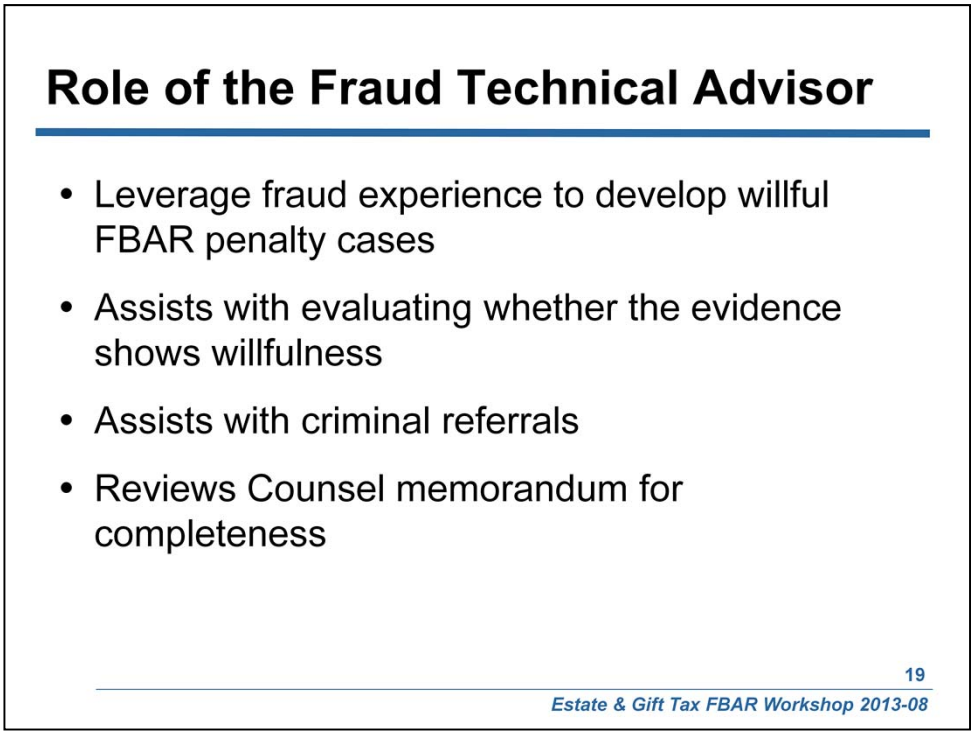


There are one or more FBAR coordinators in each Examination Area. The primary role of the FBAR coordinator is to assist you with FBAR cases, including both administrative and case-development issues.

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.



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 Title 26 tax violations but also for related FBAR violations.

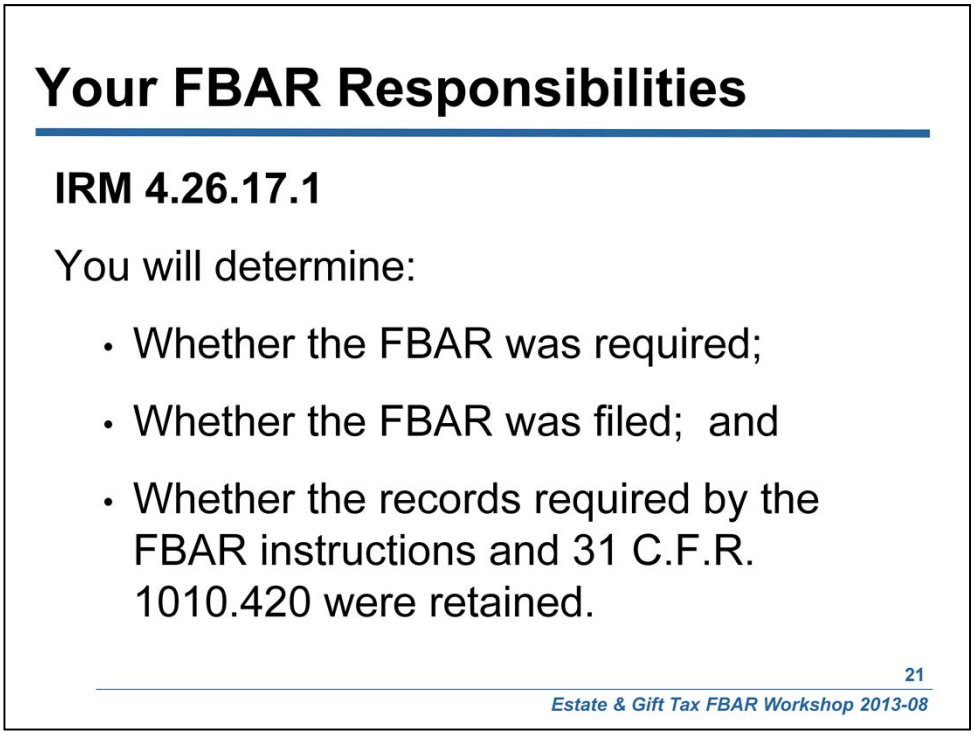
The fraud technical advisor reviews the FBAR memorandum to Counsel for completeness.

SB/SE FBAR Resources

(b) (6)

- Kris Karliner, Attorney-Advisor, Estate & Gift Tax Policy, Los Angeles, CA (213) 576-3743

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



The determinations listed on this slide are essentially those that are outlined in IRM 4.26.17.1. However, if an FBAR was required to be filed, and there was a failure to do so, or if there was a failure to maintain the required records, consideration of penalties becomes part of your responsibilities.

So, how do we do this? Where do we start?

Note also that at IRM 4.10.5, Required Filing Checks, is FBAR, at 4.10.5.8. While you should be aware of FBAR filing requirements, FBAR is not a Title 26 requirement. See the IRM section included below.

4.10.5.8 (06-01-2010)

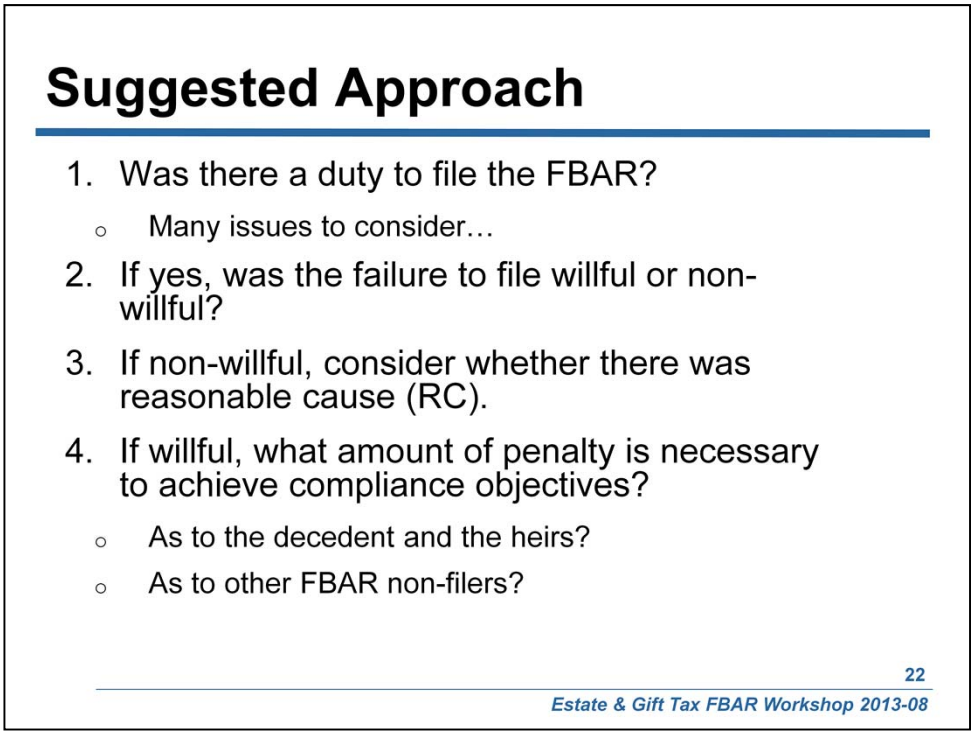
Report of Foreign Bank

and Financial Accounts
(FBAR)

(1) Examiners should be aware that each United States person who has a financial interest in or signature or other authority over any financial accounts, including bank, securities, or other types of financial accounts, in a foreign country, if the aggregate value of these financial accounts exceeds $10,000 at any time during the calendar year, must report that relationship each calendar year by filing Form TD F 90-22.1, *Report of Foreign Bank and Financial Accounts (FBAR).*

Caution: FBAR is not a Title 26, Internal Revenue Code, requirement. However,
examiners should verify the responses to the questions about foreign financial accounts and foreign trusts that appear on Form 1040, Schedule B, Part III. Examiners must use the Currency and Banking Retrieval System (CBRS) to verify the filing of an FBAR. If a required FBAR has not been filed, examiners must obtain a “related statute memorandum” before an FBAR case can be started or before the taxpayer can be asked about FBAR filings.

(2) Very specific procedures are required when a FBAR examination is warranted.
The examiner should consult IRM 4.26.16, *Report of Foreign Bank and Financial Accounts (FBAR)*, and IRM 4.26.17, *Report of Foreign Bank and Financial Accounts (FBAR) Procedures*, for guidance in working FBAR cases. Also, the examiner may need to request assistance from Fraud BSA.



The suggested approach you see on this slide will be covered within the framework of this presentation. For example, when we ask, Was there a duty to file the FBAR?, there are many issues to consider.

Overall, the goal of an FBAR penalty investigation is to gather evidence to arrive at a decision regarding the appropriate FBAR penalties, as opposed to starting at a potential penalty and simply working toward that penalty.

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

Ultimately, as with all cases, the evidence will guide your case. If the evidence tends to show willful conduct by the person, then continue to gather evidence to prove willful FBAR violations; however, if the evidence tends to show non-willfulness, then at some point during the investigation you will shift the focus to evaluating whether the person has reasonable cause for the FBAR violations. The point at which you've gathered enough information to make a decision about the direction of the investigation heavily depends upon the facts of the case.

FBAR Penalty Case Outline

Introductory information

1. **Discover a potential FBAR violation**
2. Secure a Related Statute Determination (RSD)
3. Establish FBAR administrative controls and set up your FBAR case
4. Investigate the case
5. Determine the appropriate penalty
6. Close the case
7. Appendices

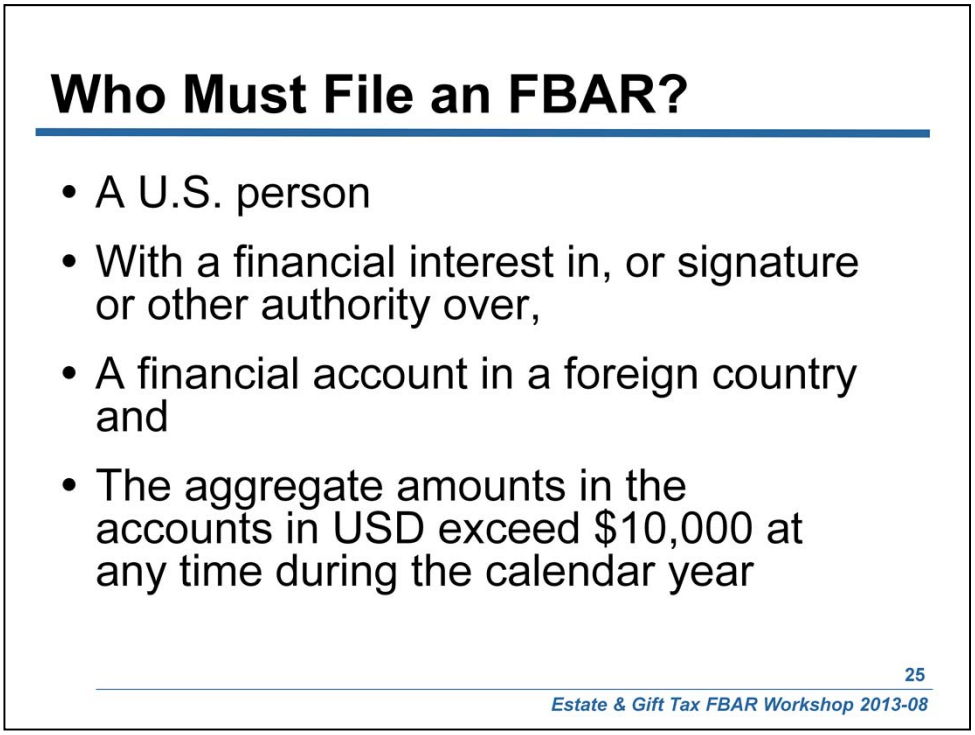
1. Is There a Potential FBAR Violation?

In determining whether there is a potential FBAR violation—

- We'll learn who is required to file an FBAR, and
- What records are required to be kept

If an FBAR was required, how do we check to see—

- If one was filed?
- If proper records were kept?



This slide outlines the FBAR filing criteria. Who has a duty to file an FBAR?

To assert any FBAR penalties, you must prove that there was an FBAR violation. You must prove each of the statutory requirements for each bullet listed on the slide.

Let's note here that an estate is a U.S. person, as is a trust. When an individual dies, the obligation to file FBARs continues with the person or person(s) who take the property from the decedent **if the filing requirements continue to be met**.

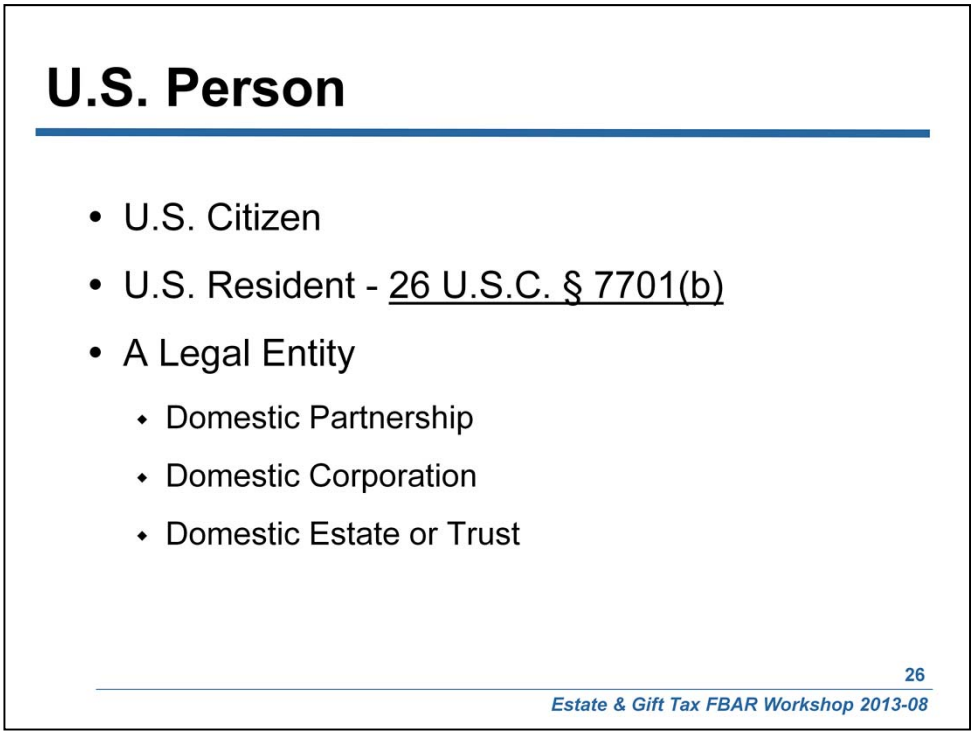
IRM sections:

- Taxpayer is a "US person"—see IRM 4.26.16.3.1
- US person had a financial account—see IRM 4.26.16.3.2
- Financial account was in a foreign country—see IRM 4.26.16.3.3

- US person had financial/signatory/other authority over the foreign financial account—see IRM 4.26.16.3.4, and 4.26.16.3.5
- Aggregate foreign account balances, in dollars, exceeded $10,000 at any time in the calendar year—see IRM 4.26.16.3.6

Related Code and Reg sections:

- 31 USC § 5314
- 31 CRF §§ 1010.350, 1010.306; and 1010.420 (formerly 31 CFR §§ 103.24; 103.27; and 103.32).



To contrast: Non-resident aliens are not required to file FBARs. The current instructions for the FBAR form do not include non-resident aliens in its definition of United States persons.

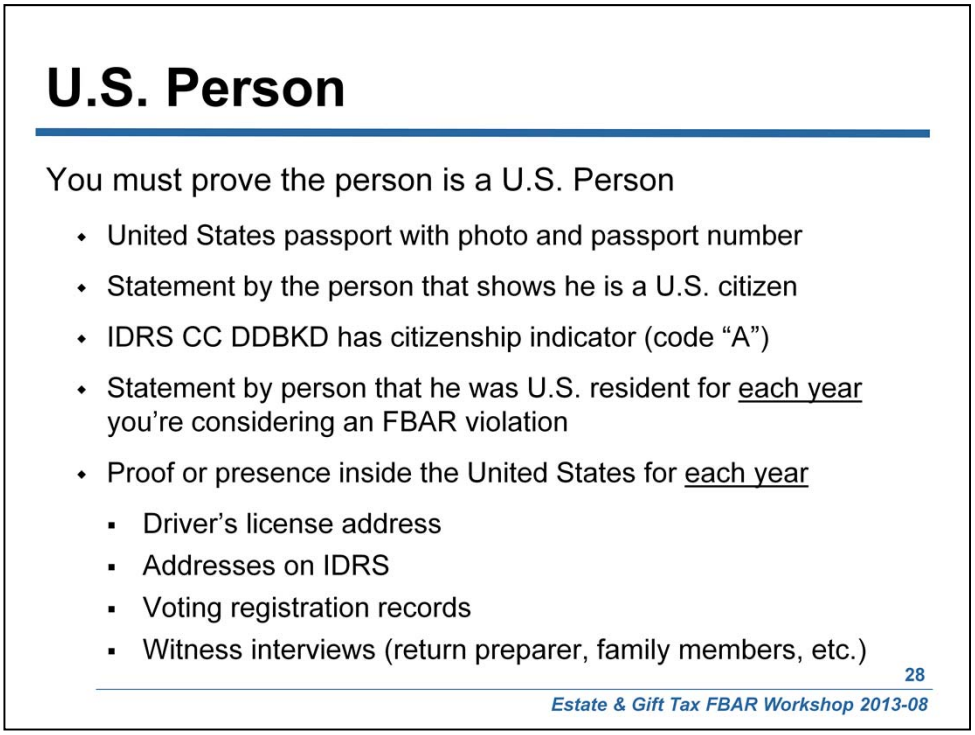
Section 5314(b)(1) of Title 31 gives the Secretary of the Treasury the discretion to exempt groups of persons identified in section 5314(a) from the FBAR filing requirements.

U.S. Person (cont.)

The term “person” means a citizen or resident of the United States and U.S. Entities.

- See 31 CFR § 1010.100(mm) for a complete definition of “person”
- The U.S. includes its states, territories, and possessions
- See 31 CFR § 1010.100(hhh) for a complete definition of “United States”

Remember, we look to Title 31 because we’re dealing with FBAR, which is a Title 31 requirement.



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

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

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

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

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

U.S. Resident

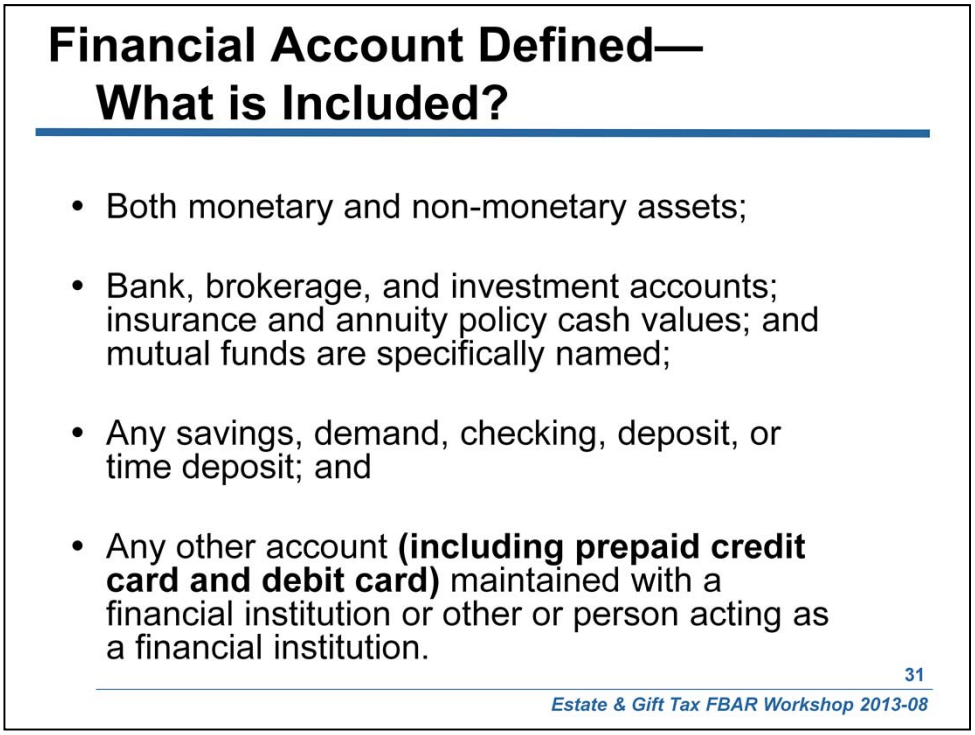
- A permanent resident, or
- Any person treated for tax purposes as a resident alien under IRC § 7701(b) of the Internal Revenue Code.

There are Green Card and Substantial Presence tests.

A resident alien is required to file FBARs.

U.S. Resident (cont.)

- Those who elect to be treated as residents under IRC § 7701(b) file FBARs only on accounts held during the election period.
- Tax treaties, and IRC § 6013(g) or (h) elections, are disregarded for FBAR purposes.



• Bank accounts—including savings, demand, checking deposit, or time deposit accounts

• Securities or securities derivatives accounts

• Other financial accounts

- Any other account maintained with a person engaged in the business of a financial institution,

OR

- An equity interest in any account in which the assets are held in a commingled fund and the account owner holds an equity interest in the fund.

Question: Is a credit card issued by a foreign bank considered a financial account?

Since the definition of "foreign accounts" contained in the FBAR instructions does not make a reference to credit cards, this is a fair question. Although the definition includes "any other account maintained with a financial institution," the examples given in the definition are generally accounts in which funds are deposited, not loans from

financial institutions. For this reason, FBARs generally are not required for credit card accounts, but there are exceptions. There may be a filing requirement if the credit card is secured by a separate deposit account (in order to report the deposit account), or if the card agreement requires that advance payments be made to cover anticipated charges. Or if overpayments are made on the credit card, such that the credit card is then used in a manner similar to a debit card. These situations may turn the credit card into a debit card (effectively drawing on a deposit account).

Financial Account Defined— What is Included? (cont.)

- A reporting obligation exists even where the assets held in the foreign account produces no taxable income.

For example: A taxpayer's account in a foreign financial institution that holds physical gold. Certain escrow accounts might also fall into this category.

Financial Account Does Not Include:

- Individual bonds, notes, or stock certificates held by the filer (not in a financial institution)
- An unsecured loan to a foreign trade or business that is not a financial institution; and
- Generally does not include real property and personal property held by the filer

Financial Account - Rulings

- An insurance policy/annuity issued by a foreign insurance company up to the cash surrender value of the insurance policy is a foreign financial account.
- An unsecured loan to a foreign trade or business that is not a financial institution is not a foreign financial account,
  - but a loan to a foreign financial institution is.
- A safety deposit box rental may create an account relationship.
  - If the lessee retains sole control over the contents of the safe deposit box, then no account relationship exists between the lessee and the lessor, or any other person.
  - If the lessee, however, grants to another person agency authority to access the safe deposit box and dispose of the contents, then an account relationship exists between the lessee and the lessee's agent.

Financial Interest - Direct

- A U. S. person has a direct 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 or her 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 direct financial interest in that account.

This second bullet is something we may see in E&G if, for example, two children co-own with, or inherit from, their deceased parent.

Financial Interest – Direct

- The individual reporting requirement means that even persons who file joint tax returns must file separate Foreign Bank and Financial Accounts Reports.

- Under certain conditions, spouses can file joint FBARs (see FBAR Instructions)

Financial Interest – Indirect

A United States person has an indirect 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 person acting as an agent, nominee, attorney, or in some other capacity on behalf of the U.S. person,
- a corporation in which the United States person owns directly or indirectly more than 50 percent of the total value of shares of stock,
- a partnership in which the United States person owns an interest in more than 50 percent of the profits (distributive share of income), or
- a trust 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.

Financial Interest—Example 1

Mary, a U.S. citizen residing in Canada, directs John, who has a power of attorney to open and maintain Mary's financial accounts totaling $60,000, to open a Canadian bank account in accordance with her instructions.

Q: Must Mary file an FBAR?

A: ***Yes***. *Mary has a financial interest in the accounts. Although John is the owner of record, he is maintaining the accounts for Mary in accordance with her instructions.*

Recall the rules for who must file:

1. Mary is a US person
2. With a financial interest or signature or other authority over
3. A financial account in a foreign country, and
4. The aggregate amounts in the accounts exceed US$10,000 at any time during the calendar year.

Financial Interest—Example 2

Mary is a U.S. citizen residing in Canada. Mary grants John, who is a Canadian citizen, a power of attorney to access her Canadian bank accounts. John is the owner of record.

Q: Must John file an FBAR?

A: ***No.*** *He is not a U.S. person.*

Financial Interest—Example 3

A New York corporation owns 100% of a foreign corporation that has foreign financial accounts.

Q: Must the NY corporation file an FBAR?

A: ***Yes***. *The NY corporation is a U.S. person. The owner of record or holder of legal title of the financial accounts (the foreign company) is a corporation in which the U.S. person (the NY corp.) owns directly or indirectly more than 50% of the total value of shares of stock.*

So the follow-up question is: How does this relate to an estate? Or where there is a gift of an interest in the NY corporation gifted to a donee?

What if you get a Form 709 and the donor made sliver gifts of that NY corporation? Should the donor have filed FBARs? Do you check CBRS to see if the donor filed FBARs?

What if that same donor is now your decedent? Should the estate and/or the person who inherited the NY corporation, have filed FBARs?

Let's see the next slide.

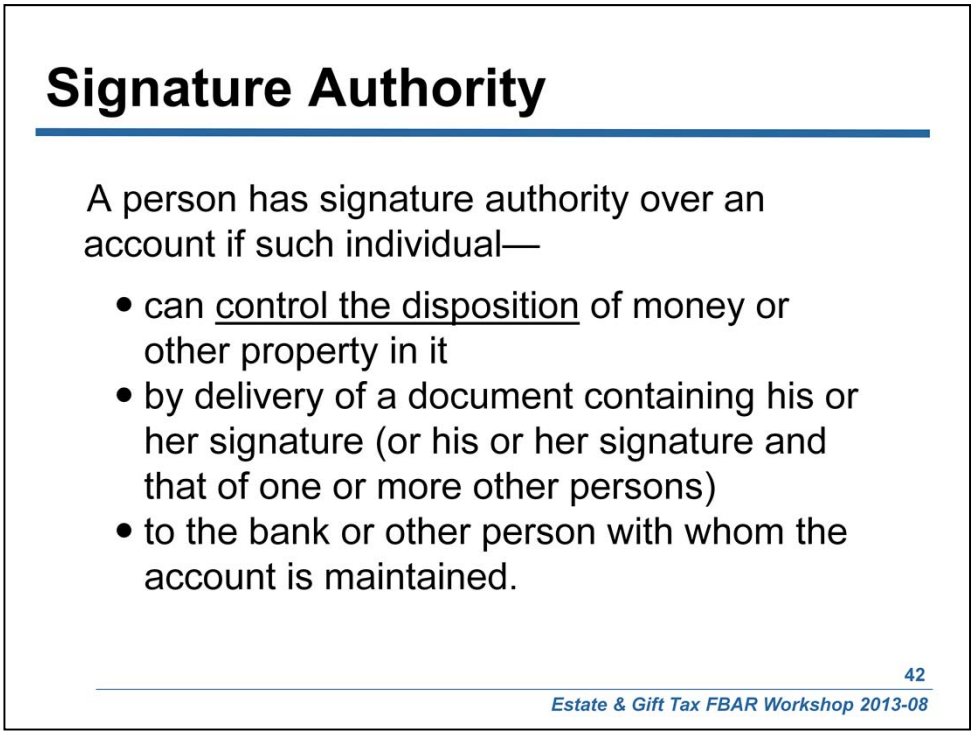
Financial Interest—Example 4

Q: Must a U.S. person who owns 75% of the NY corporation mentioned in the previous slide file an FBAR?

A: ***Yes.*** *The shareholder (U.S. person) owns indirectly (through the NY corporation)* ***more than 50% of the total value of shares of stock*** *of the foreign corporation which is the holder of legal title of the foreign financial accounts.*

How would you see this? If you were to get a Form 709 to examine, and you determine that your donor (US person) owned or still owns 75% of the NY corporation, that donor should have filed FBARs.

Similarly, if you were to get a Form 706, and your decedent, now the estate (or recipient of the shares), owned/owns the NY corporations, FBARs should have been filed by the appropriate parties.



Any U.S. person having signature authority or other account authority over a foreign account that has an aggregate value exceeding $10,000 at any time during the calendar year is required to file FBAR.

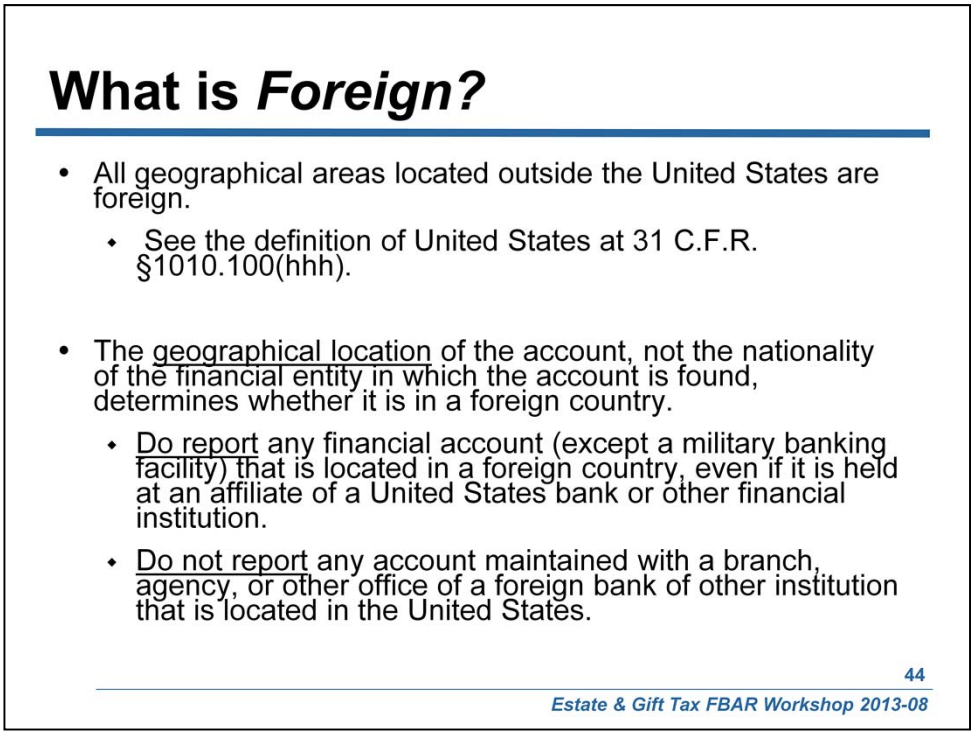
So, how do we define “signature authority or other account authority”?

- Signature authority exists when a person can control the disposition of money (or other property) in an account by delivery of a signed document.
- Other account authority exists when… (see the next slide).

Other Authority

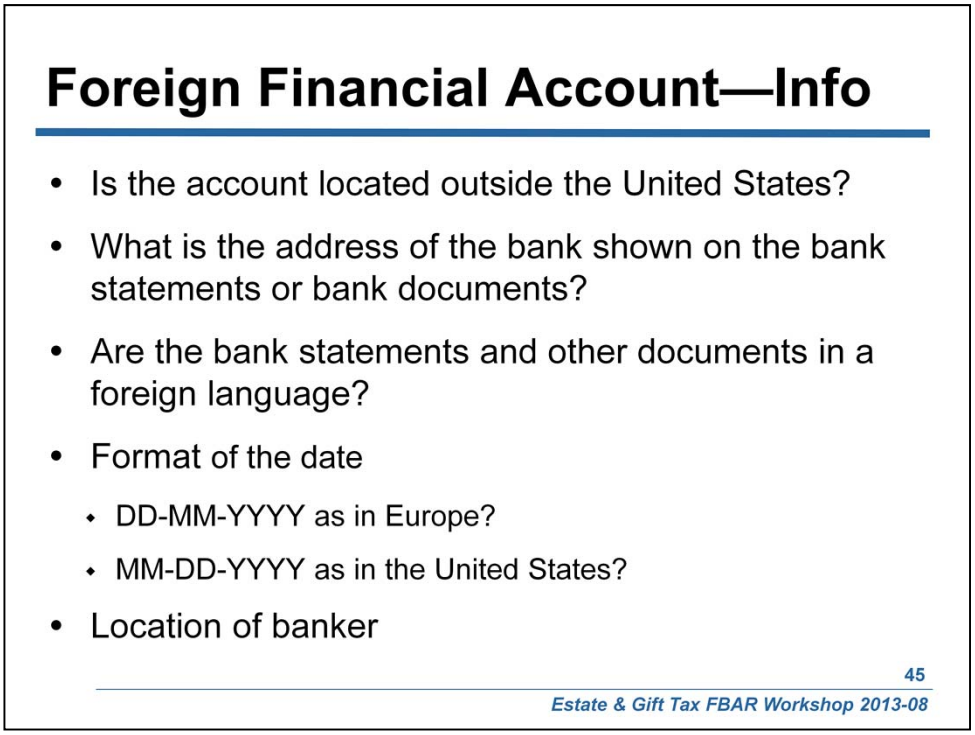
Other authority exists in a person who can—

- exercise comparable power over an account
- by communication with the bank or other person with whom the account is maintained,
  - either directly or
  - through an agent, nominee, attorney or in some other capacity on behalf of the U.S. person,
- either orally or by some other means.



Re the first bullet includes:

- Northern Mariana Islands
- Puerto Rico
- Territories and Possessions of the United States (including Guam, American Samoa, and the United States Virgin Islands)



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

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

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

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

For treaty cases, if there are banker notes or other notes in the case file, can you determine the location of the parties who wrote the notes?

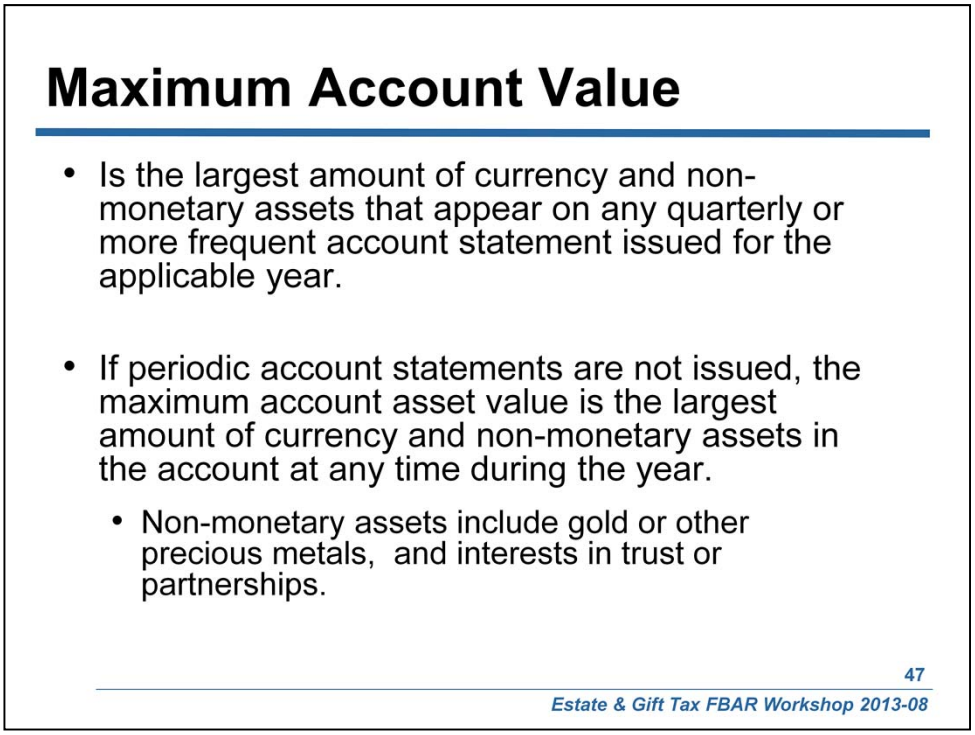
Are the notes in American English? If the notes were written in a foreign language, or the person who wrote the notes is located outside the United States, it is highly likely that the associated account is a foreign bank account.

(Banker notes may come in a file where the FBAR is received by you as a referral from another business unit.)

The Aggregate Value Test

- File an FBAR if the aggregate value of the foreign financial accounts exceeds $10,000 at any time during the calendar year.

- If the taxpayer is unable to determine whether the maximum value of these accounts exceeded $10,000 at any time during the year, the FBAR must be completed.

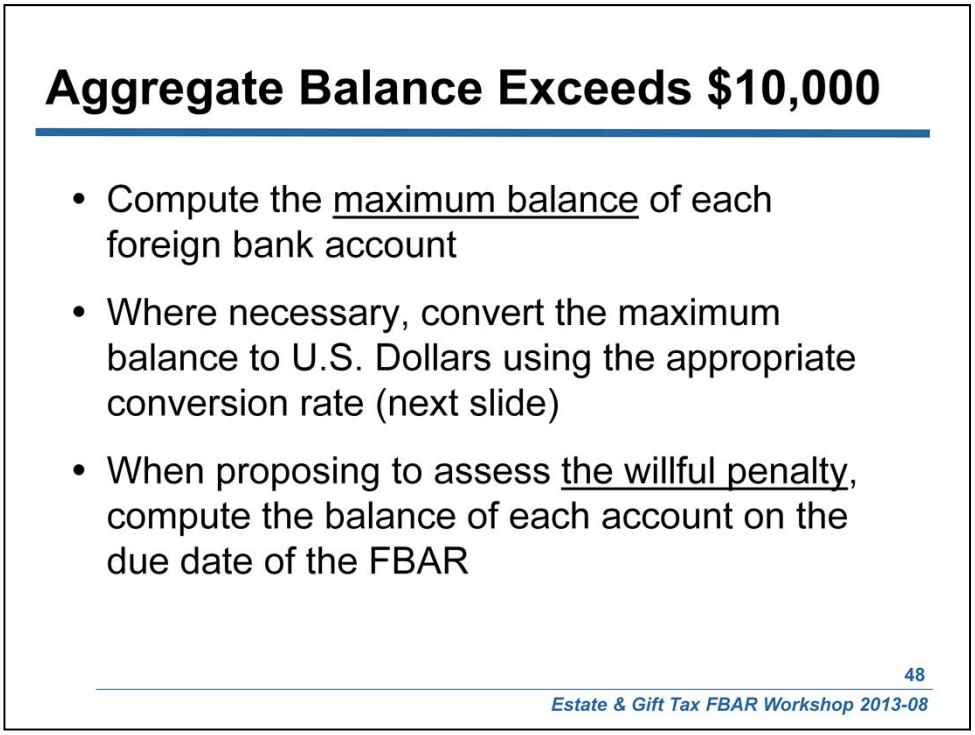


Maximum Amount:

Note the language, “at any time during the year.” If in August 2010, a US person puts more than $10,000 in a foreign financial account, and then in October 2010 withdraws some or all of it, he is required to file an FBAR.

Convert foreign currency by using the official exchange rate in effect at the end of the calendar year.

For individuals, complying with the statutory and regulatory requirement to report foreign financial accounts is a two-part process that begins with the income tax Forms 990, 1120, 1065, 1041 & 1040. e.g. Form 1040 - Schedule B, Part III instructs a taxpayer to indicate an interest in a financial account in a foreign country by checking “yes or no” in the appropriate box. Form 1040 then refers the taxpayer to FBAR, Form TD F 90-22.1.



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

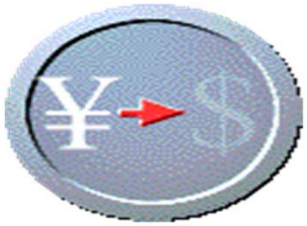
Based upon the bank statements you should be able compute the maximum balance of each foreign bank account in the currency of that account and, where necessary, the maximum balance of each account converted into U.S. Dollars.

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

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

Foreign Currency

- Convert foreign currency to U.S. dollars
- Use the official exchange rate at the end of the calendar year
- Treasury Department End-of-Year Exchange Rates (search irs.gov)



It does not matter what the exchange rates were during the year, only at year end.

Treasury Department End-of-Year Exchanges Rates can be found at irs.gov.

What are Reportable Accounts?

- Bank accounts (checking, savings, CDs)
- Securities or brokerage accounts (buying, selling, holding or trading stocks, bonds, etc.)
- Other financial accounts
  - Other deposit accounts
  - Cash value of insurance or annuities
  - Commodity futures or options accounts
- Mutual funds, or similar pooled funds

Reportable Account Exceptions:

- U.S. military banking facility
- Accounts of U.S. governmental entities
- International financial institutions
- Correspondent or “nostro” accounts
- Accounts in a U.S. tax-qualified retirement plans (if participant or beneficiary)
- Consolidated filings

Mutual Fund Definition

- Issues shares to the general public
- Shares have a regular net asset value determination, and
- Regular redemptions

Custodial Accounts

Include “Omnibus” foreign accounts held by **U.S. banks** or other financial institutions to hold investments of multiple persons.

- If a U.S. Person can access the account only through a U.S. entity and cannot directly access the foreign account, no FBAR reporting is required.

Exceptions for Officers or Employees with Signature Authority Only

- Banks examined by U.S. Federal bank regulators
- Financial institutions registered or examined by SEC or Commodity Futures Trading Commission
- Authorized Service Providers (SEC registered)
- Entities registered under 12(g) of SEC

This slide and the two following it are provided for information purposes, in case you have the situations presented.

Exceptions for Officers or Employees with Signature Authority Only (cont.)

- Of entities (foreign or domestic) whose equity securities are listed on any U.S. securities exchange.
- U.S. subsidiaries of U.S. listed entities/parents and subsidiaries are included in consolidated FBAR of parent.
- The exceptions permit an officer or employee to answer "no" to the FBAR question on Form 1040, Schedule B, Line 7a.

The Form 1040, Schedule B, line 7a FBAR question is: If you are required to file Form TD F 90-22.1, enter the name of the foreign country where the financial account is located.

Exceptions for Officers or Employees with Signature Authority Only (cont.)

- **Notice 2011-54** (6/16/2011) further extended the filing date until **November 1, 2011** for individuals with **only** signature authority whose filing requirements were properly deferred under Notice 2010-23 or Notice 2009-62. The extension only applies to reports for the 2009 or earlier calendar years.
- **This Notice did NOT extend the reporting deadline for calendar year 2010.**

Trust Beneficiary Exceptions

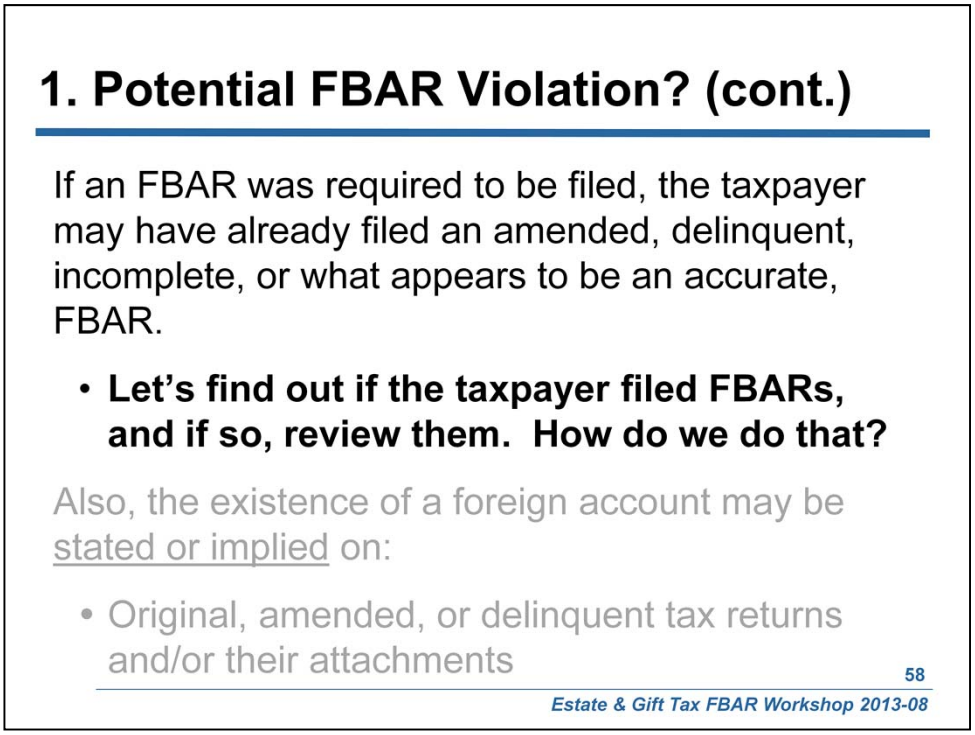
- A trust beneficiary does not need to file an FBAR if the trust, trustee, or agent is a U.S. person and that person files an FBAR disclosing the trust's foreign financial accounts.
- A reportable beneficial interest does not include a remainder interest.
- A discretionary beneficiary filing is not required based on the trust's discretionary status.

Regarding the first bullet, what if the trust, trustee, or agent does NOT file an FBAR disclosing the trust's foreign financial accounts. Is the trust beneficiary required to file the FBAR? Yes.

Where Are We Now?

- Up to this point, we have been reviewing the rules so we know who must file an FBAR.

- Now we have a general idea of who must file an FBAR, how do we determine whether we have a potential FBAR violation?

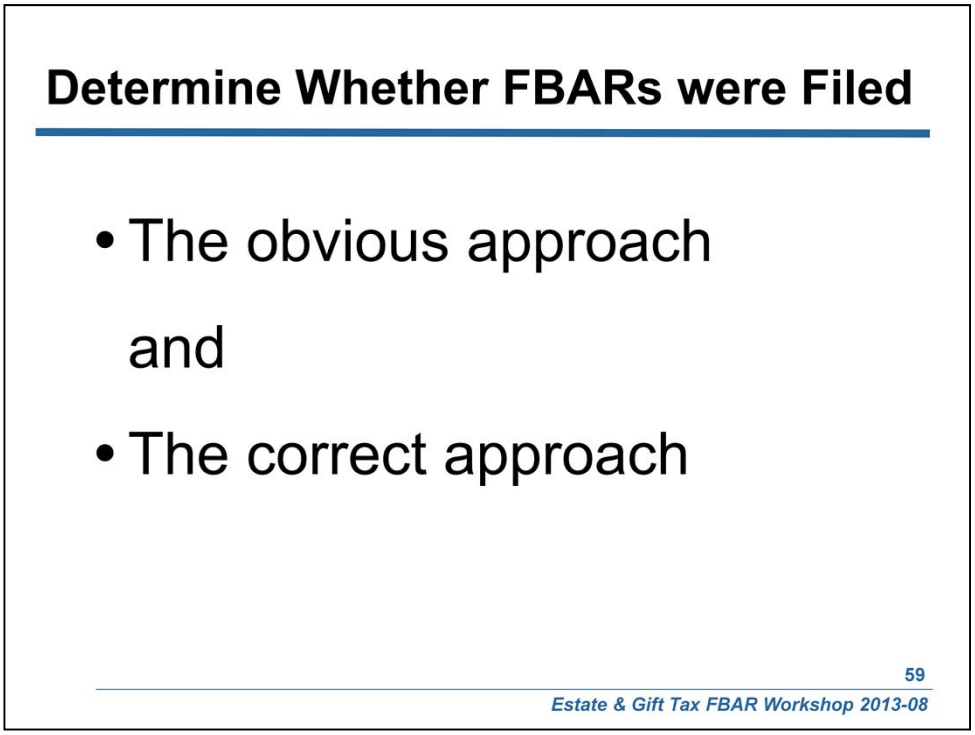


What is being said here?

1. Let's check to see if the taxpayer filed FBARs. We'll see in a moment that checking to see if the taxpayer filed FBARs can be dangerous. It has to be done correctly.

Coming up, we'll take a look at the rest of this slide (the muted text).

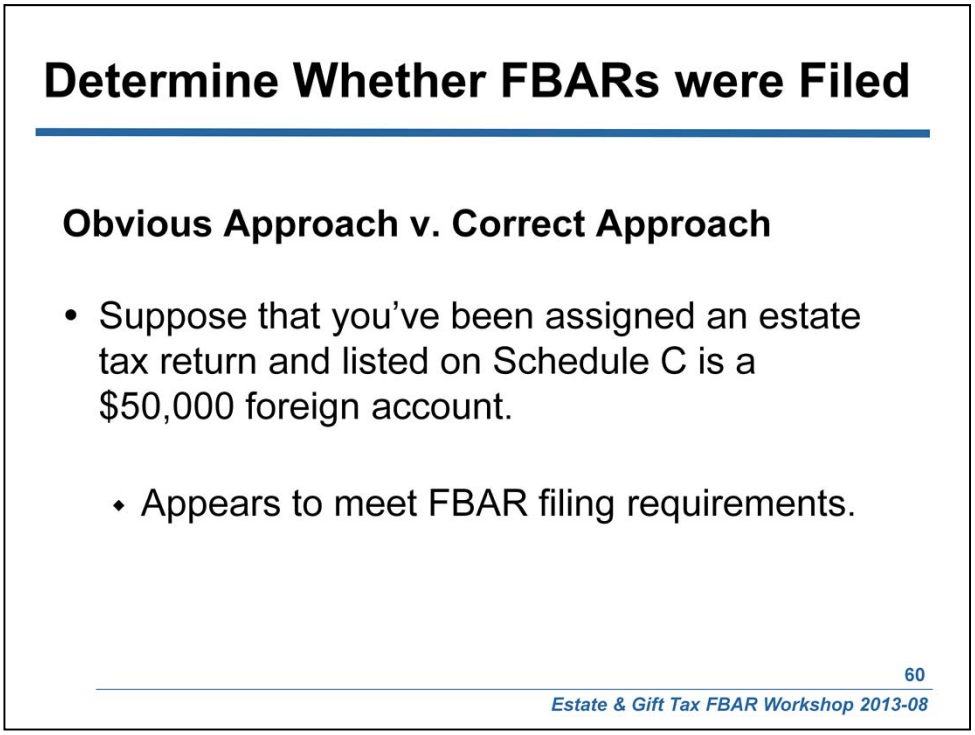
2. You might also see a potential FBAR violation during your examination, during your review of information related to your exam, during review of information you requested, etc. We'll take a look at some examples of this, too.



Again, earlier in Topic 1, we talked about the FBAR filing criteria. Now we want to find out if FBARs were filed, or not, so we can determine if there was a violation subject to penalties. We have the obvious approach and the correct approach.

First, let's go over the obvious approach, then we'll go through the correct approaches.

We'll start with a simple example.



Suppose that you've been assigned a Form 706 and on it is listed a foreign bank account valued at $50,000. Let's say it's obviously foreign. On its face, it appears to meet the FBAR filing requirements:

Let's say that:

- The decedent is a US person;
- The foreign bank account is obviously a foreign financial account;
- The decedent obviously had an interest in the foreign account, that's why it's listed.
- Likely your decedent had signature authority over the account;
- If valued at DOD at $50,000, then the balance obviously exceeded $10,000 during the year.

Just to narrow the example, let's also say that per the testamentary documents, the account passed to his probate estate.

By all appearances the decedent should have filed FBARs, and if

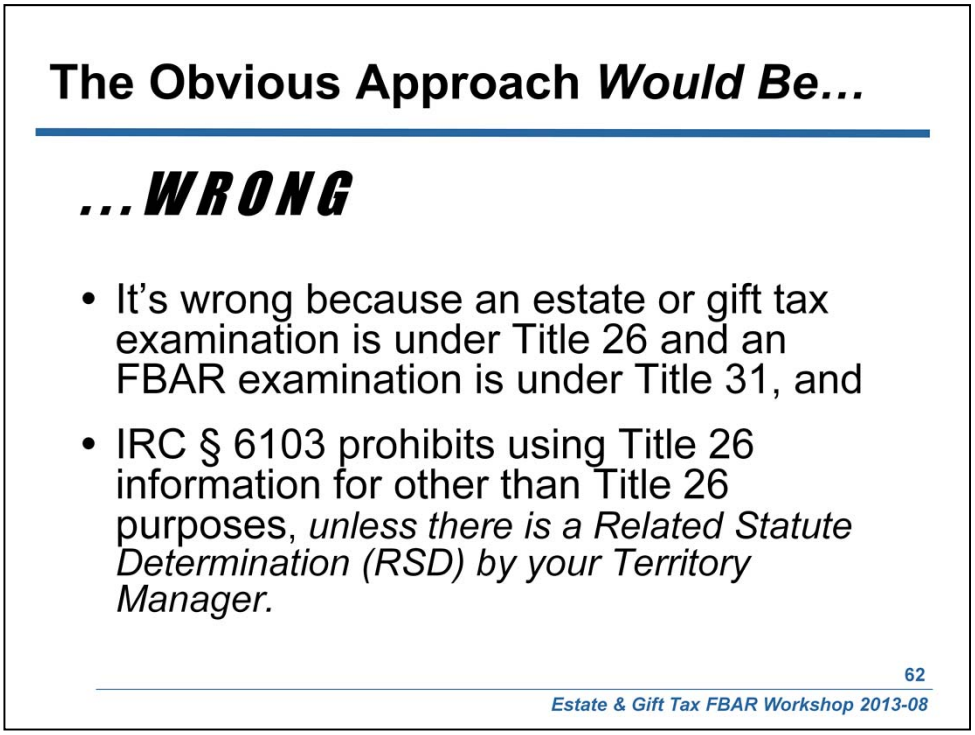
enough time has passed since DOD, his executor probably should have filed FBARs, too.

How do we find out?

The Obvious Approach *Would Be*…

- As part of your normal audit you might think to ask the taxpayer (executor) or rep if FBARs were filed during life and post-DOD, ask for copies of those filed FBARs, and then on inspect them on receipt.
- So, in your initial IDR, in addition to your normal request for copies of all related returns, you ask for those FBARs…

This is what you may want to do, but given these facts asking the taxpayer for FBARs is wrong. See the next slide.



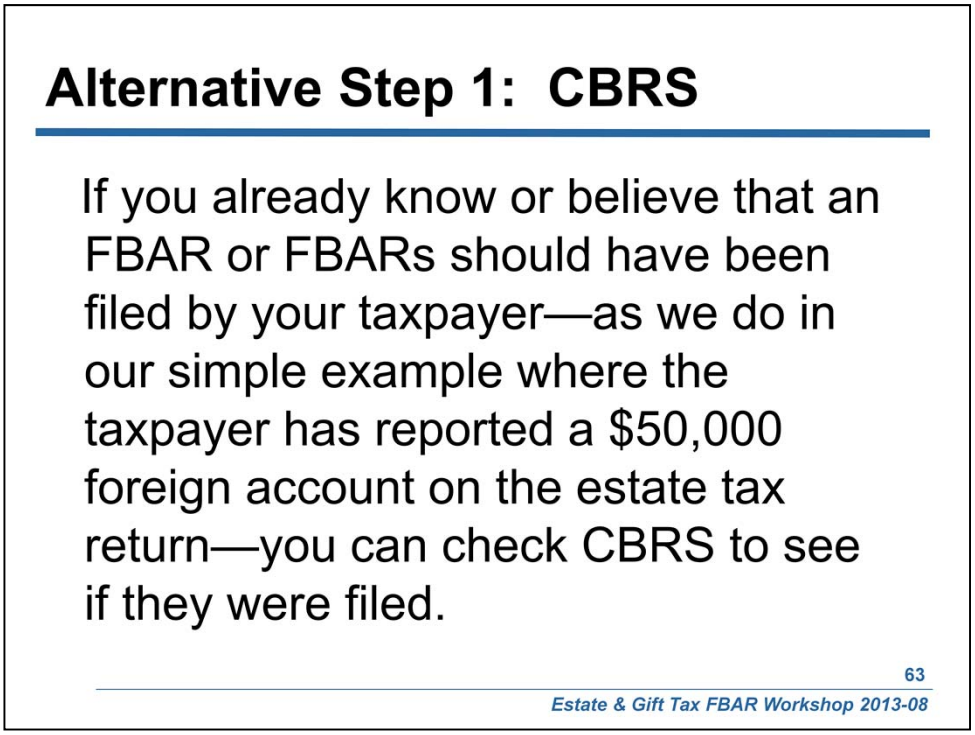
It is important to note here that directly asking the taxpayer for copies of FBAR filings prior to obtaining a Related Statute Determination will cause all of the information from your Title 26 audit to be unusable in your Title 31 inquiry (FBAR penalties).

That is, if we were correct in our example, that FBARs should have been filed by the decedent during life, and the executor should have filed for the post-death year(s), by asking for those FBARs without a Related Statute Determination you cause that information to be unusable in your FBAR case.

So how do you make your way into an FBAR examination and the possible imposition of penalties if you can't simply ask the taxpayer—during your tax audit—for copies of any filed FBARs?

What are your options for determining whether FBARs were filed?

What are the correct approaches?



Even prior to obtaining this document called a Related Statute Determination from your TM, you <u>can</u> check the Currency and Banking Retrieval System [**CBRS**] for FBAR filings. We'll talk about how to do CBRS research in a moment.

What About Routine CBRS Searches?

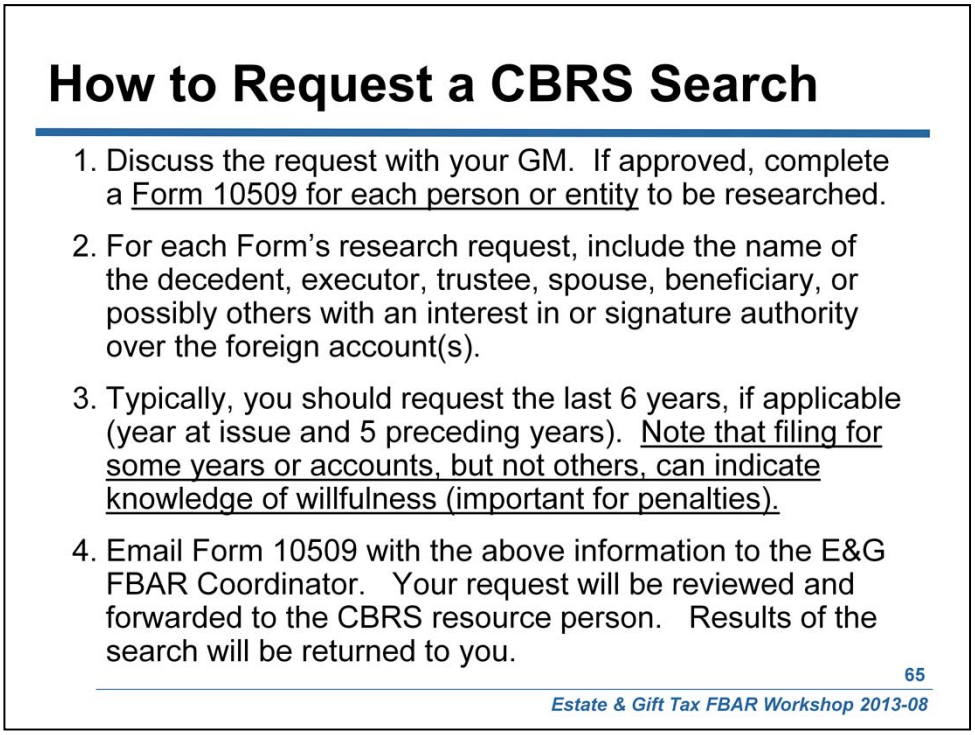
Q1: What if you're suspicious about foreign accounts being part of the estate? Or a foreign account being gifted?

Q2: Or what if you just want to check?

A: You can do routine CBRS research.

These CBRS (Currency and Banking Retrieval System) inquiries--to find out whether your taxpayer filed FBARs—do not constitute the initiation of a Title 31 examination.

So by checking CBRS you are not offending the Title 31/Title 26 separation.



1. In our simple example you'd advise your manager that there's a foreign account listed on Schedule C that may have required an FBAR. Note that the slide says to complete a separate Form 10509 for each person or entity to be researched (you may use one form to search for multiple years for the same person/entity). This is important so that each person or entity's information stays in its own separate file (to avoid disclosure issues).
    - In our simple example, you'd fill out a separate Form 10509 to do CBRS research on whether FBARs were filed by:
        - the decedent;
        - anyone who might have held an interest in that account with the decedent;
        - the executor;
        - possibly the beneficiary of the account (if the account has been distributed); and/or
        - any other person that may have taken or held an interest in that account post-DOD.

2. The second item lists the typical persons that might have had an

interest in or signature authority over the account, either before or after DOD.

3. Consider that the years after DOD may also be important.

4. Current E&G FBAR Coordinator is Kris Karliner.

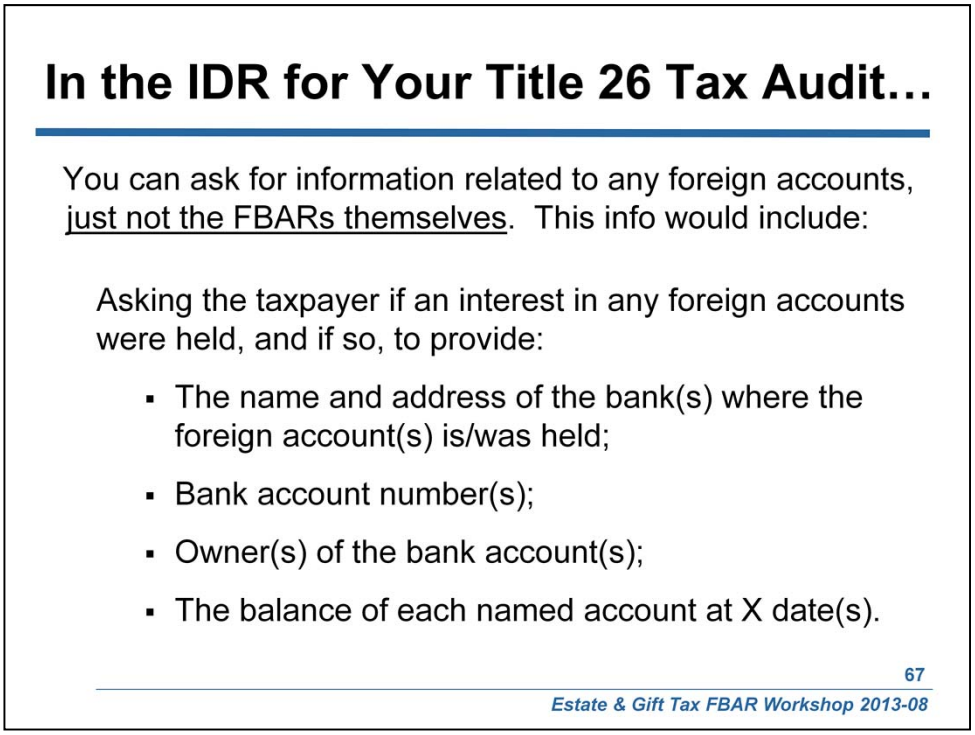
Alternative Step 2: Your Carefully Drafted IDR

Q: What if it's not as clear as our simple case, where a foreign account is listed on the estate tax return?

A: Use can use your carefully drafted Title 26 IDR to ask for information that, if the taxpayer did have foreign accounts, would have had to be retained under the FBAR rules—just not copies of the FBARs!

For example, what if the account is not explicitly listed on Schedule C, but in the documents attached to the return you see something that makes you wonder about foreign accounts. Not anything explicit, but that may indicate the ownership of foreign accounts. Say they owned rental property in a foreign country (which does not require an FBAR), but the rent receipts are likely going to a local bank (that may require an FBAR).

Remember: Asking for the FBAR itself requires that a Related Statute Determination (Form 13535, signed by your TM). However, there's no problem doing the CBRS research, and no problem with asking in your IDR for information related to foreign accounts.



This slide mirrors the directions that are provided for you in the E&G FBAR lead sheet at step 3.

Recall that directly asking the taxpayer if FBARs were filed, or asking for copies of filed FBARs, **prior** to obtaining a Related Statute Determination from your TM is **WRONG**, and will cause all information from the Title 26 audit to be unusable in a Title 31 inquiry (FBAR penalties). IRM 4.26.17.2(1)f.

However, in your Information Document Request ["IDR"] (as part of your Title 26 case) you **can** ask for information related to foreign accounts, such as:

Please state whether the taxpayer held any foreign accounts. If so, please provide the following:

- The name and address of the bank(s) where the foreign account(s) is/was held;
- Bank account number(s);
- Owner(s) of the bank account(s);
- The balance of each named account at X date(s).
- If any interests in any foreign accounts were held by the decedent and have been distributed to beneficiaries, provide the name(s) of each beneficiary.

All of this information is relevant to a Title 26 tax examination.
It is important that you remember that you are not soliciting the FBAR form, but you are essentially soliciting the information the taxpayer is required to keep if foreign accounts were held.

Additional Title 26 Considerations

- Accurately responding to the foreign account questions (*not* "FBARs filed?") on any tax return is an appropriate Title 26 consideration.
- A full examination (non-limited scope audits) includes identifying potential foreign accounts.
- If you determine that there is an FBAR issue related to the return you are examining, you may soon be working your own FBAR case.

FBAR Form TD F 90-22.1 (rev. 1/2012)

A filer completes only the parts needed to report:

- Part 1 – Filer Information
- Part II – Sole Owner of Accounts
- Part III – Jointly Owned Accounts
- Part IV – Signature or Other Authority
- Part V – Consolidated Report for Corporations

Become familiar with the FBAR form, so that you can determine whether or not the FBAR appears to be a complete filing. Recall that an incomplete filing is an FBAR violation.

FBAR TD F 90-22.1 (rev. 1/2012)(cont).

- By having separate schedules for each type of account relationship, the same FBAR can be used for all relationships.
- This means that filer's information need only be entered once, in Part I, rather than on multiple FBARs to reflect the different account relationships.

Special FBAR Filing Rules

- Filers holding financial interests in 25 or more foreign financial accounts need only check the **Yes** box in Part I, item 14, and list number of accounts.
  - No account detail is required (record keeping requirements still apply).
- Signature authority-only filers with 25 or more foreign financial accounts check the **No** box in Part 1, item 14, and
  - Must provide each account owner's information in Part IV (items 34-43).

Special Filing Rules, cont.

Consolidated Filing (Part V of FBAR)

- Allowed for all types of entities
- All U.S. Persons in consolidated group required to file should be shown

Special Filing Rules (cont.)
Spousal Filings

Spouses are allowed to file one combined FBAR if:

- Second (non-filing) spouse has only joint accounts with first (filing) spouse.
- All joint accounts are reported on the single FBAR.
- Both spouses sign in item 44.
- Filer should write “spouse” on Line 26 after the last name of the joint spousal owner.
- If a spouse has an interest or signature authority on other accounts, he or she must file separate FBAR.

1. Potential FBAR Violation? (cont.)

The taxpayer may have already filed an amended, delinquent, incomplete, or even what appears to be an accurate, FBAR.

- **Let's find out if the taxpayer filed FBARs, and if so, review them.**

★ Also, the existence of a foreign account may be stated or implied on:

- Original, amended, or delinquent tax returns and/or their attachments

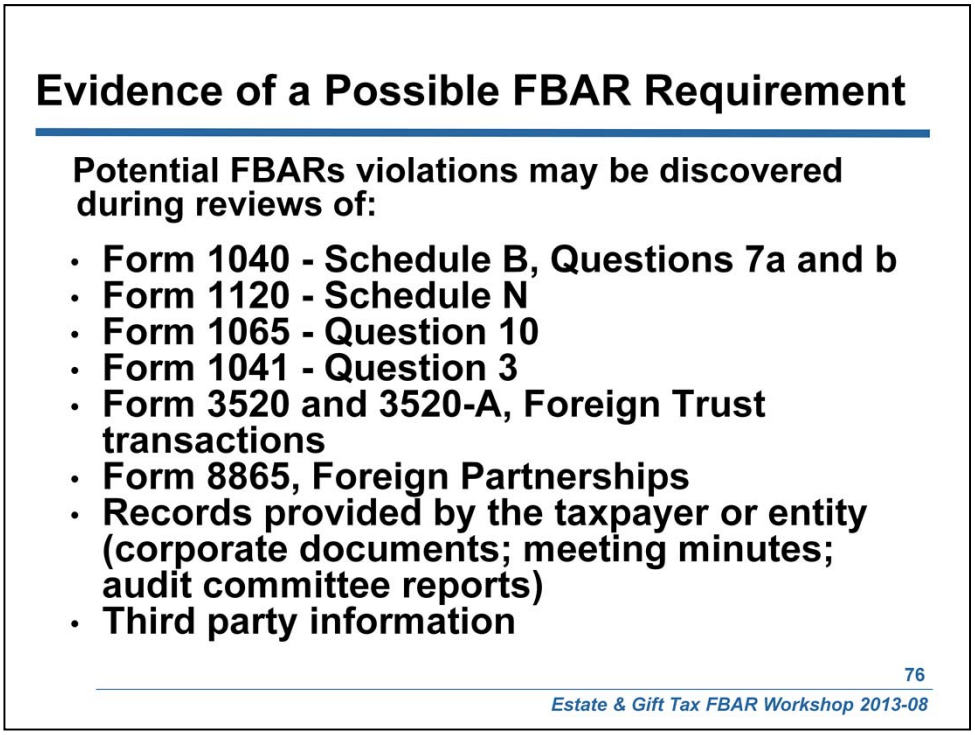
This slide is the other half of our Topic 1, do we have a potential FBAR violation.

Remember that we just went over checking CBRS for filings. What if there were no filings, but on the return you're auditing, or on a reference return, there is an indication that FBAR may be an issue?

Potential FBAR Requirement Indicators

What else might we look at that prompts us to consider whether there was a FBAR filing requirement by the person we're auditing?

Consider that during your examination, as part of your asset probe you ask for other tax returns. On review of those returns, what is the possible FBAR evidence that you might find?



Perhaps you're already sent your initial IDR on your estate and/or gift audit, and you've asked for related returns. On those related returns, you can review certain items that may help you determine whether an FBAR was required to be filed by your taxpayer.

Practitioner Duties re FBAR Under Circular 230

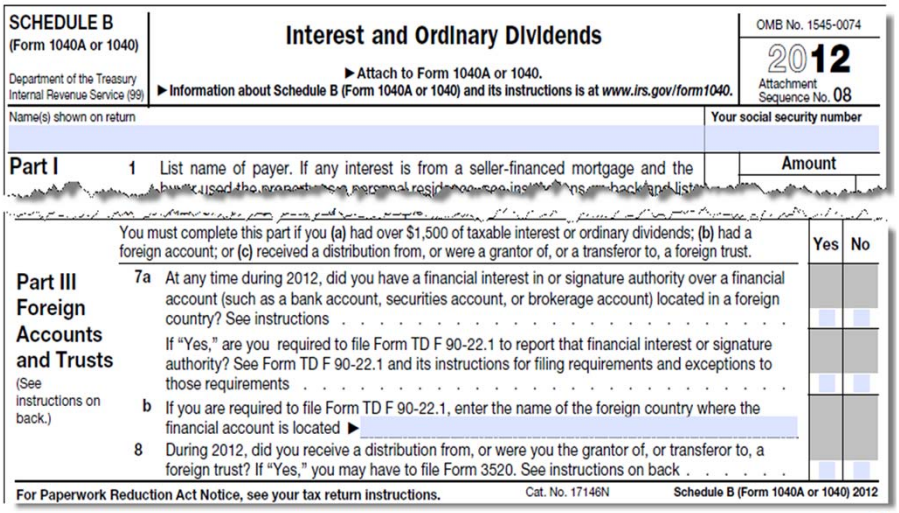
Practitioners who prepare U.S. persons' Forms 1040, 1041, 1065, or 1120/S have a duty under Circular 230 to inquire of their clients with sufficient detail to prepare correct responses to the foreign bank and financial account questions on—

- Form 1040 Schedule B, Part III
- Form 1120 Schedule N, Question 6a and b
- Form 1065 Schedule B, Question 10, or
- Form 1041, Schedule G ("Other information"), Question 3

The level of due diligence required by the practitioner in Circular 230 is addressed in section 10.22.

So, let's take a quick look at some of those forms.

Form 1040, Schedule B, Part III



SCHEDULE B (Form 1040A or 1040)
Department of the Treasury Internal Revenue Service (99)

Interest and Ordinary Dividends

▶ Attach to Form 1040A or 1040.
▶ Information about Schedule B (Form 1040A or 1040) and its instructions is at *www.irs.gov/form1040*.

OMB No. 1545-0074
2012
Attachment Sequence No. 08

Name(s) shown on return | Your social security number

Part I 1 List name of payer. If any interest is from a seller-financed mortgage and the buyer used the property as a personal residence, see instructions on back and list . . . | Amount

You must complete this part if you **(a)** had over $1,500 of taxable interest or ordinary dividends; **(b)** had a foreign account; or **(c)** received a distribution from, or were a grantor of, or a transferor to, a foreign trust. | Yes | No

Part III Foreign Accounts and Trusts (See instructions on back.)

7a At any time during 2012, did you have a financial interest in or signature authority over a financial account (such as a bank account, securities account, or brokerage account) located in a foreign country? See instructions . . . .

If "Yes," are you required to file Form TD F 90-22.1 to report that financial interest or signature authority? See Form TD F 90-22.1 and its instructions for filing requirements and exceptions to those requirements . . . .

b If you are required to file Form TD F 90-22.1, enter the name of the foreign country where the financial account is located ▶

8 During 2012, did you receive a distribution from, or were you the grantor of, or transferor to, a foreign trust? If "Yes," you may have to file Form 3520. See instructions on back . . . .

For Paperwork Reduction Act Notice, see your tax return instructions. Cat. No. 17146N Schedule B (Form 1040A or 1040) 2012

This is Form 1040, Schedule B, Part III.

For individuals, filing the FBAR is in addition to completing boxes 7a and 7b on Schedule B of Form 1040.

For individuals, complying with the statutory and regulatory requirement to report foreign financial accounts is a two-part process that begins with the Form 1040. Schedule B, Part III instructs a taxpayer to indicate an interest in a financial account in a foreign country by checking "yes or no" in the appropriate box. Form 1040 then refers the taxpayer to FBAR, Form TD 90-22.1.

Form 1120, Schedule N, Q6a&b

SCHEDULE N (Form 1120)

Department of the Treasury
Internal Revenue Service

Foreign Operations of U.S. Corporations

▶ Attach to Form 1120, 1120-C, 1120-IC-DISC, 1120-L, 1120-PC, 1120-REIT, 1120-RIC, or 1120S.
▶ Information about Schedule N (Form 1120) and its instructions is available at *www.irs.gov/form1120.*

OMB No. 1545-0123

2012

Name

Employer identification number (EIN)

Foreign Operations Information

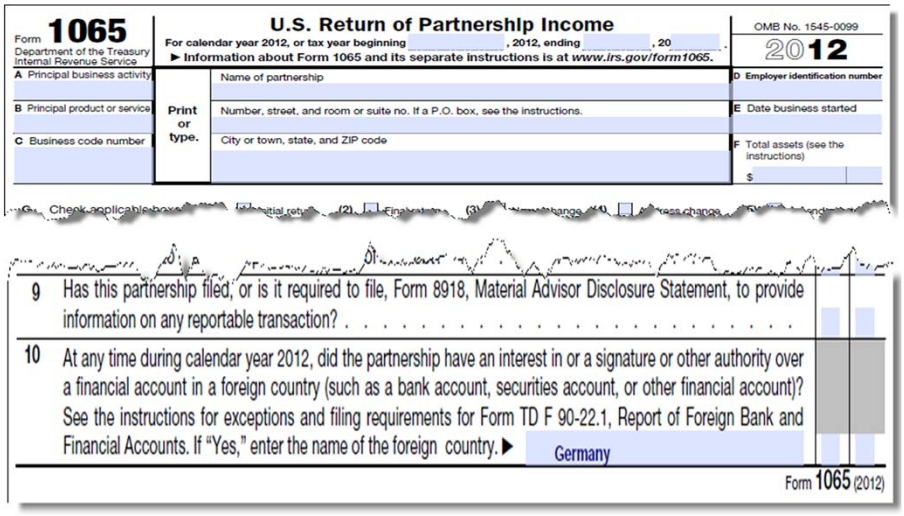
6a At any time during the 2012 calendar year, did the corporation have an interest in or a signature or other authority over a financial account (such as a bank account, securities account, or other financial account) in a foreign country? . . . . . .

See the instructions for exceptions and filing requirements for **Form TD F 90-22.1**, Report of Foreign Bank and Financial Accounts.

b If "Yes," enter the name of the foreign country . . . . . ▶ Switzerland

This is Form 1120, Schedule N. See questions 6a and 6b.

Form 1065, Schedule B, Q10



Form **1065**
Department of the Treasury
Internal Revenue Service

U.S. Return of Partnership Income

For calendar year 2012, or tax year beginning , 2012, ending , 20

► Information about Form 1065 and its separate instructions is at *www.irs.gov/form1065.*

OMB No. 1545-0099

2012

A Principal business activity

B Principal product or service

C Business code number

Print or type.

Name of partnership

Number, street, and room or suite no. If a P.O. box, see the instructions.

City or town, state, and ZIP code

D Employer identification number

E Date business started

F Total assets (see the instructions)

$

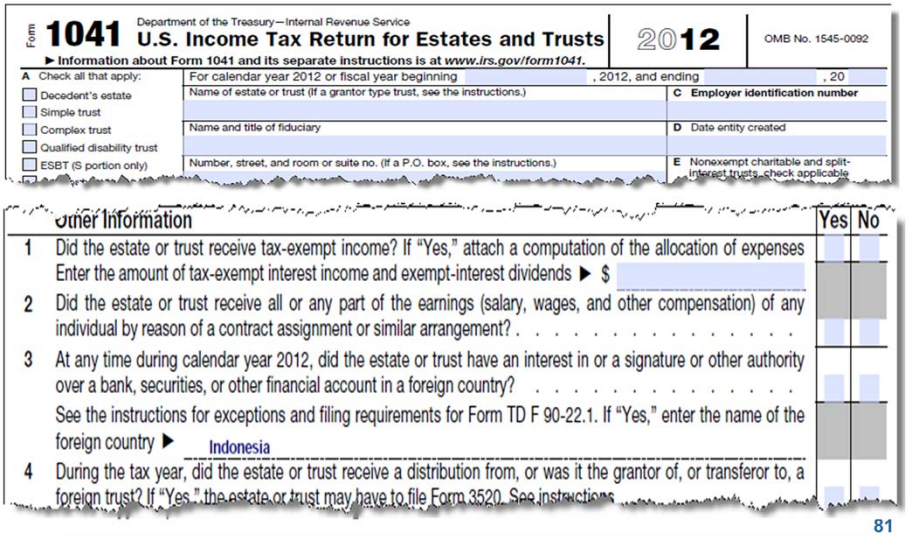
G Check applicable boxes: (1) Initial return (2) Final return (3) Name change (4) Address change (5) Amended return

9	Has this partnership filed, or is it required to file, Form 8918, Material Advisor Disclosure Statement, to provide information on any reportable transaction?		
10	At any time during calendar year 2012, did the partnership have an interest in or a signature or other authority over a financial account in a foreign country (such as a bank account, securities account, or other financial account)? See the instructions for exceptions and filing requirements for Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts. If "Yes," enter the name of the foreign country. ► Germany		

Form 1065 (2012)

This is Form 1065, Schedule B, Question 10.

Form 1041, Schedule G (Other Info), Q3



Form **1041** Department of the Treasury—Internal Revenue Service
U.S. Income Tax Return for Estates and Trusts 2012 OMB No. 1545-0092
► Information about Form 1041 and its separate instructions is at *www.irs.gov/form1041.*

A Check all that apply:
- ☐ Decedent's estate
- ☐ Simple trust
- ☐ Complex trust
- ☐ Qualified disability trust
- ☐ ESBT (S portion only)

For calendar year 2012 or fiscal year beginning , 2012, and ending , 20

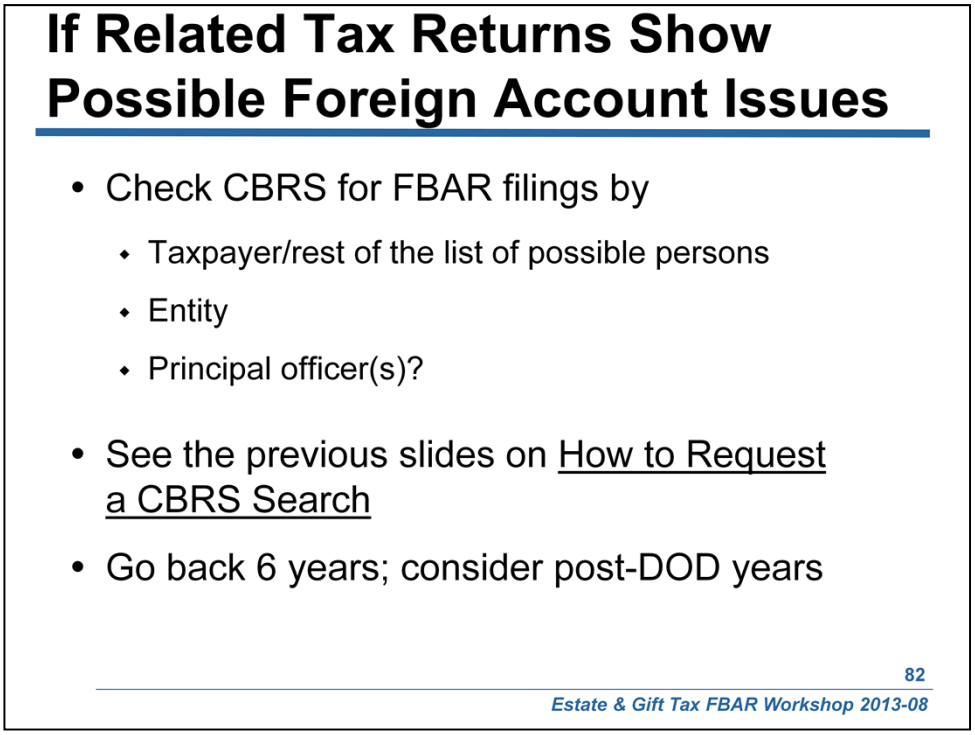
Name of estate or trust (If a grantor type trust, see the instructions.) | C Employer identification number

Name and title of fiduciary | D Date entity created

Number, street, and room or suite no. (If a P.O. box, see the instructions.) | E Nonexempt charitable and split-interest trusts, check applicable

Other Information		Yes	No
1	Did the estate or trust receive tax-exempt income? If "Yes," attach a computation of the allocation of expenses. Enter the amount of tax-exempt interest income and exempt-interest dividends ► $		
2	Did the estate or trust receive all or any part of the earnings (salary, wages, and other compensation) of any individual by reason of a contract assignment or similar arrangement?		
3	At any time during calendar year 2012, did the estate or trust have an interest in or a signature or other authority over a bank, securities, or other financial account in a foreign country? See the instructions for exceptions and filing requirements for Form TD F 90-22.1. If "Yes," enter the name of the foreign country ► Indonesia		
4	During the tax year, did the estate or trust receive a distribution from, or was it the grantor of, or transferor to, a foreign trust? If "Yes," the estate or trust may have to file Form 3520. See instructions		

This is Form 1041, Schedule G (Other Information), Question 3.



At this point, you are still doing the FBAR/CBRS check as a part of your regular Title 26 estate and/or gift tax exam. The FBARs are being researched on CBRS as a part of your Asset Probe and your general exam plan.

If on the related returns we just reviewed—which you are not examining, but reviewing—there is an indication of an FBAR filing requirement, consider the following:

Yes, if your decedent reported an interest in a business entity with a potential foreign account (whose tax return you are reviewing as part of your asset probe), asking about that account certainly relates to a Title 26 issue (valuation of an account that impacts valuation). The same may be true for a donor who is gifting an interest in a business entity that a potential foreign account.

Consider who must file FBARs. Review slides regarding foreign financial accounts, financial interests, signature authority, and other authority.

Possible Title 26 Info Requests

If warranted, secure a list of employees, with details about the separation of duties and financial responsibilities.

- Specifically those parties responsible for identifying transactions, completing forms, and filing forms.
- Who has signature authority or other controls over each foreign financial account?

Depending on your facts, and whether the entity held by the decedent or donor is the subject of your audit, these items may or may not be relevant.

This slide and the two following it are additional Title 26 questions that may be relevant to your facts.

Possible Title 26 Info Requests (cont.)

- Copies of all account statements for any foreign financial account in which the taxpayer had a financial interest (direct or indirect), or over which the taxpayer had signature or other authority.

From these you can find—

- The title holder of the account;
- The maximum value during the year;
- The value of the account on June 30 of the year following the year being reported; and
- The value of the account on the date the records were requested, as required under 31 C.F.R. 103.32.

Note that the request on this slide could be used for the decedent, or any foreign account held by a business interest owned or held by that decedent at DOD. Similarly, it could be used for a donor, or any foreign account held by a business interest owned or held and gifted by that donor.

From the responses to your Title 26 information requests you can find the information listed on the slide.

Possible Title 26 Info Requests (cont.)

- Copies of Foreign Account Signature Cards or similar documents.
- Copies of any agreements concerning foreign financial accounts made by the taxpayer with any others person(s).

Question

Can you ask in an initial IDR for information on:

- Any foreign bank accounts owned or controlled by the taxpayer?

Or

- Any foreign account the taxpayer held an interest in?

Answer

Can you ask in an initial IDR for information on:

- Any foreign bank accounts owned or controlled by the taxpayer?

Or

- Any foreign account the taxpayer held an interest in?

- **YES**

Because…

Information relevant to a Title 26 (IRC) case that is also relevant to an FBAR case may be obtained during a tax examination.

- For example, "Do you have foreign bank accounts, if so give me the statements" **IS** a necessary part of an income probe under IRM 4.10.4 (the equivalent of an E&G asset probe under IRM 4.25.1).
- "Give me copies of your 2008 and 2009 FBARs" **IS NOT.**

Question

The taxpayer checks “Yes” on Schedule B, Form 1040, for foreign accounts.

- Can you ask for copies of FBARs in your initial Title 26 IDR?

Answer

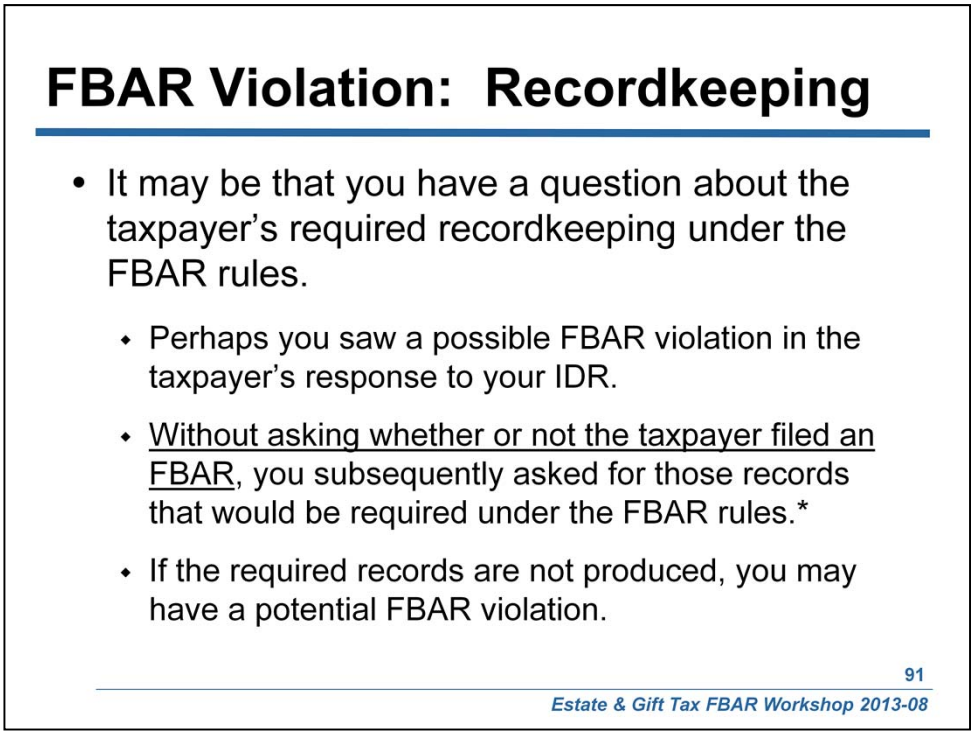
The taxpayer checks “Yes” on Schedule B for foreign accounts.

- Can you ask for copies of FBARs in the initial IDR?

- **NO**—checking “YES” does not automatically require an FBAR, and you have not yet obtained an RSD.

Recall that Form 1040 Schedule B asks about foreign accounts, but it does not ask about the filing threshold for requiring the filing of an FBAR.

Even so, you may not directly ask for FBARs without a Related Statute Determination.



Recall that failing to file FBARs is not the only information we're concerned with. There is also the recordkeeping requirement.

Let's say in your CBRS research you see the taxpayer filed an FBAR. In your initial Title 26 IDR you ask the typical, "Did/does the taxpayer have an interest in or signature authority over any foreign accounts", and they respond with insufficient information or records. You may have a situation where you're able to pursue the penalty for failure to keep the required FBAR records. (Remember, you'll have to first obtain the Related Statute Determination.)

See 31 CFR § 1010.350.

FBAR Recordkeeping Requirements: 31 CFR § 1010.350

- Account records shall be retained for 5 years.
- Exception: Officers or employees who file an FBAR because of signature authority over a foreign financial account of their employers are not expected to personally maintain the records of these foreign financial accounts.

What records must be kept?
31 C.F.R. § 1010.350

- Name, type of account, and account number
- Name and address of the foreign bank
- Maximum value of each account
- Retaining a copy of the FBAR is not required
- However, a copy of the current FBAR form contains most of the required information
- The records must be kept for five years and
- Be available at all times for inspection

The information listed on this slide—those records that must be kept by an FBAR filer—is essentially the same information that is reported on the FBAR form.

Such records shall contain:

1. The name in which each account is maintained;
2. the number or other designation of each such account;
3. the name and address of the foreign bank or other person with whom such account is maintained;
4. the type of such account; and
5. the maximum value of each such account during the reporting period.

Recordkeeping Violation Date

- The date you first request records required to be kept under the FBAR rules is the date of the violation for failure to keep records.
- You must document your Title 26 Form 9984 regarding this request.
- The balance in the account at the close of the date on which the records are first requested is the amount to use in calculating the recordkeeping violation penalty.

Review Your CBRS and IDR Results

CBRS shows FBARs were filed? Complete?	Tax file or IDR results raise questions (filing or records)?	**Submit RSM (Form 13535) to TM?**	Note
Not filed	No	No	A
Filed; incomplete	No	Yes	B
Filed; complete	No	No	A
Not filed	Yes	Yes	C
Filed; incomplete	Yes	Yes	B
Filed; complete	Yes	Maybe; info matches?	A; C

A: You may have no facts to support filing an RSM with your TM. Your FBAR responsibilities are terminated. Document your tax file.
B: Incomplete FBARs are subject to review. Articulate a possible Title 26 violation in the RSM.
C: Articulate a possible Title 26 violation in the RSM.

95

Estate & Gift Tax FBAR Workshop 2013-08

- No FBARs were filed. There's no information on your tax return, or in response to your foreign accounts questions in your IDR. You likely have no facts to support filing an RSM. Document your tax file as such.

- FBARs were filed, but they were incomplete. There was no information on the tax file suggesting a foreign account. Craft your IDR carefully (you don't yet have an RSD). Submit an RSM to your TM.

- FBARs were filed and complete. Neither the tax return nor the IDR response suggests anything other than what was reported on the FBARs. You may have no other facts to support a Title 26 violation that will allow you to submit an RSM. If not, document your tax file as such.

- FBARs were not filed, but you have information on the tax return or in response to your IDR regarding foreign accounts. Submit the RSM to your TM.

- FBARs were filed, but incomplete. You have information on the tax return or in response to your carefully crafted IDR regarding foreign accounts. Submit an RSM.

- FBARs were filed and complete, as far as you can tell. You have information on the tax return or in response to your IDR regarding foreign accounts. Do you submit a related statute memorandum? Maybe, it depends on whether the information matches to your satisfaction.

- If the information matches satisfactorily, your FBAR inquiry is complete. Document your Title 26 tax file.
- If the information doesn't match, articulate the possible Title 26 violation and submit Form 13535 to your TM.

What are the possible Title 26 violations that we're talking about?

- Omitted assets
- Undervaluation
- Underreporting
- Possible failure to report a previous transfer of an interest in a foreign account

FBAR Penalty Case Outline

Introductory information

1. **Discover a potential FBAR violation**
2. **Secure a Related Statute Determination (RSD)**
3. Establish FBAR administrative controls and set up your FBAR case
4. Investigate the case
5. Determine the appropriate penalty
6. Close the case
7. Appendices

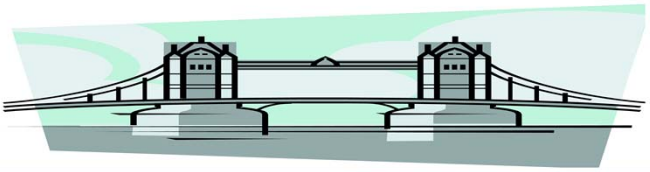
2. The Related Statute Determination

- Form 13535 is the Related Statute Memorandum (RSM)
  - Signed by your TM it becomes a Related Statute Determination (RSD)
- RSD is necessary to allow Title 26 information to be used in a Title 31 FBAR penalty case
- Until RSM is signed by your TM, you cannot
  - Ask the taxpayer specifically about the FBAR
  - Ask for a copy of the FBAR
  - Request information that relates only to the FBAR penalty
- Currently your territory manager signs the RSM

RSD Basics

- RSD is a TM's good-faith determination that the FBAR violation was in furtherance of a Title 26 violation

- The Related Statute Determination provides the bridge between Title 26 and Title 31



RSD and Title 26 Violations

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

How Many RSMs (Forms 13535)?

Complete a separate RSM—

- for each year an FBAR was required, and
- for each person/entity (and for each officer/agent of that entity with signature authority over the account) that was required to file an FBAR.

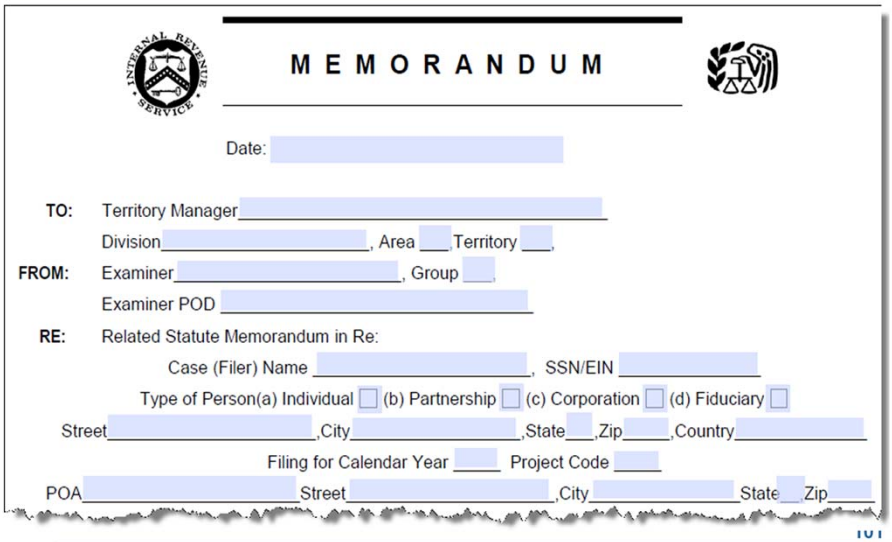
Result: A single foreign account may cause multiple filing requirements for a single year.

GM initials concurrence and forwards all Forms 13535 to TM.

If based on the last many slides, you believe you should open an FBAR case, prepare Form 13535.

Regarding GM concurrence and TM signature, see IRM 4.26.17.2.1 (2).

Form 13535—RSM



MEMORANDUM

Date:

TO: Territory Manager
Division , Area , Territory ,
FROM: Examiner , Group ,
Examiner POD
RE: Related Statute Memorandum in Re:
Case (Filer) Name , SSN/EIN
Type of Person(a) Individual (b) Partnership (c) Corporation (d) Fiduciary
Street ,City ,State ,Zip ,Country
Filing for Calendar Year Project Code
POA Street ,City State Zip

This slide shows the top part of Form 13535.

To complete this form:

Complete the Examiner info and Group code.

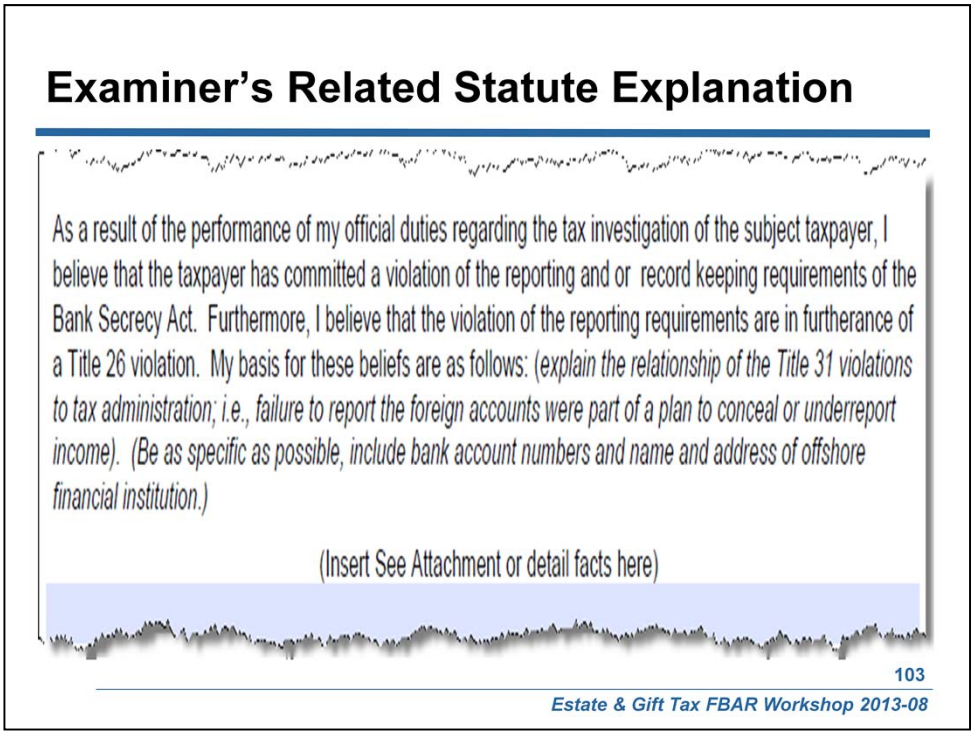
- If the assigned examiner changes, notify ECC. An FBAR monitoring document (FMD) can be used to notify ECC of the change.
- Statute expiration notices are sent to the examiner shown on the FBAR database.

Representatives/Powers of Attorney for the Title 26 exam should be noted on Form 13535.

However, note that a Form 2848 can be used in an FBAR penalty exam only after the RSD if made (signed by the TM).

FBAR Power of Attorney

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



The language you see here is printed on the Form 13535.

Below this language on the form is a small space to input info. It's more convenient to attach your narrative and supporting documents to Form 13535. You'll submit that package through your manager to the TM.

Sample RSM Text—
Info Arose on an Amended Return

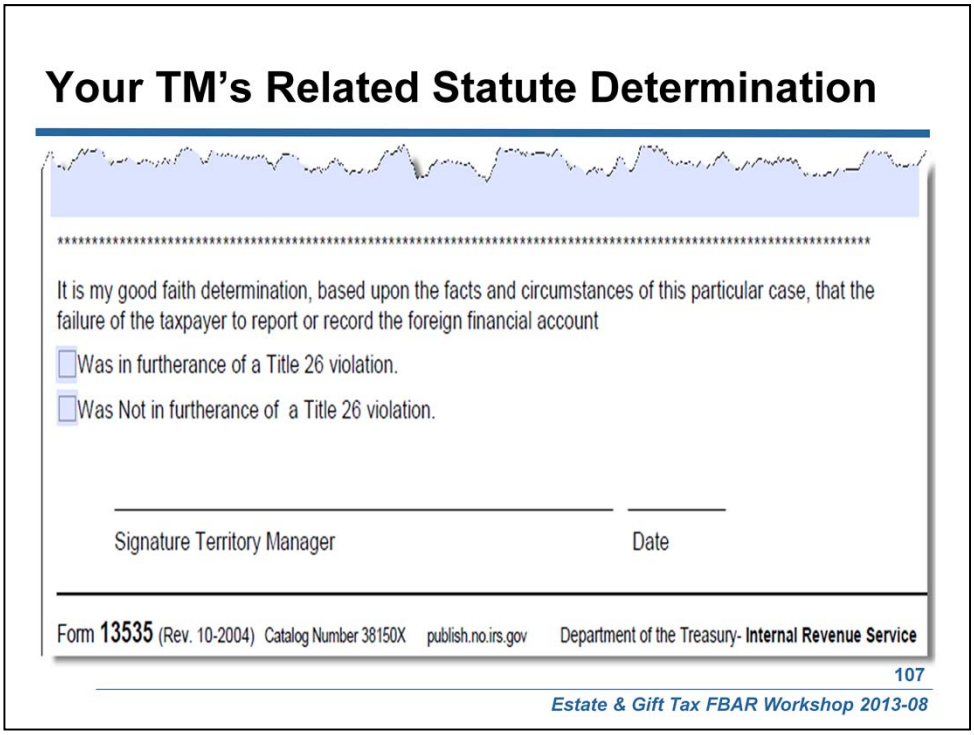
This taxpayer filed an amended [TYPE OF] tax return on [INSERT DATE] to correct a previously-filed, inaccurate return that failed to include [WHAT INFORMATION] from foreign sources. On [INSERT DATE] the taxpayer also filed a delinquent FBAR. Based upon the information shown on the amended return there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

Sample RSM Text—
Info Arose on a Delinquent Return

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

Sample RSM Text—
Info Arose on an Information Return

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



This slide shows the bottom portion of Form 13535.

The Territory Manager is making the determination based on the facts presented in your narrative. You must show an apparent Title 31 violation (failure to file an FBAR or failure to file a complete and accurate FBAR). Most likely that is a failure to file an FBAR under the circumstances where one was required.

It is not necessary at the related statute memo stage to prove the civil case. But you must present facts sufficient to indicate that a Title 31 violation occurred.

As discussed earlier, there must also be a possible Title 26 violation.

The TM must sign the determination, but the signature can be made electronically.

TM Makes a RSD Based on a Good Faith Judgment—Not Met

If your TM determines that the related statute test has not been met, in that the FBAR violation was **not** in furtherance of the Title 26 violation—

- TM does not sign the RSD (Form 13535);
- TM returns the determination to you and copies the group manager;
- The FBAR case cannot proceed;
- Place the Form 13535 in the Title 26 case file; and
- Your FBAR responsibilities are fulfilled.

See IRM 4.26.17.2.2(1).

TM Makes a RSD Based on a Good Faith Judgment—Met

If your TM determines that the related statute test has been met, in that the FBAR violation **was** in furtherance of the Title 26 violation—

- TM signs the RSD and returns the determination to you and copies the group manager;
- The FBAR case can proceed; and
- You can now open the FBAR penalty case and issue an FBAR IDR.

Note that the TM does not have to be certain that there was an FBAR violation and that the violation was made in furtherance of a Title 26 violation.

The TM can make a determination based on apparent violations, but this determination must be made in good faith.

Regarding disclosures when Title 26 information is used in Title 31 examinations, see IRM 4.26.14.2.

Question

During an estate tax examination of the estate of John Smith, you secure an RSD for the estate. You then determine that John Smith owned the account jointly with Mary, his daughter.

Q: Can you open an FBAR penalty case on Mary without opening an examination and securing an RSD for her?

Answer

YES

- The "in furtherance of a Title 26 violation" requirement can be the violation of someone other than the subject of the FBAR penalty investigation.

BUT BE SAFE

- The RSD allows use of Title 26 information in any Title 31 investigation, **but you should secure** an RSD as to Mary.

The admonition in that second bullet is why it's advocated that you submit a Related Statute Memorandum for every person (and every year) against whom you want to open an FBAR case.

Question

Assume a Related Statute Determination (RSD) is made by your Territory Manager.

- If the examination ends up as a “no-change”, can you still propose an FBAR penalty?
- In other words, in a “no-change” case, is there still a Title 26 violation that the Title 31 violation was “in furtherance of”?

Answer

YES

- The good faith determination that the Title 31 violation was in furtherance of the Title 26 violation is made to satisfy IRC § 6103.
- A Title 26 violation is not a condition precedent to asserting a Title 31 penalty.
- So long as the determination was made in good faith, the FBAR case may go forward.

If TM Approves Your Form 13535

- Fax the signed RSM (Form 13535), which is now a Related Statute Determination, RSD, to the Enterprise Computing Center (ECC) at

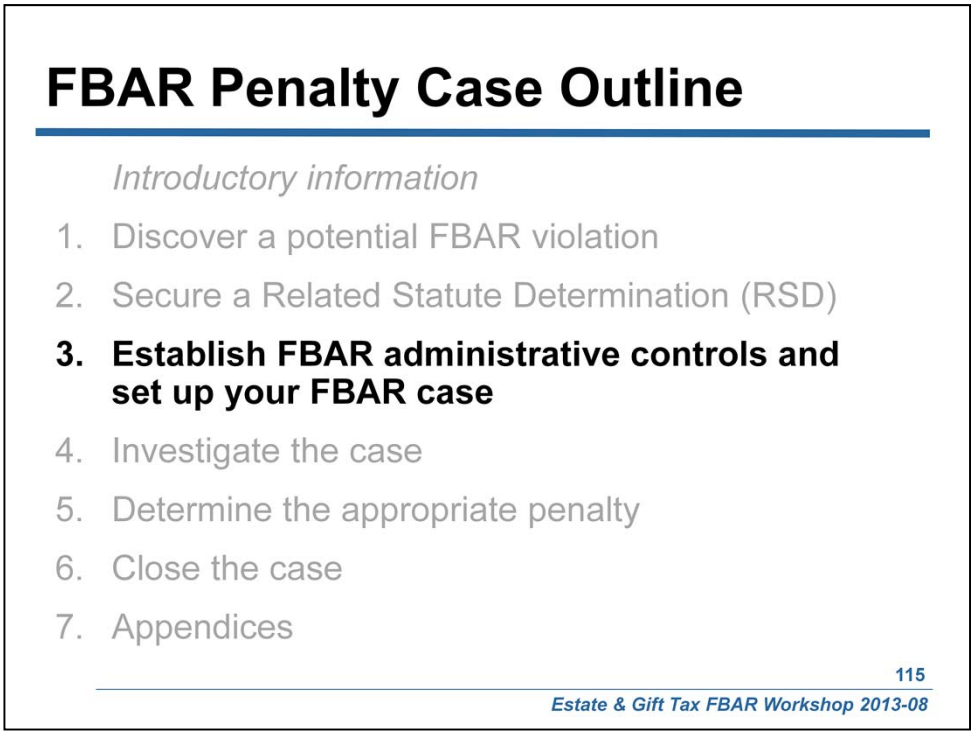
  Fax # 313-234-2278 or email to *SBSE BSA COMPLIANCE-FBAR PENALTY COORDINATOR

- Print out the fax transmission report, which will record the date ECC was notified of the commencement of the FBAR case.

- The original RSD and fax confirmation will be put into your separate FBAR case file, which you can now open.

Re commencement of the FBAR case, see IRM 4.26.17.2.2 (2).

Note that ECC will enter the RSD information you fax into the FBAR database, which starts the monitoring of the FBAR case for statute purposes.



Under Topic 3 we're going to discuss establishing FBAR admin controls and setting up your FBAR case.

3. FBAR Administrative Controls

Two separate administrative controls:

1. Exam controls on ERCS
2. Title 31 database maintained by ECC

- Establish on ERCS each year where you have obtained a Related Statute Determination

★Before starting any FBAR examination, you **must** have obtained the TM's approval and received back a signed RSD.

We'll go over the ERCS controls first, then the ECC controls. Then we'll talk about other items needed to set up your FBAR case.

Before ERCS, Enter Case on IMS

1. Create a manual return in IMS
   a. If your taxpayer is no longer living, use a V with the SSN; if still living, no V
   b. MFT is C6
   c. Activity Code is 545
   d. Use the SAIN code that goes with your FBAR-generating case (your original case)
   e. UIL is 09999.99-01 FBAR Penalty
   f. Any tracking and/or project code(s) will mirror that of your FBAR-generating case (your original case)
   g. Each separate FBAR case will appear as direct exam time on your timesheet
   h. Your FBAR case time is not charged to an AIMS database

Before ERCS, IMS (cont.)

2. Within IMS, for each separate FBAR case, complete Form 5345-D to establish ERCS controls. Submit for processing as you normally would.

★ See the **FBAR-ERCS Guide** in the handout package for additional information on filling out the Form 5345-D.

In the past FBAR files typically were not established on ERCS. Some of you have had some FBAR cases that were not on ERCS. Time spent working the FBAR cases was lumped together on Activity Code 545, which is a miscellaneous direct exam time code. As such, the time would not be applied to a specific taxpayer or year. More importantly, it meant that the statute expiration dates could not be properly tracked.

The FBAR-ERCS Guide in your handout package will show you and the group secretary how to get the FBAR cases onto ERCS. Let's go over a few point of that guide now.

Obtain Exam Controls on ERCS

- See the FBAR-ERCS Guide in the handout package for details
  - Establish each FBAR case year on ERCS
  - Input the FBAR penalty statute date
  - Charge time directly to the case

★The FBAR-ERCS Guide includes information for the group secretary regarding creating and closing the ERCS record

ECC Database Controls

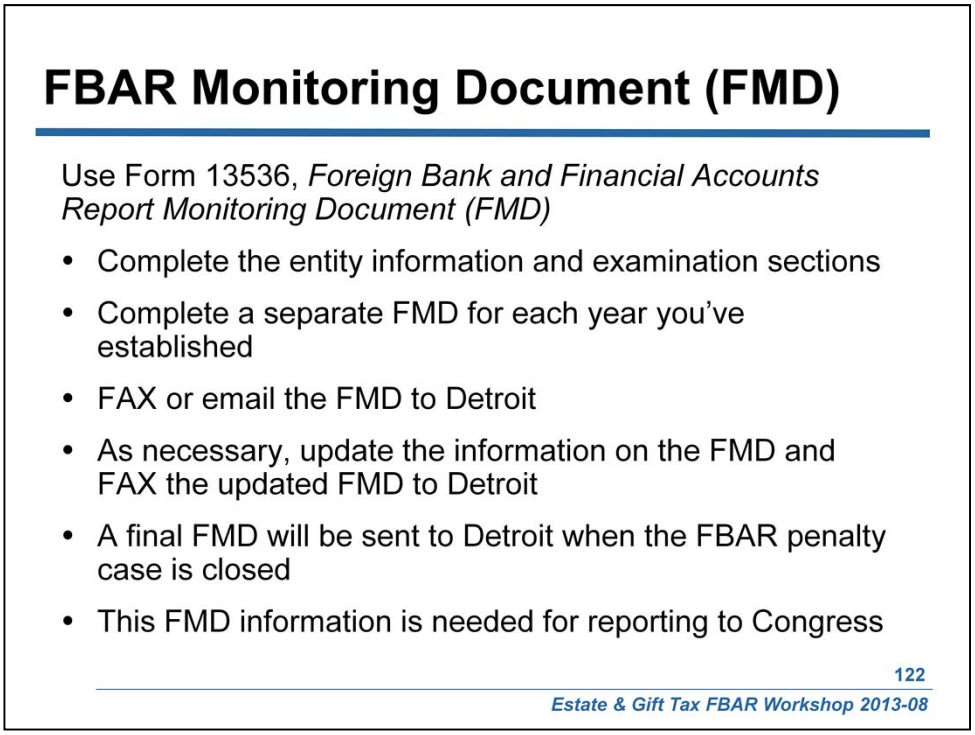
- See IRM 4.26.17.3
- FAX or email the RSD to ECC to establish the case on the Enterprise Computing Center database
- Start your FBAR Monitoring Document (FMD), Form 13536, which provides the initial and updated information to Detroit:
  - Case name
  - Owner of the foreign account
  - Representative's information, if any
  - Examination information, including contact information
  - Case Disposition
- Fax or email your FMD to Detroit as often as necessary to update the database on your case

The fax number is 313-234-2278.

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

ECC Database Controls (cont.)

- The ECC inputs each case into an FBAR database to monitor FBAR penalty statutes
- Place the original RSD, FMD, and the FAX transmission reports in the FBAR penalty case



Use Form 13536, *Foreign Bank and Financial Accounts Report Monitoring Document (FMD)*. Download it from the intranet or use the one provided in your handout package.

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.

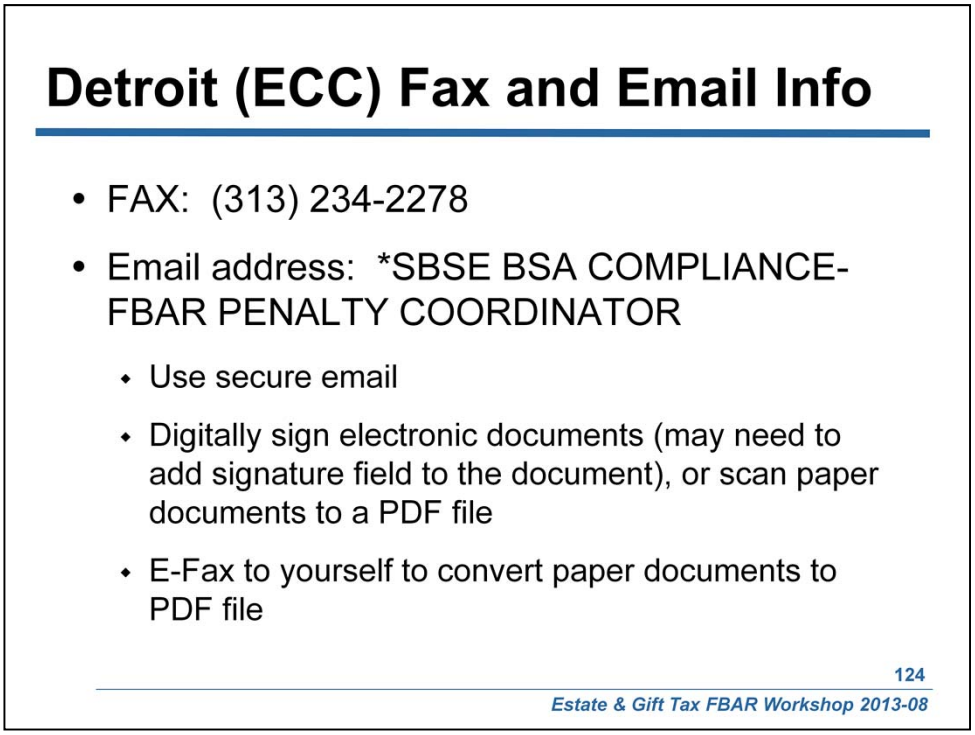
The Detroit database is the source of information used to prepare statutory-required FBAR reports for Congress, so it is important that the database contains the most current information regarding the status of all FBAR penalty investigations.

Updating Your FMD

When might you update the FMD (Form 13536)?

- Major changes in the case
- POA changes
- Owner of the account has changed (e.g., property gets distributed from the estate to an heir)
- Your contact phone number changes
- The case gets submitted to CI
- The case gets reassigned

See the Form 13536 for the types of actions that warrant the form being updated to ECC.

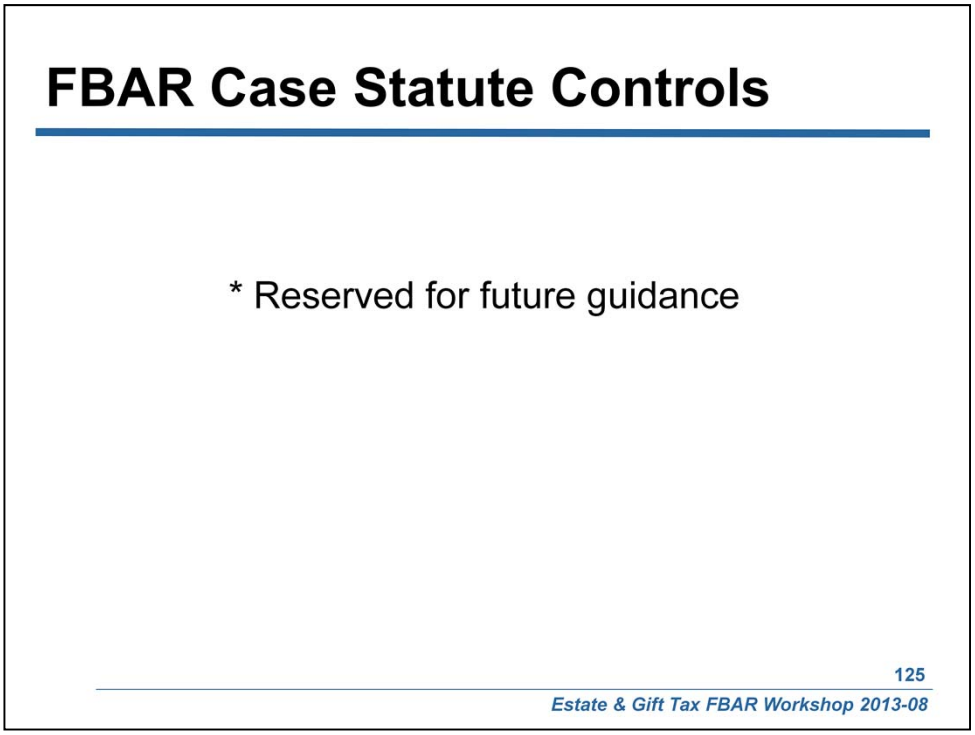


This slide contains the fax number and email address for Detroit (ECC).

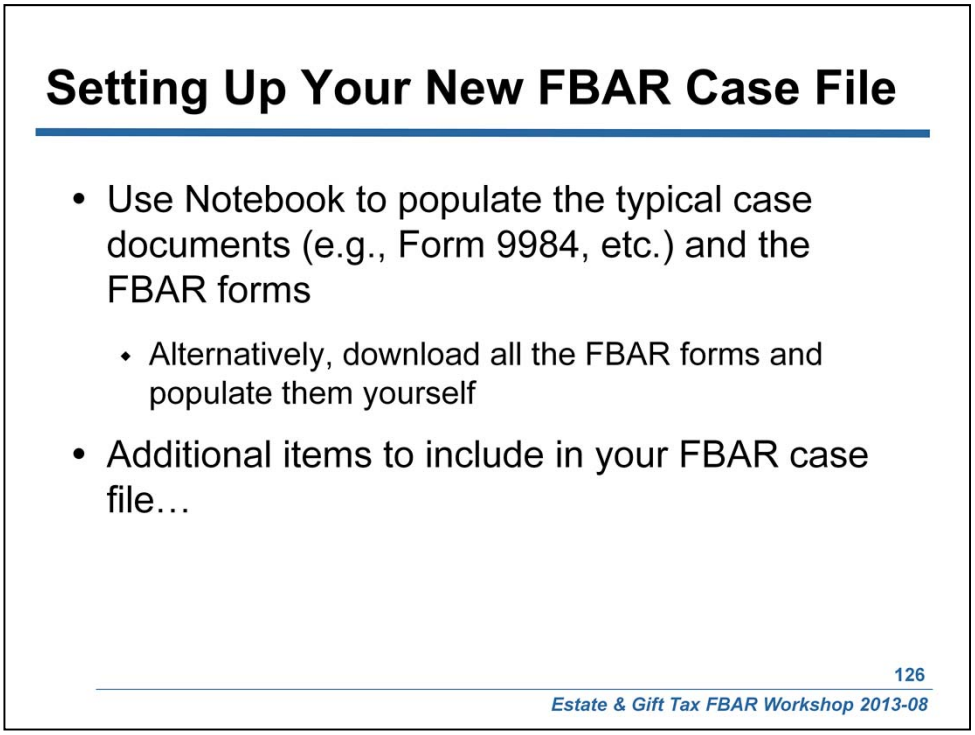
The fax number is 313-234-2278.

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 you can e-fax the document to yourself.



Reserved for future guidance on statute controls for FBAR cases.



You've already learned in this section how to set up your two admin controls on the case—ERCS and with ECC.

Now we'll take a look at the rest of the items you need to set up your FBAR case file.

Additional items for your FBAR case file:

- E&G Exam Planning and Workpaper Index
- Form 9984
- Original, signed RSD (Form 13535), and the fax confirmation showing the date it was faxed to ECC (or email equivalents)
- E&G FBAR lead sheet (Notebook or E&G sharepoint (FBAR folder))
- Copies of any CBRS FBAR research
- Copies of all relevant records from the Title 26 tax case
- All correspondence you have with ECC, including all fax and email confirmations

Your FBAR Case File: E&G FBAR Lead Sheet

- The E&G FBAR Lead Sheet contains step by step procedures that following IRM 4.26.17—IRS Exam Procedures for FBAR.
- See Step # 7, which lists items included in FBAR case file at initial setup.
- See Step # 29, which lists the contents of a closed FBAR case file.

The IRM for FBAR procedures is Section 4.26.17.

Time on the individual FBAR case is entered on the individual FBAR case file activity record (Form 9984)

Copy relevant LB&I Title 26 tax case workpapers to include in the FBAR case file.

Your FBAR File—Form 9984

- You'll keep a separate Form 9984 for each FBAR case you have
- Be sure to document in your Form 9984 the date you request the FBAR records required to be kept per 31 CFR § 1010.350. Also document the date the taxpayer received your request (cert. mail; next slide)
  - These dates should be prominently and clearly displayed in the activity record.
  - The SOL on penalties for failure to retain records runs from this date you requested the FBAR records.
  - This request date is also the penalty computation date for failure to retain records.

Notify the Taxpayer that the FBAR Case has Commenced

Notice to the taxpayer can be either—

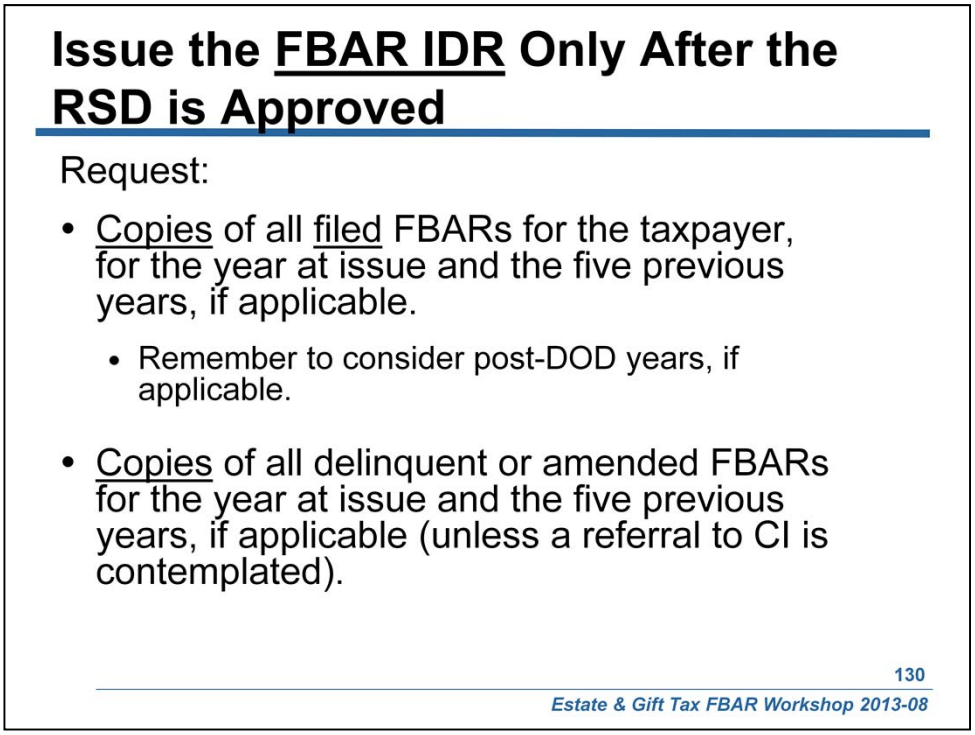
1. Verbal—during your work on the Title 26 case. Document notice on your FBAR case's Form 9984 (send confirming letter?)

OR

2. By letter—issue Letter 4265, FBAR Appointment Letter. Send the letter by certified mail with your FBAR IDR attached; or deliver the IDR in person and have the taxpayer initial and date a copy of the IDR to confirm receipt.

1. If you use verbal notice, you may want to review Letter 4265 beforehand so that you apprise the taxpayer of important information, including what to expect (your IDR on the FBAR case).

2. Note that you may need to adjust some of the language on Letter 4265 if you use your own IDR (and not Form 4564, as noted in the letter).



With respect to which filed FBAR copies you'll request, consider whose FBARs your addressee has control over. That is, if you've received the RSD on the estate, you're asking the executor for the decedent's FBARs and any FBARs filed by the estate. Your other FBAR IDRs will be issued—after obtaining RSDs for those cases, of course—to others, and you'll ask for their required FBARs.

--

IRM 4.26.17.4.8 says that you should secure delinquent or amended FBARs, unless a criminal referral is contemplated. In the case of a referral to CI, you should not solicit delinquent or amended forms, but should accept them if offered.

--

Regarding the second bullet: **Copies** is stressed there because after July 1, 2013, all FBARs, whether timely, delinquent, or amended FBARs are required to be filed electronically. You may obtain copies of any electronically filed FBARs from CBRS. See the document in the handout package, "Examiner Guidance—FBAR E-File and Delinquent or Corrected FBARs".

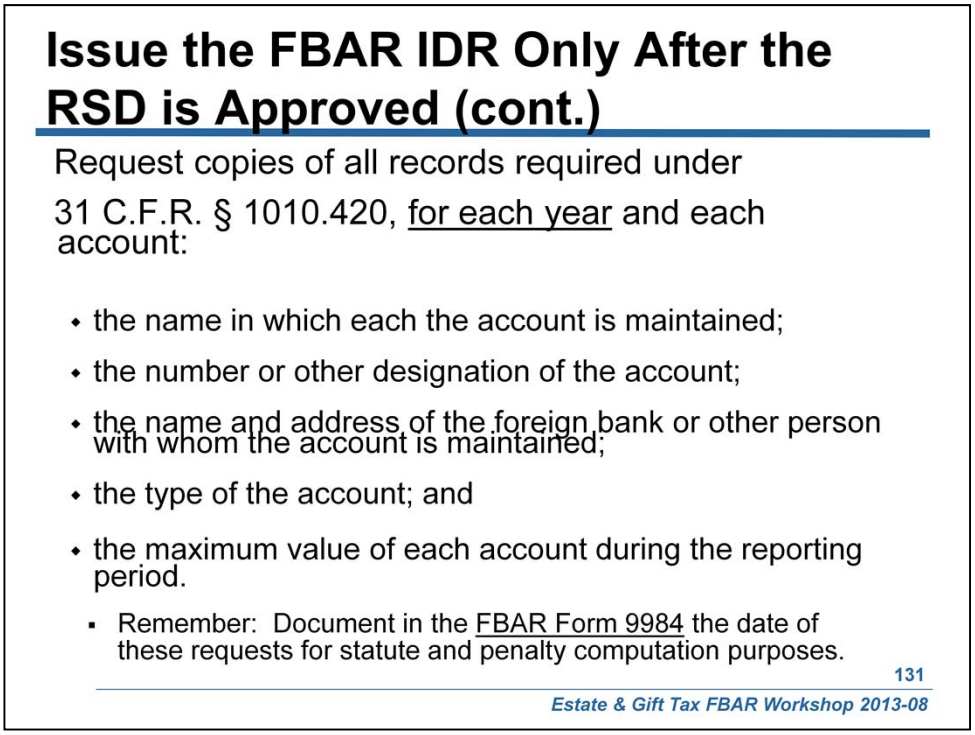
Regarding a possible submission CI:

Again, delinquent FBARs should not be solicited if the examiner is considering a referral to Criminal Investigation (CI).

If delinquent FBARs are offered to you—

- Advise the taxpayer that after July 1, 2013, all FBARs must be E-Filed.
- Provide the E-File procedures to the taxpayer. See Examiner Guidance—FBAR E-File and Delinquent or Corrected FBARs in the handout package or on the E&G sharepoint, FBAR folder.
- Have the taxpayer provide you with copies of the FBARs that were E-Filed, then verify with CBRS that they were filed. (FBARs post 48 hours after receipt by ECC.)

Procedures for working and processing cases with criminal referrals are found in IRM 4.26.17.5.4.



The phrase “for each year” is underlined to remind you that you must have submitted a Related Statute Memorandum (Form 13535) for each year you wish to open an FBAR case on.

Note that 31 CFR § 1010.420 is the current citation, formerly 31 C.F.R. § 103.32.

FBAR IDR DATE
The Importance of the IDR Date

Account balances on the date you request the taxpayer to produce FBAR records (the "IDR date") may be necessary to compute the FBAR statutory penalty ceiling for recordkeeping violations.

FBAR IDR

The Importance of the IDR Date (cont.)

To document the date the taxpayer received your IDR—which fixes the date on which account balances are used to compute recordkeeping violation statutory penalty maximums—it is *strongly* suggested that the IDR for FBAR records be issued either—

- By certified mail, return receipt requested, or
- In person, by having the taxpayer initial and date the IDR to confirm receipt.

Document the FBAR case's Form 9984 with the date the taxpayer received the IDR.

Regarding the "IDR date" and penalties for recordkeeping violations, see IRM 4.26.16.4.5(5). Also see step #21 on the E&G FBAR lead sheet.

FBAR Power of Attorney

- May only use Form 2848 after your TM (or 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 also covers E&G 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)

I've repeated this slide here just for convenience.

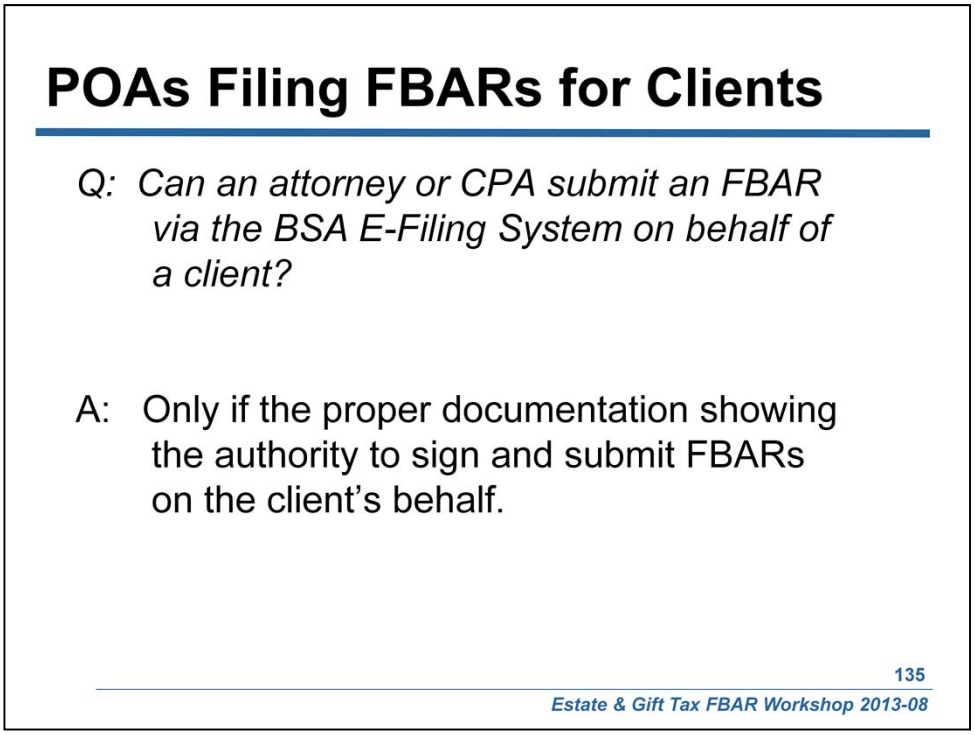
Form 2848 is a power of attorney form for Title 26 tax cases. You may use Form 2848 for FBAR penalty cases only after the delegated official signs the related statute memorandum.

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 cover both FBAR and E&G tax matters. Where the power of attorney covers tax matters, in addition to sending to ECC, 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 ECC.

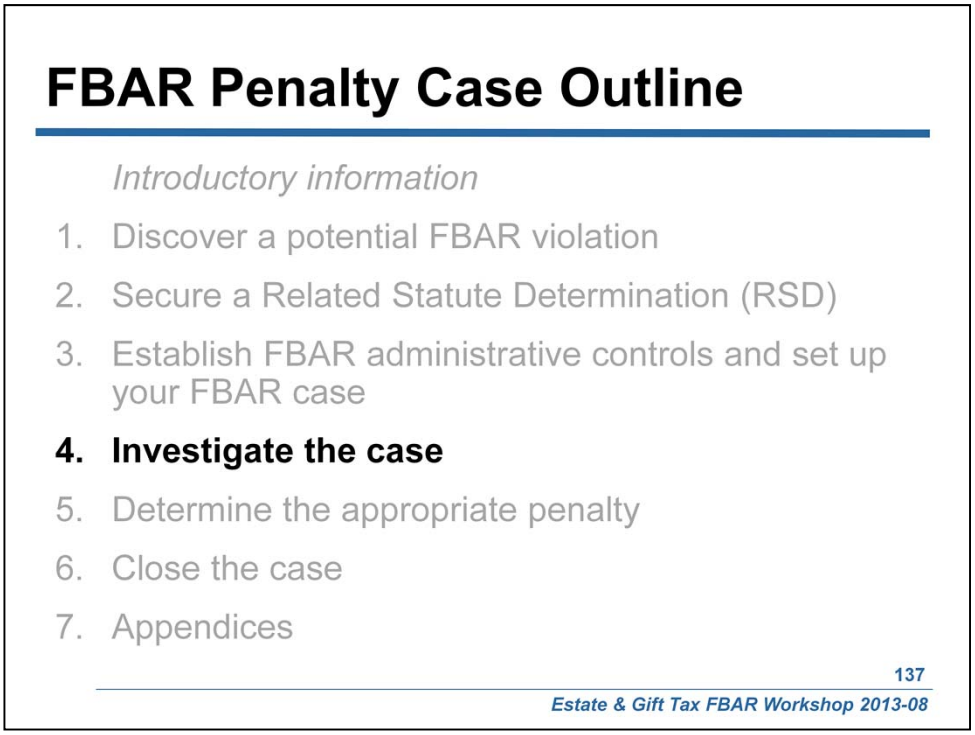


Q: Can an attorney or CPA submit an FBAR via the BSA E-Filing System on behalf of a client?

A: An attorney or CPA always may assist clients in the preparation of electronic BSA forms for BSA E-Filing, including the FBAR. Consistent with FinCEN's recent proposal to provide for approved third-party filing of the FBAR, if an attorney or CPA has been provided documented authority by the legally obligated filers to sign and submit FBARs on their behalf through the BSA E-Filing System, that attorney or CPA can do so through a single BSA E-Filing account established for the attorney or CPA. If such authority is not provided, the filings must be signed and submitted through a BSA E-Filing account unique to each client.

Your FBAR Case File

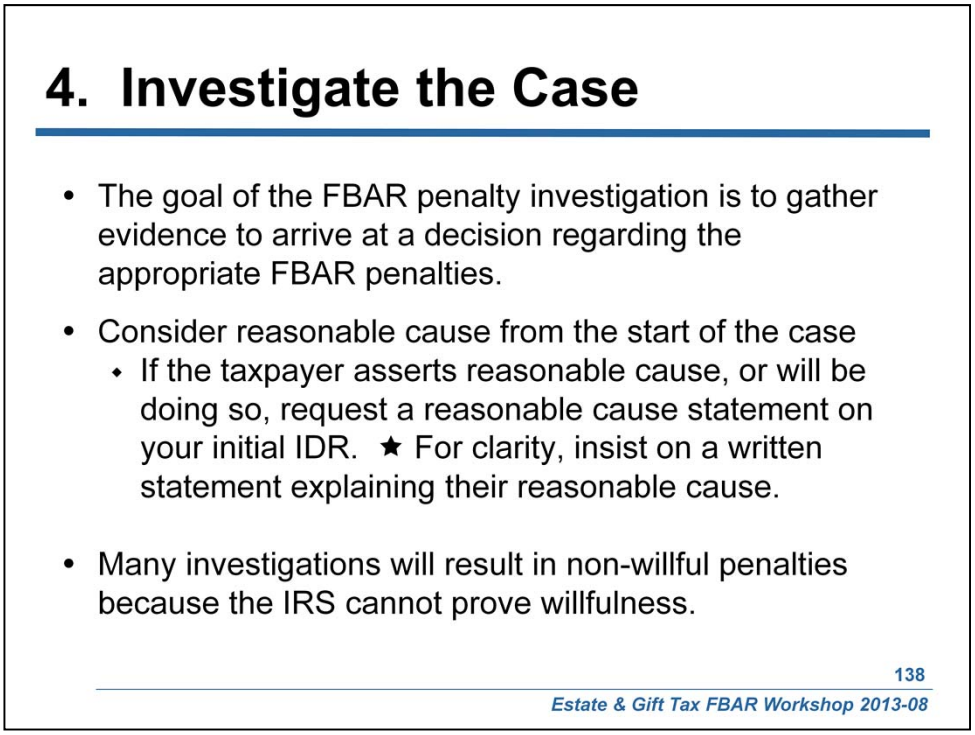
- Work papers created for FBAR issues go into your FBAR file only, not into your Title 26 case file.
- Include in your FBAR case file copies of relevant workpapers from your Title 26 case.
  - Always be mindful of disclosure issues.



In Topic 3, we reviewed how to set up your FBAR admin controls, and the initial set up of your FBAR case file.

We also talked about notifying the taxpayer that the FBAR case has commenced. Now we're going to talk about investigation of the case.

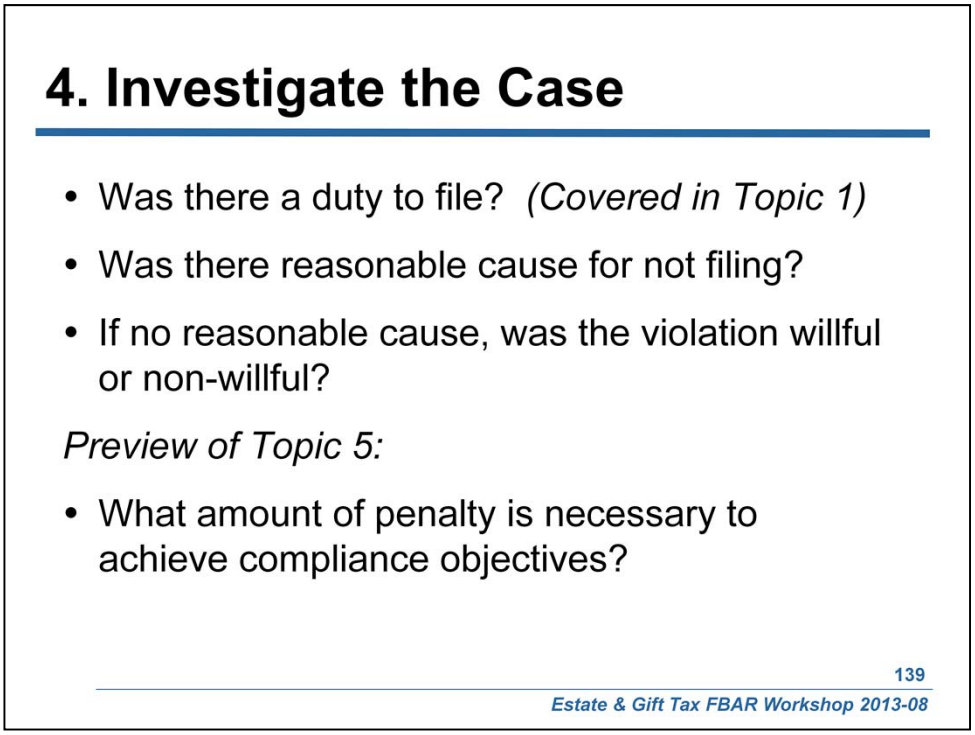
By the time you've reached the Related Statute Determination point in your case, you've probably done a fair amount of investigation. Depending on your facts, there could be much more to do.



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

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

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



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

To show there was a violation that could be subject to a penalty, the person had to have a duty to file an FBAR, had to have failed to file that FBAR or keep the required records, and the person did not have reasonable cause for the violation.

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

In order to do that, we'll quickly review the duty to file, and then we'll get into reasonable cause, willfulness, and gathering evidence—including interviews.

Investigate the Case—
Step 1: Prove a Violation Exists

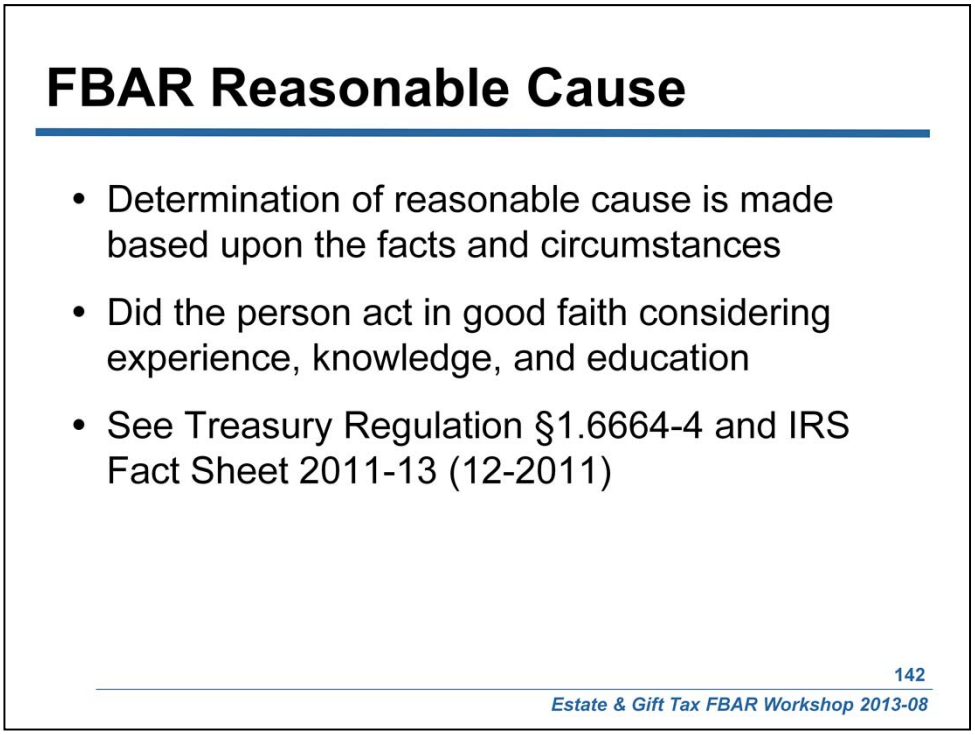
- To assert any FBAR penalties, you must prove that there was an FBAR violation
- You must prove each of the statutory requirements to file an FBAR (review Topic 1, if necessary):
  - A U.S. person
  - With a financial interest in, or signature or other authority over
  - Foreign financial accounts
  - The aggregate value of which exceeded $10,000 at any time during the calendar year

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

To prove that the person had filing requirement, you must prove each of the bulleted items on the slide.

Investigate the Case—
Step 2: The Appropriate Penalty

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



Both of those documents mentioned are in the handout package:

Treasury Reg § 1.6664-4, **Reasonable cause and good faith exception to section 6662 penalties.**

IRS Fact Sheet 2011-33 (12-2011), **Information for U.S. Citizens or Dual Citizens Residing Outside the U.S.**

FBAR Reasonable Cause (cont.)

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

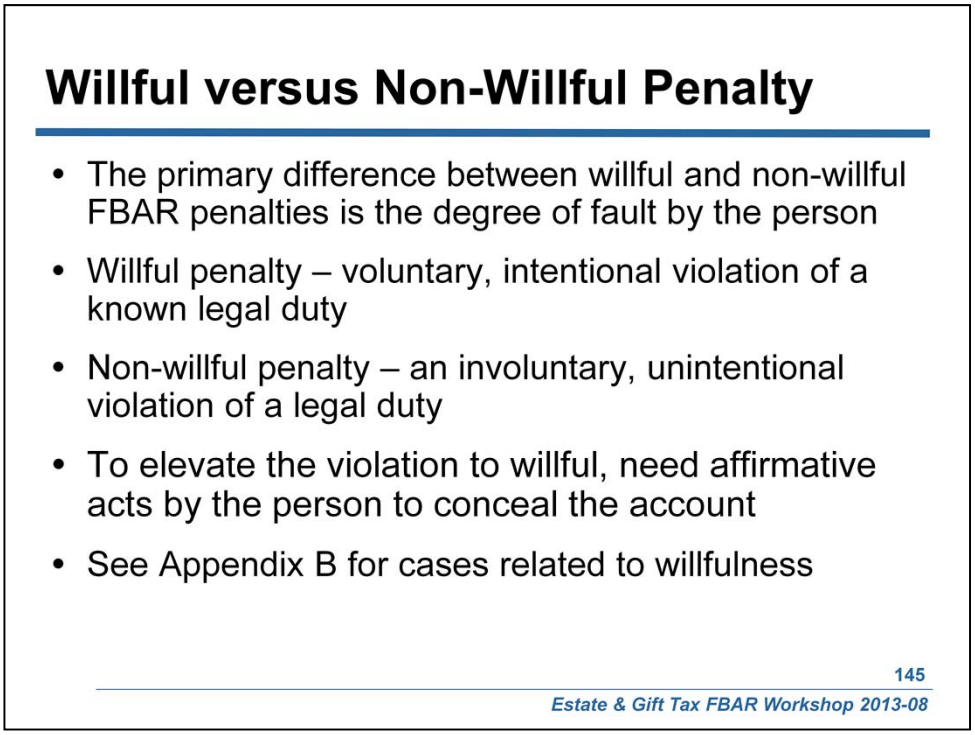
As you are investigating the FBAR penalty case, remember that you must address the issue of reasonable cause. Was there some event, condition, or reason that prevented the person from timely filing the FBAR? Did the person consult a qualified tax professional for advice? Remember that an uninformed belief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

If there is reasonable cause, and the person filed correct or corrected FBARs, you cannot assert an FBAR penalty.

However, where you discover a violation, even if the violation is due to reasonable cause, you should issue an FBAR warning letter, Letter 3800, to establish the person's knowledge of the FBAR filing requirement in the event there are future FBAR violations.

Reasonable Cause for Willful Actions?

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



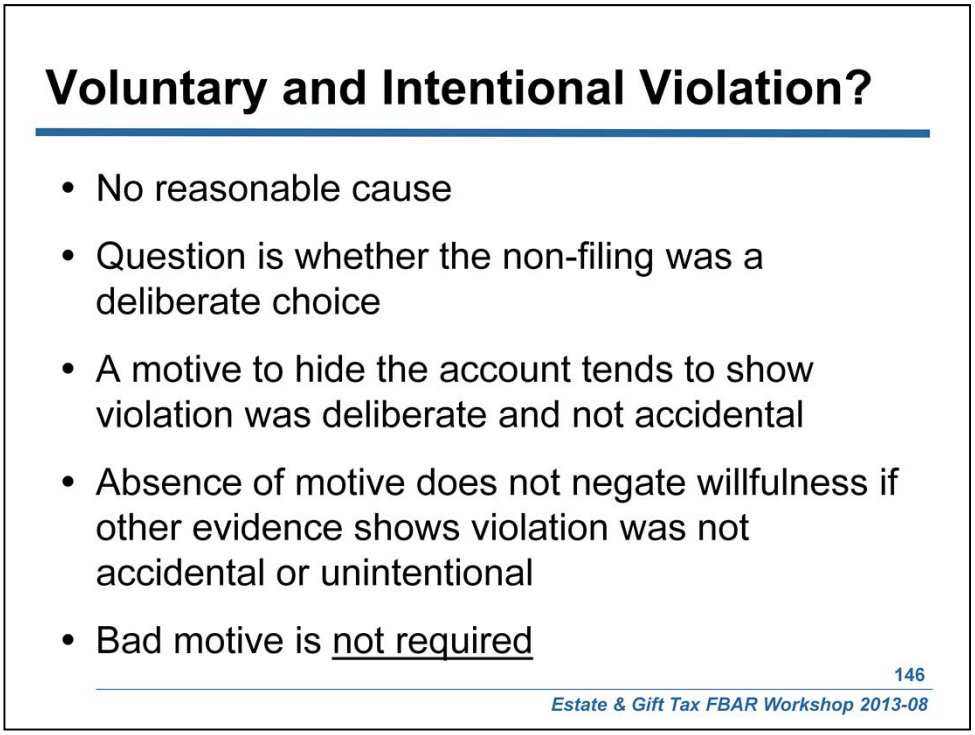
There are two FBAR penalties, one for willful violations and one for non-willful violations. The primary difference between willful conduct and non-willful conduct is the degree of fault of the person who failed to file the FBAR.

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

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

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

See Appendix B for cases related to willfulness.



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

Was FBAR a Known Legal Duty?

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

(b) (7)(E)

(b) (7)(E)

Evaluate Your Evidence

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

Willful or Not?

Factors tending to support a willful penalty

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

Factors tending not to support a willful penalty

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

Willful or Not? (cont.)

Factors tending to support a willful penalty

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

Factors tending not to support a willful penalty

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

Willful or Not? (cont.)

Factors tending to support a willful penalty

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

Factors tending not to support a willful penalty

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

Willful or Not? (cont.)

Factors tending to support a willful penalty

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

Factors tending not to support a willful penalty

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

Willful or Not? (cont.)

Factors tending to support willfulness

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

Factors tending not to support a willful penalty

- (this side is intentionally blank)

Willful Blindness

- Willful blindness is a voluntary, intentional, reckless failure to discover a legal duty (willful ignorance, intentional avoidance, blatant ignorance)
  - Prove by circumstantial evidence
  - Evidence subject to different interpretations
- Show the person was in a position to acquire the necessary knowledge
  - A weakness in your case would be if the person argues he did not know or even had reason to know that he had to report the account (and you can't show otherwise)

(b) (7)(E)

See Appendix B, Cases.

Willful Blindness (cont.)

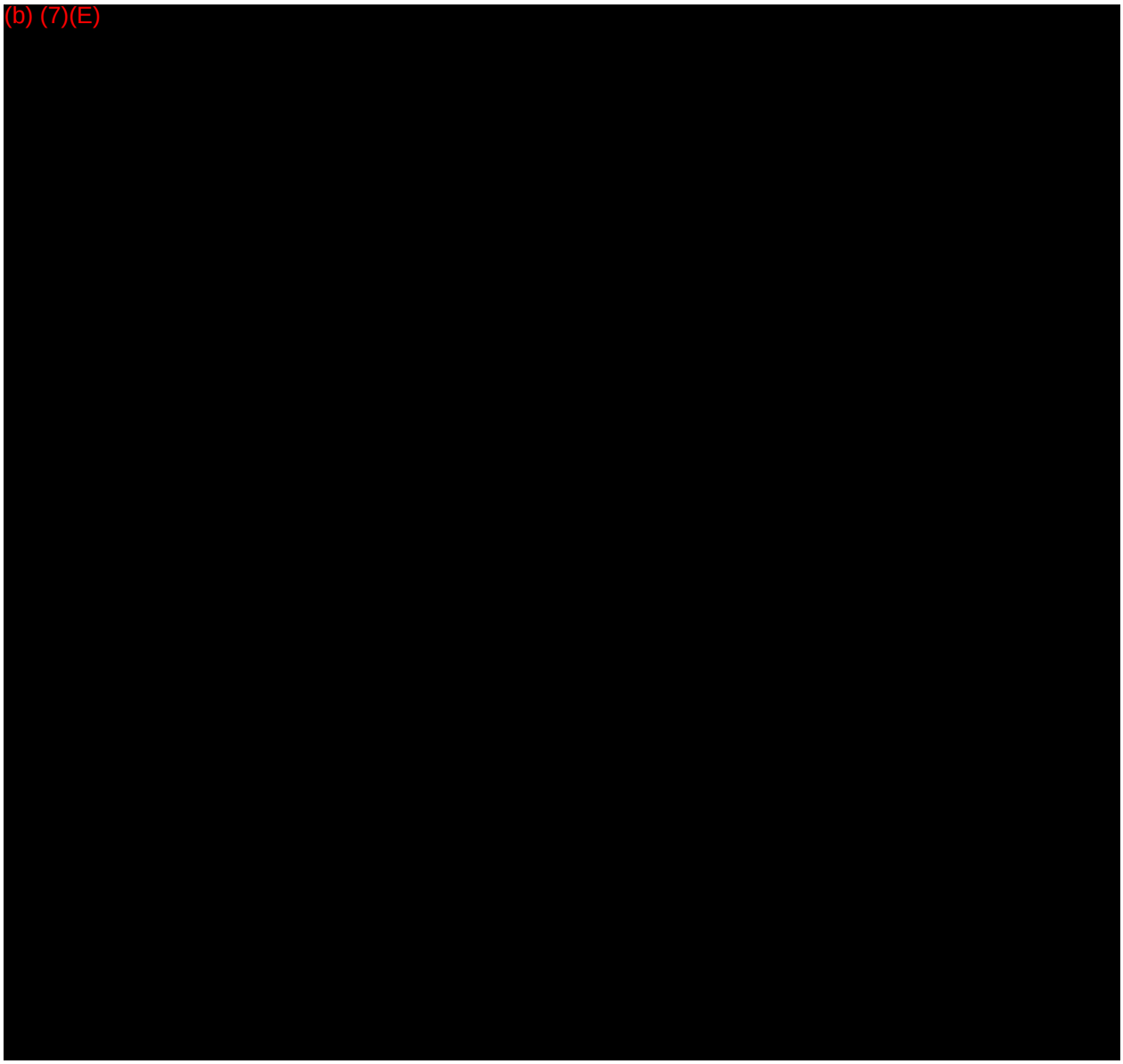
- Key factors
  - Extraordinary acts or complexity to conceal the account
  - A desire not to contradict strong beliefs or desires
  - Bad faith
- You must make the case for willful blindness
  - Link the facts
  - Tell a story
  - Argue weight of evidence
  - Failing to report was necessary to carry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

(b) (7)(E)

Willful Blindness – Extraordinary Actions Taken?

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

(b) (7)(E)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Willful Blindness – Contradict the Person's Beliefs

- If the person is not a natural-born U.S. citizen
  - Consider the tax system in the country of origin
  - Ask about steps taken to become familiar with U.S. laws
- Does business in foreign countries?
- Compliance with other state or local laws
- Other indications that show the person objects to disclosing information to the government

(b) (7)(E)


(b) (7)(E)

Willful Blindness – Contradict the Person's Beliefs

- Beliefs on taxability of income, gifts, etc.
  - Basis for belief
  - Who was consulted (is foreign person qualified)?
  - Compare and contrast source of advice with other sources of advice in other areas
  - Obtained second opinions?
- Disclosed foreign account to return preparer or other tax professional?
  - U.S. bank accounts, but not foreign accounts
  - Did return preparer ask about foreign accounts—get intake form?
  - Foreign accounts question on Sch. B, Form 1040 (or other returns)

(b) (7)(E)

(b) (7)(E)

Willful Blindness – Bad Faith

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

(b) (7)(E)

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Interview the Return Preparer

- Included in Appendix C to this PowerPoint are the slides that go into extensive detail about interviewing the return preparer

(b) (7)(E)

Interview the Taxpayer

- Included in Appendix D to this PowerPoint are the slides that go into extensive detail about interviewing the taxpayer

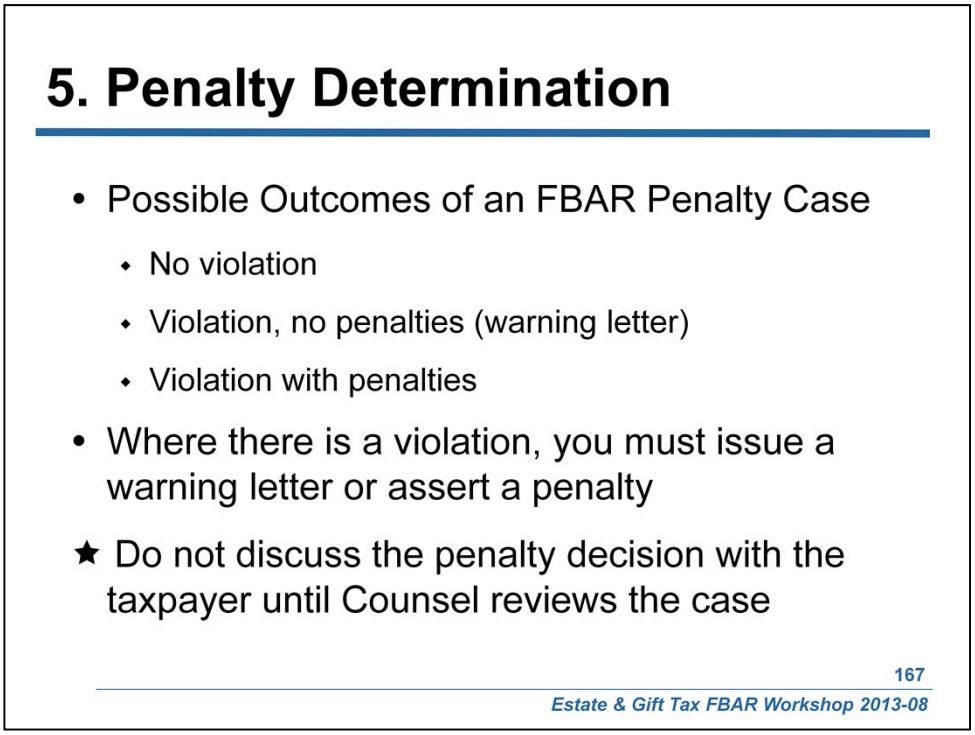
A Note About Summonses

- Title 26 summons, Form 2039, may be used **if** the TM approved your RSM (Form 13535), **and** the information can also be used in the Title 26 matter. See IRM 4.26.17.3.1(2)(c).
- If there is no approved RSM, or the information will not be used in the Title 26 case, a BSA Title 31 summons must be used. See IRM 4.26.17.5.3 and 4.26.8.3.

FBAR Penalty Case Outline

Introductory information

1. Discover a potential FBAR violation
2. Secure a Related Statute Determination (RSD)
3. Establish FBAR administrative controls and set up your FBAR case
4. Investigate the case
5. **Determine the appropriate penalty**
6. Close the case
7. Appendices



Now that you've investigated the case, determining there was an FBAR requirement and a failure to file (or an incomplete filing) or a failure to keep the required records, you need to determine the penalty applicable to your facts, if any.

If you will be asserting a penalty, the case will need to go to Counsel for approval *before you discuss the penalty decision with the taxpayer.*

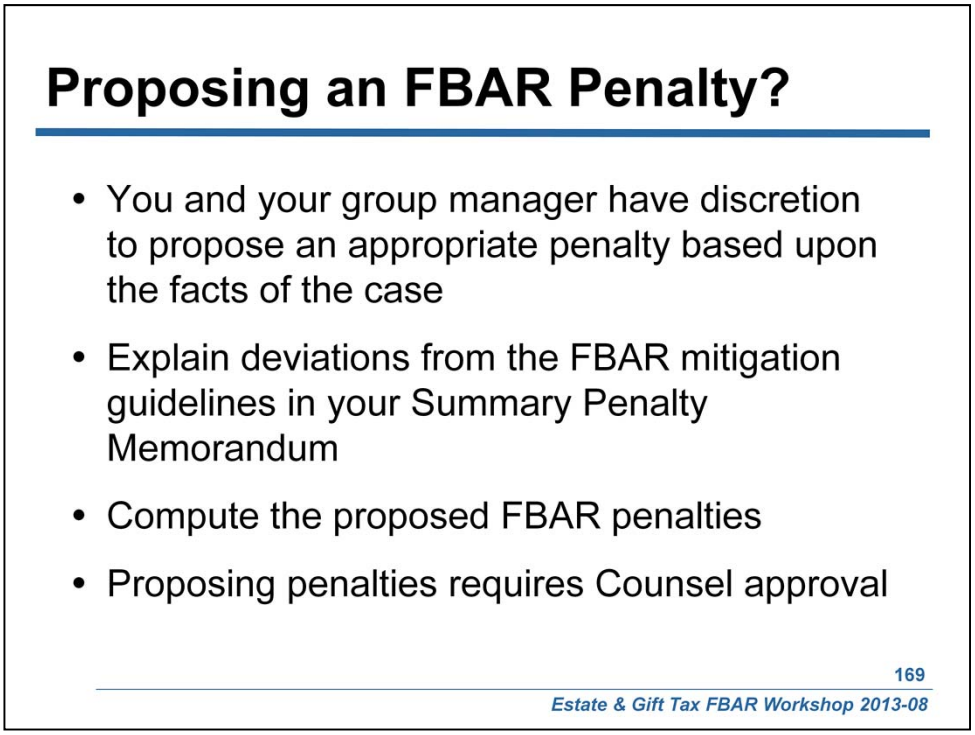
First, we'll go over what the penalties are, then get into more specifics and examples, including mitigation of the penalties under the IRM, then what to do based on your conclusions.

FBAR Civil Penalties

1. The statute does not define "violation"
   - Example: For three years a person failed to file FBARs to report two accounts each year. Is that—
     - 6 violations: one per account per year?
     - 3 violations: one per year for the unfiled FBAR?
     - 1 violation: one for the entire three-year period?

2. You and your manager have flexibility to compute an appropriate non-willful penalty based upon the facts of the case. For example, in the case where you have:
   - Strong indications of willfulness but cannot prove willfulness
   - Some willful conduct, but not enough to assert willful penalty

Two significant things to consider when determining the penalties for your case (the above), which also brings us to possible mitigation of these penalties under the IRM.



Once you have shown both that:

- the person had a requirement to file an FBAR, and
- that the person failed to file the FBAR,

you need to determine the appropriate penalty.

Under the FBAR penalty mitigation guidelines in the IRM, **you and your manager have the discretion** to propose an appropriate penalty based upon the specific facts of the case.

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

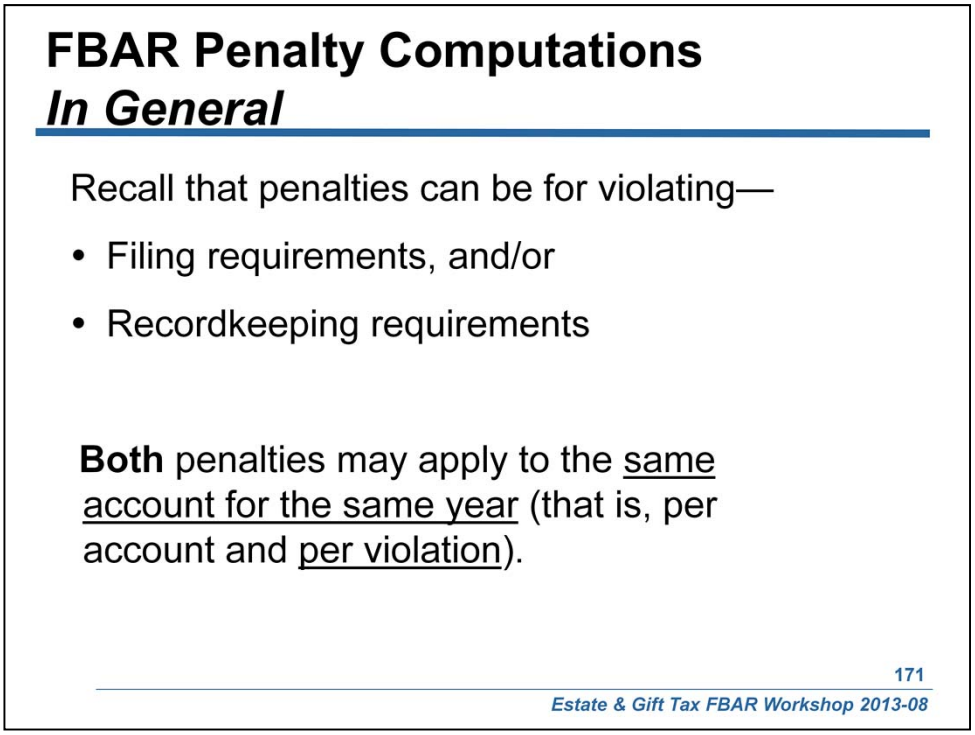
You must also compute the amount of the proposed penalty. (Counsel will not compute it for you.)

If Taxpayer Refuses to File FBARs or Delinquent FBARs

If the taxpayer refuses to provide delinquent FBARs, or FBARs are not provided within 30 days after receipt of Letter 3800, Warning Letter—

- The ETA and the manager will make a determination about the appropriate penalty, considering that the failure to provide delinquent FBARs is a failure to cooperate, which may prevent mitigation of penalty amounts.

Remember that as of July 1, 2013, all FBARs, including delinquent or amended FBARs, must be filed electronically. For more information, see Examiner Guidance—FBAR E-File and Delinquent or Corrected FBARs on the E&G sharepoint (FBAR folder).



Penalty Computations in general, IRM 4.26.16.4.

For filing requirements, see 31 CFR 1010.350 (formerly 31 CFR 103.24)

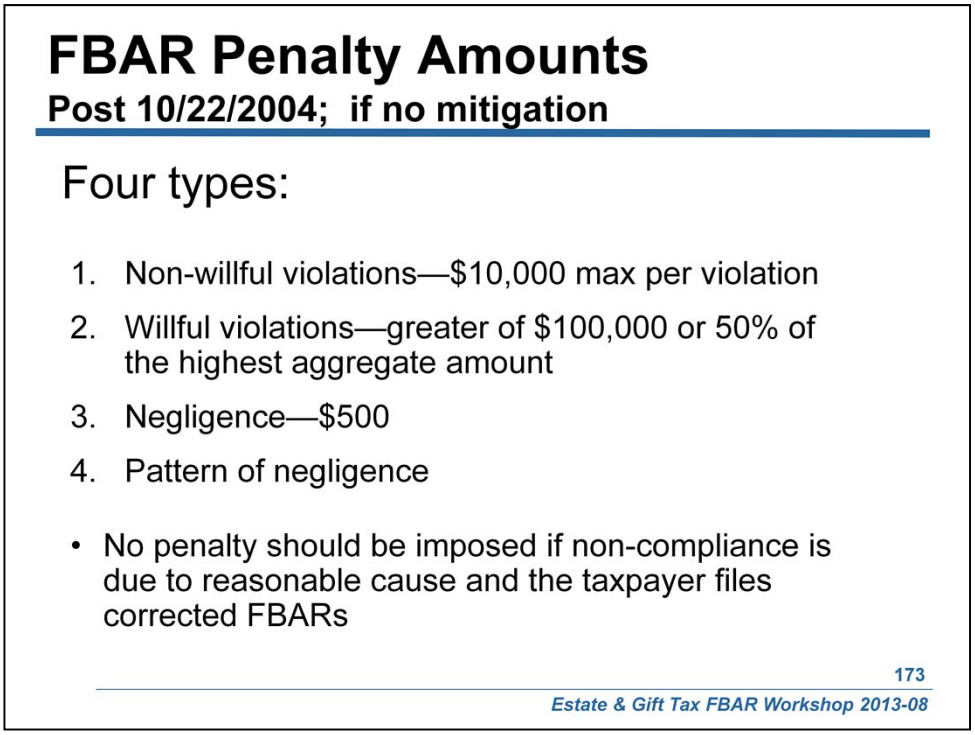
For recordkeeping requirements, see 31 CFR 1010.306 (formerly 31 CFR 103.32)

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 person. The value of the account is not reduced by half because there are two owners.

However, see IRM 4.26.16.4(3) and (4), which mentions warning letters, and that penalties are asserted only to promote compliance with FBAR reporting and recordkeeping requirements.

What are the Penalties?



The IRM sections applicable here are 4.26.16.4.3, and 4.26.16.4.4.

1. **Non-willful violations**— 31 USC § 5321(a)(5)(A) and (B)

   The IRM advises that the penalty should not be imposed if:

   - Reasonable causes exists and
   - Delinquent FBARs are filed

2. **Willful violations**— 31 USC § 5321(a)(5)(A) and (C)

   - The penalty ceiling is the greater of $100,000 or 50% of the balance in the account at the time of the violation. This penalty applies to any person (individual or business) who has willfully violated the FBAR reporting **or** recordkeeping provisions (June 30).

3. Negligence— 31 USC § 5321(a)(6)(A)
4. Pattern of negligence— 31 USC § 5321(a)(6)(B)

Warning: The FBAR regulations, 31 CFR 1010.820 (formerly 31 CFR 103.57) have **not** yet been revised to reflect changes in:

- Negligence penalty, 31 USC 5321(a)(6)(A): applicability extended to all businesses [not just financial institutions], effective 10/27/2001.
- Willfulness penalty, 31 USC 5321(a)(5)(C): ceiling increased effective 10/23/2004.

FBAR Penalty Amounts (cont.)
Post 10/22/2004; if no mitigation

Non-Willful Violations

- Applies to individuals and business entities
- Maximum $10,000 max per violation
- Reasonable cause exceptions may apply if foreign transaction or account balance was properly reported on a delinquent or amended FBAR
- Mitigation guidelines are available

Non-willful violations— 31 USC § 5321(a)(5)(A) and (B) and IRM 4.26.14.4.4.

FBAR Penalty Amounts (cont.)
Post 10/22/2004; if no mitigation

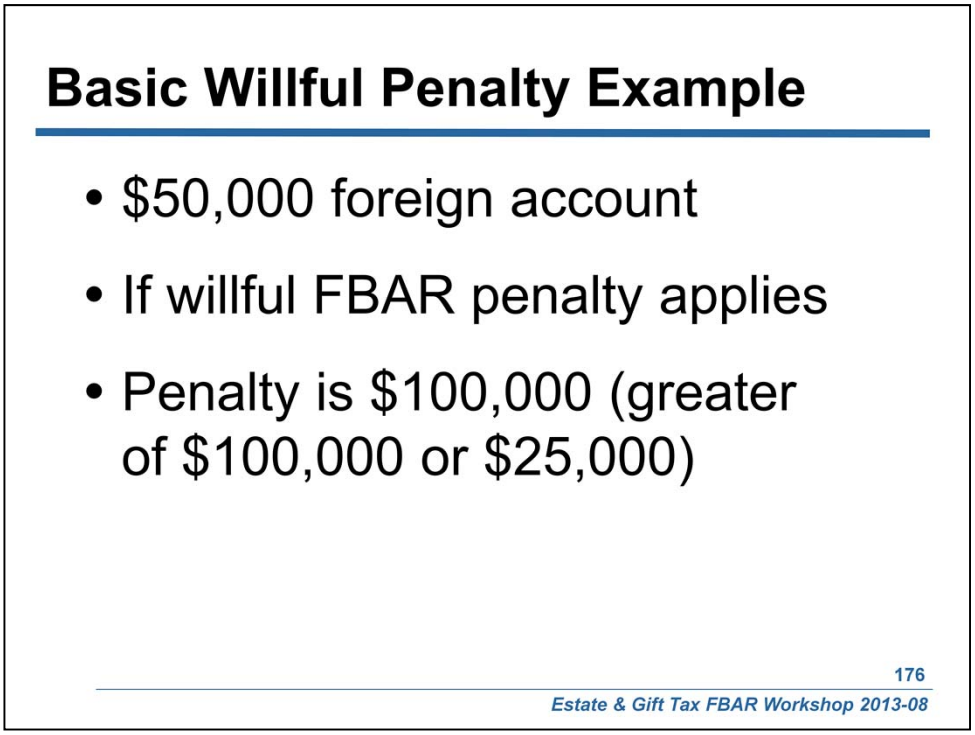
Willful Violations

- Applies to individuals and business entities
- Maximum is greater of
  - $100,000, or
  - 50% of transaction amount or account balance
- No reasonable cause exception (if no mitigation!)
- Mitigation guidelines are available

Willful violations— 31 USC § 5321(a)(5)(A) and (c), and IRM 4.26.14.4.5.

Note that your local Fraud Technical Advisor (FTA) can assist in determining whether or not there was a willful violation, and also provide the examination with information concerning referrals to Criminal Investigation (CI).

If you believe you will have penalties for a willful violation, get the FTA involved early because the FTA will have to review your willful penalty write-up before it goes to Counsel.



Review willfulness in Topic 4.

See IRM 4.26.16 and .17 for types of evidence you should look for.

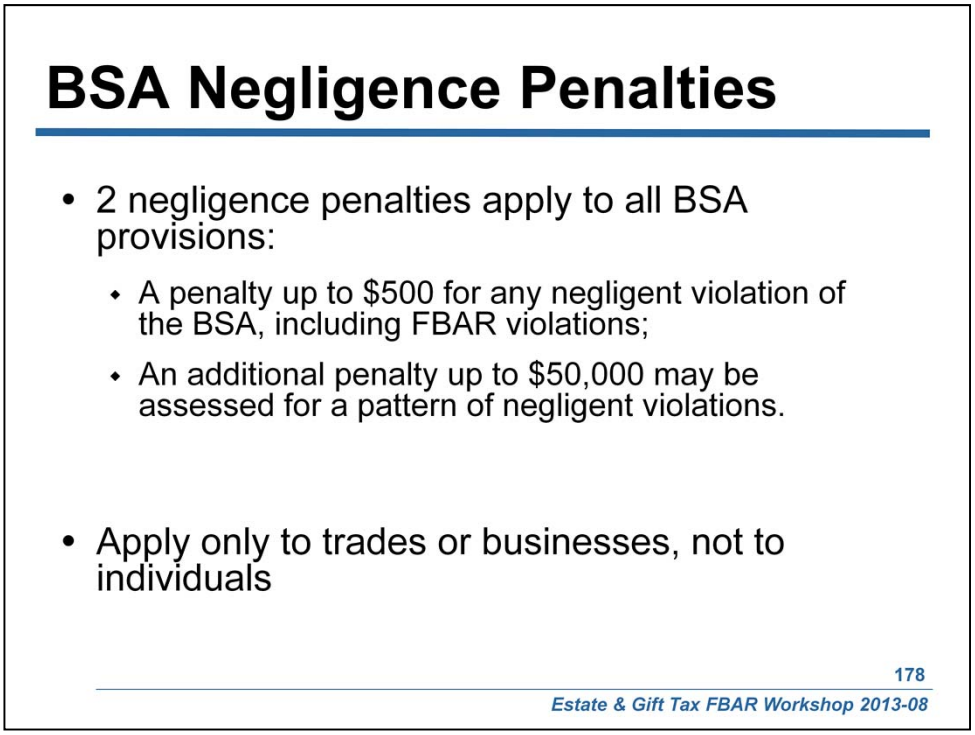
FBAR Penalty Amounts (cont.)
Post 10/22/2004; if no mitigation

Negligence and Pattern of Negligence

- Applies only to business entities
- Maximum $50,000 penalty per entity
- No reasonable cause exception
- No mitigation

Negligence— 31 USC § 5321(a)(6)(A), and IRM 4.26.16.4.3.

Pattern of negligence— 31 USC § 5321(a)(6)(B), and IRM 4.26.16.4.3.5.



This slide is entitled BSA Negligence Penalties just to remind you we're talking about BSA penalties, not your typical negligence penalties under Title 26.

The general principles of negligence apply:

- Ordinary care
- Standard business practices
- IRC § 6664 type factors
- Reasonable cause

Example: Multiple FBAR Penalties for One Account (without mitigation)

Three siblings jointly own an account with a balance of $120,000, and no FBARs were filed.

- Willful penalty would be $300,000 ($100,000 per accountholder).

Recall that:

- FBAR penalties are determined per account for each year.
- FBAR civil penalties apply to each person required to file an FBAR.
- There may be multiple penalty assessments if there is more than one account owner, or if a person other than the account owner has an FBAR filing requirement for the foreign account.
- Each person can be liable for the full amount of the penalty.

This example could obviously extend to:

- surviving joint tenants or other co-owners of a foreign account, or
- joint owners of a gifted foreign account

Another Example (without mitigation)

John has 5 offshore accounts each with a $50,000 balance. Consider that the willful penalty applies.

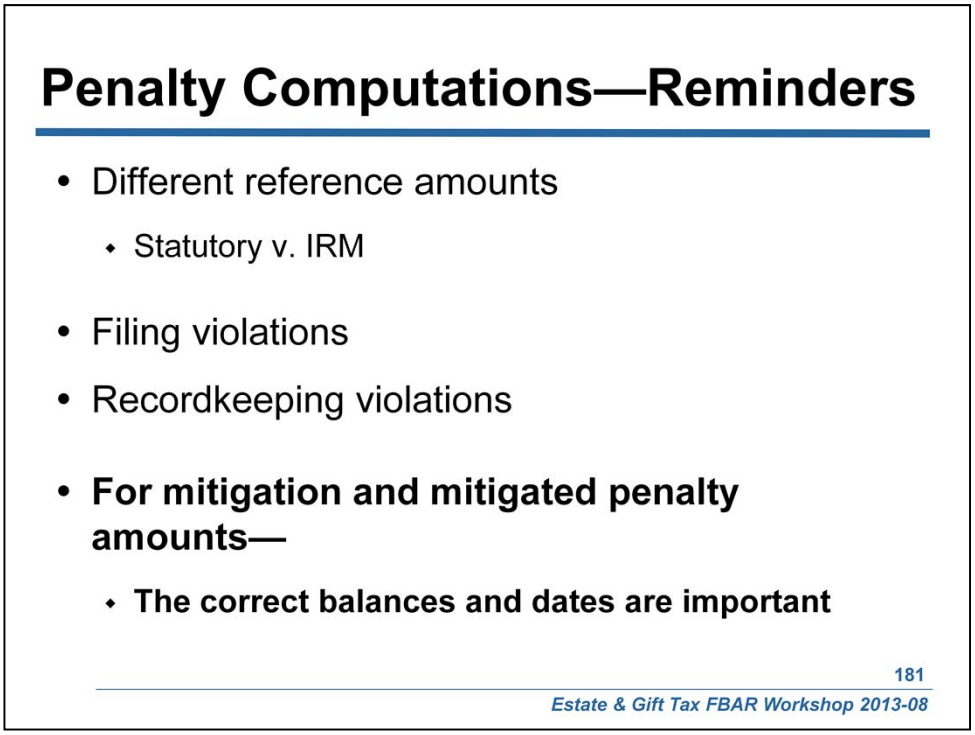
- The penalty would be 5 times $100,000 = $500,000.
- If he had one account with $250,000 balance, the willful penalty would be $125,000.

To extend this example (again, this example is without mitigation):

If John and Jane, children and beneficiaries of your decedent, inherited these 5 offshore accounts with $50,000 balances—

- If the willfulness penalties applies, the (5 times $100,000 =) $500,000 penalty could apply to each. Each could be liable for the full amount of his/her own penalty. Neither the balances nor the penalties are divided by two.

- Also keep in mind that if the non-filing were for 2 years, these penalties could apply for each year.



a. Different reference amounts are used to compute the **statutory** penalty ceiling under the Title 31 Code & Regulations, and **mitigated** penalty maximums under the IRM.
    1. The statutory penalty ceilings are based on account balances on the "**violation date**", per Title 31 Code & Regs.
    2. The mitigated penalty maximums are based on highest account balance during the **calendar year**, per the IRM.

b. Filing violations – The FBAR **due date** is the violation date. [Remember, there's no extension to file, and the statute commences with or without a filing.] The balance in account at the close of the following June 30 [which is the due date] is the statutory penalty ceiling calculation amount. IRM 4.26.16.4.5.5(4). Remember also that these penalty amounts are before mitigation.

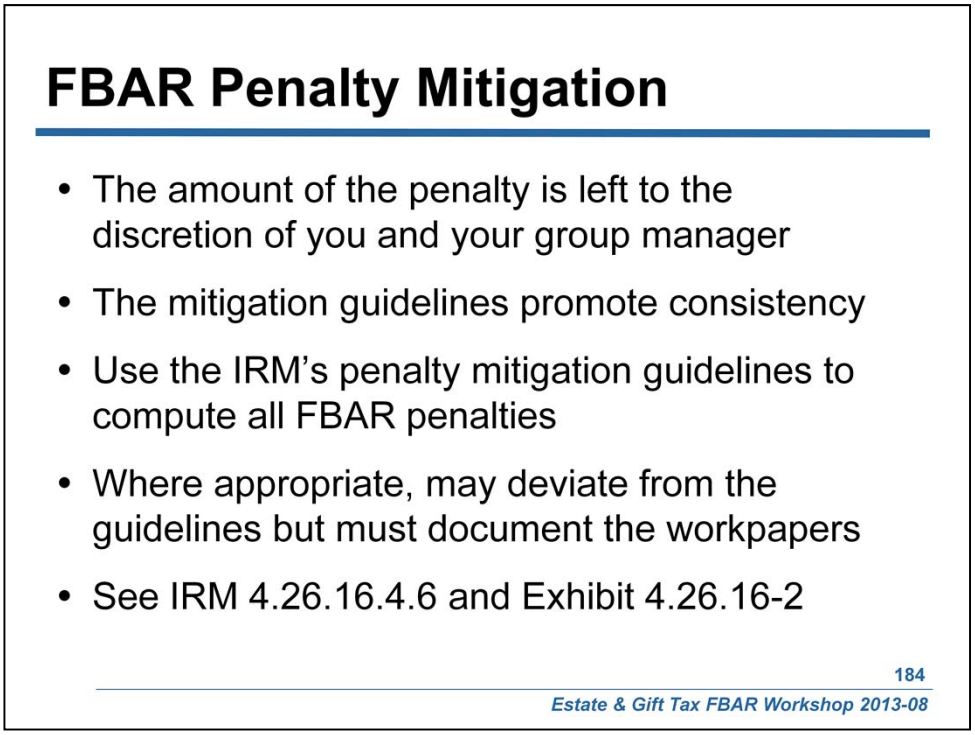
c. Recordkeeping violations – The date you request records is the violation date. That's the IDR date. [see **IDR date**, Step #13 of the E&G FBAR lead sheet.] The balance in the account at the close of the day the records are requested [IDR date] is the statutory penalty ceiling calculation amount. IRM 4.26.16.4.5.5(5).

d. For mitigation levels and mitigated penalty amounts, you need maximum aggregate balances and maximum separate balances in each account **during the calendar year,** as opposed to the “due date” or “IDR date” balances used to determine statutory penalty ceilings. IRM Exhibit 4.26.16-2.

Because the primary purpose of the FBAR penalty is to effect compliance, the IRM gives you and your manager discretion to mitigate the penalties. Let’s look at mitigation now.

Is This Fair?

Is This Over?



FBAR civil penalties have upper limits, but no floor.

Your discretion (e.g., use of the IRM mitigation guidelines) 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.

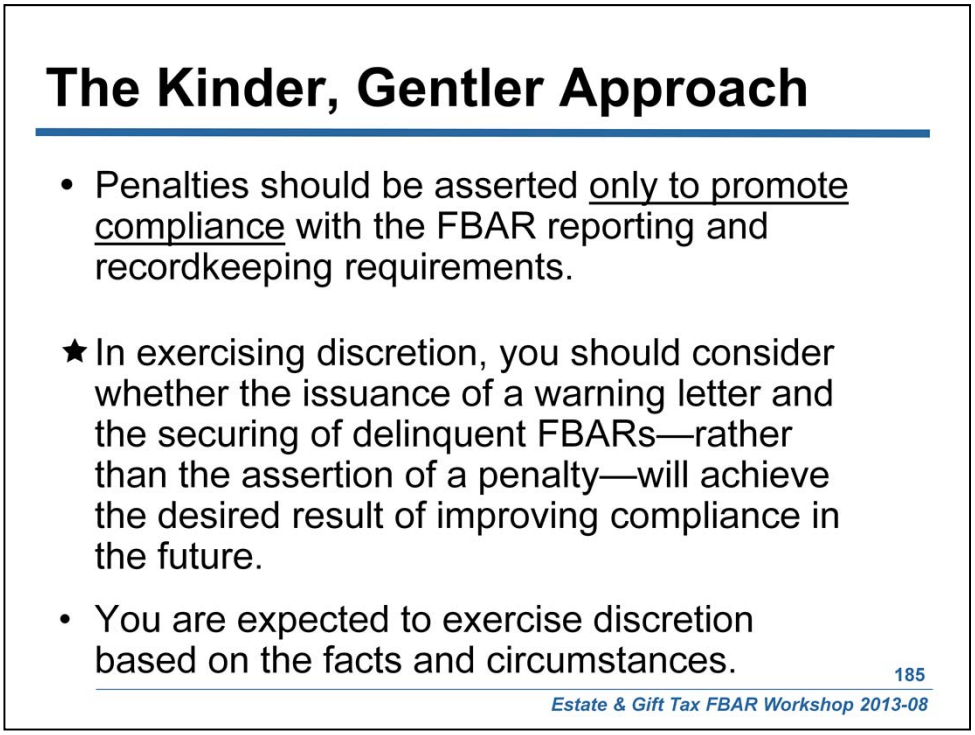
The FBAR mitigation guidelines allow you to determine the appropriate FBAR penalty to assert based upon the facts and circumstances of the case.

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 you should use the penalty mitigation guidelines to compute FBAR penalties.

You may deviate from the guidelines where the facts of the case warrant either a lesser or greater penalty amount than the amount of

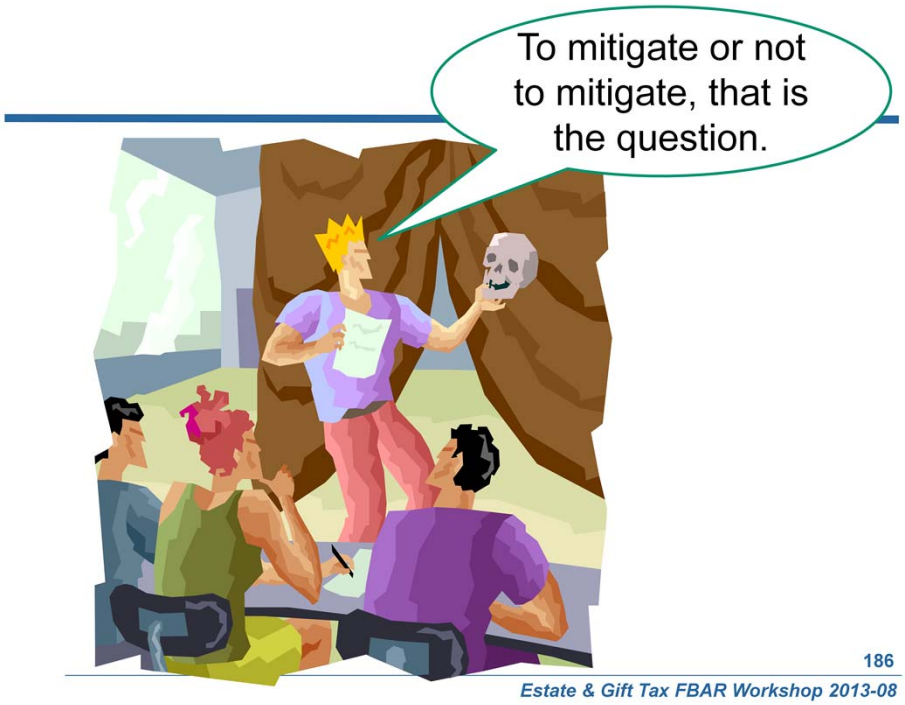
the penalty computed using the mitigation guidelines. Where you believe it is appropriate to deviate from the mitigation guidelines, you must document the reasons for the deviation in the workpapers for the FBAR penalty case.

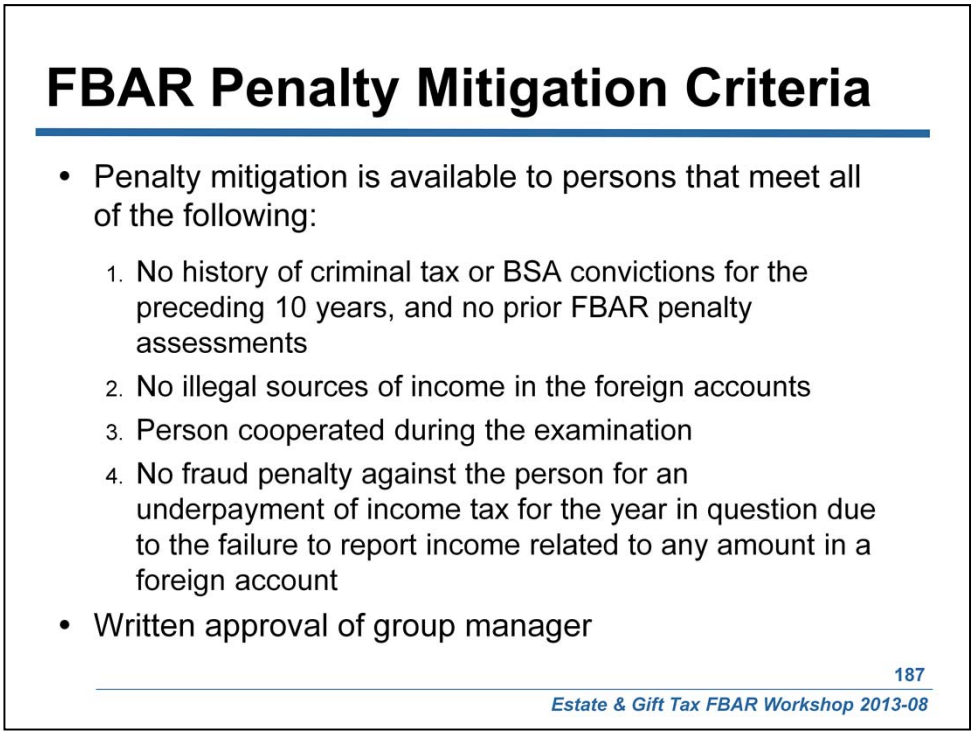
The FBAR penalty mitigation guidelines are in IRM 4.26.16.4.6 and IRM Exhibit 4.26.16-2.



Consideration of future compliance is especially important where your FBAR investigation may be against a decedent, where, technically, there is no future compliance by that taxpayer.

However, if the FBAR investigation is against the executor, who perhaps is also the child and beneficiary of the decedent, there is future compliance to consider. Even in that instance, you may use your discretion and issue a warning letter. The warning letter can be viewed as setting up continuing compliance as well as providing the taxpayer with the knowledge of the requirement of filing FBARs.

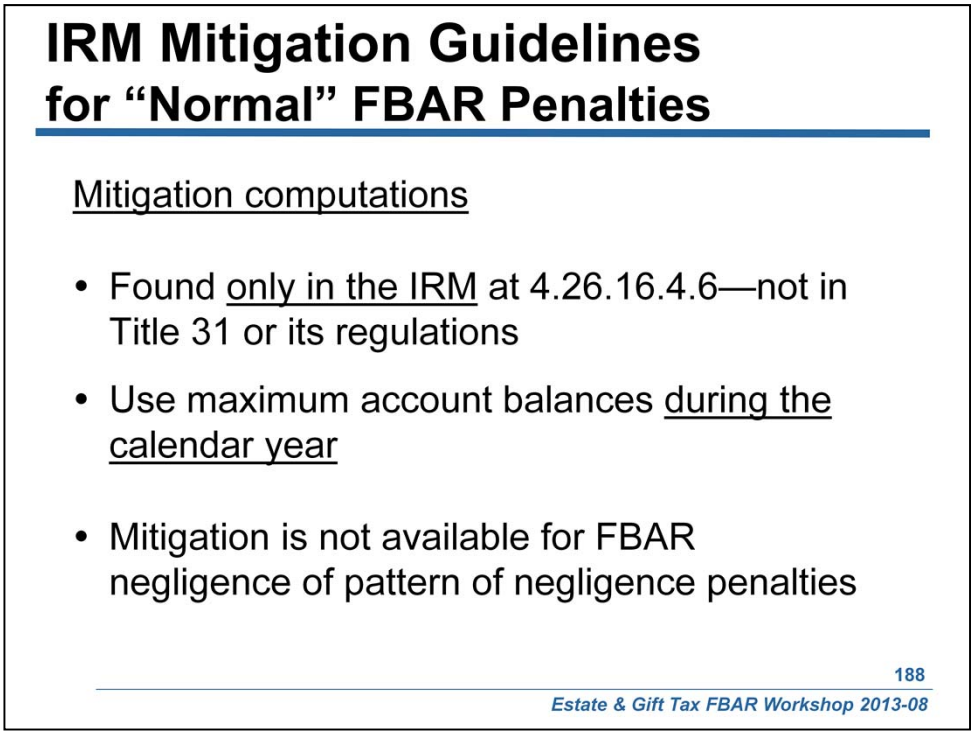

To mitigate or not to mitigate, that is the question.



FBAR penalty mitigation is available to any person that meets all 4 requirements shown on the slide.

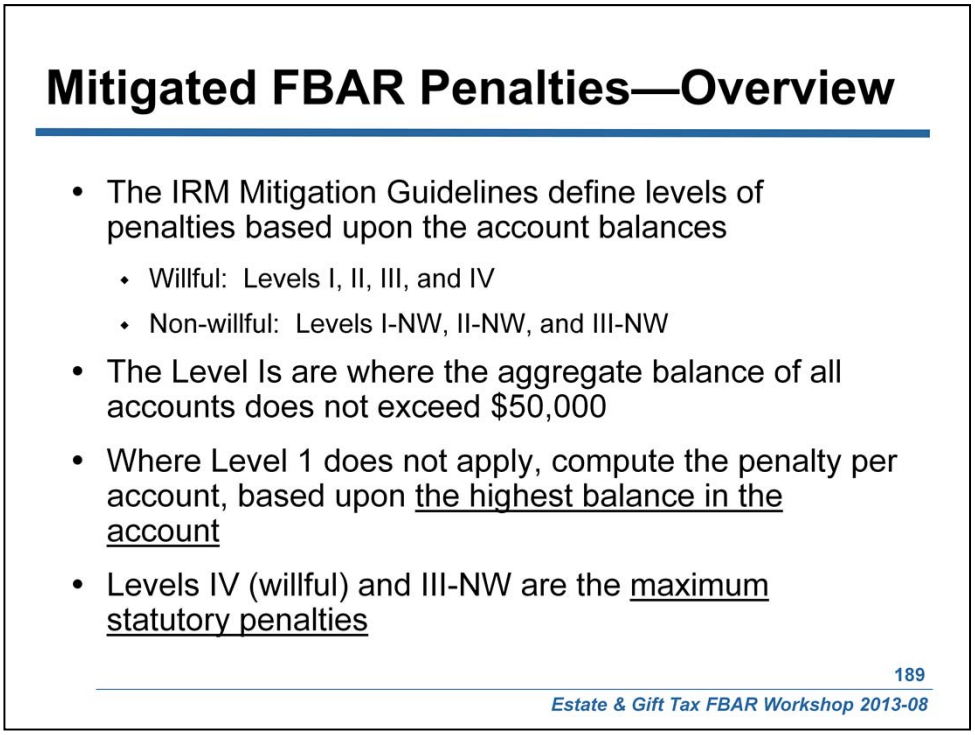
When the person does not meet the threshold conditions for mitigation (see IRM 4.26.16.4.6.1), then the mitigation guidelines found in the Exhibits to this IRM section should not be used.

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



The applicable IRM section is 4.26.16.4.6.

Mitigation is not available for FBAR negligence of pattern of negligence penalties, per IRM 4.26.16.4.3.4(2) and 4.26.16.4.3.6(2).



The phrases in this slide are underlined to highlight the fact that penalty calculations are different under the statute and the IRM. Mitigation occurs only per the IRM.

IRM Mitigation – Willful Violations

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

This table is a summary of the table provided at IRM Exhibit 4.26.16-2, Normal FBAR Penalty Mitigation Guidelines for Willful Violations Occurring After 10/22/2004 Per Person Per Year.

Level 1 Mitigation – Willful Penalties

- Applies where the 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

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. Where Level 1 does not apply, use the appropriate penalty mitigation level for each account.

Level 1 Willful Mitigation Example

- Facts: For 2011 the person failed to report three accounts. The maximum balance during the calendar year 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 x 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 are $4,000.

Level 2 Mitigation – Willful Penalties

- Level 2 applies where the 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

Level 2 willful FBAR penalty mitigation could apply to accounts held by a person that don't 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. The maximum balance during the calendar year 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

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 penalty using the Level 2 mitigation guidelines is $15,500.

Level 3 Mitigation – Willful Penalties

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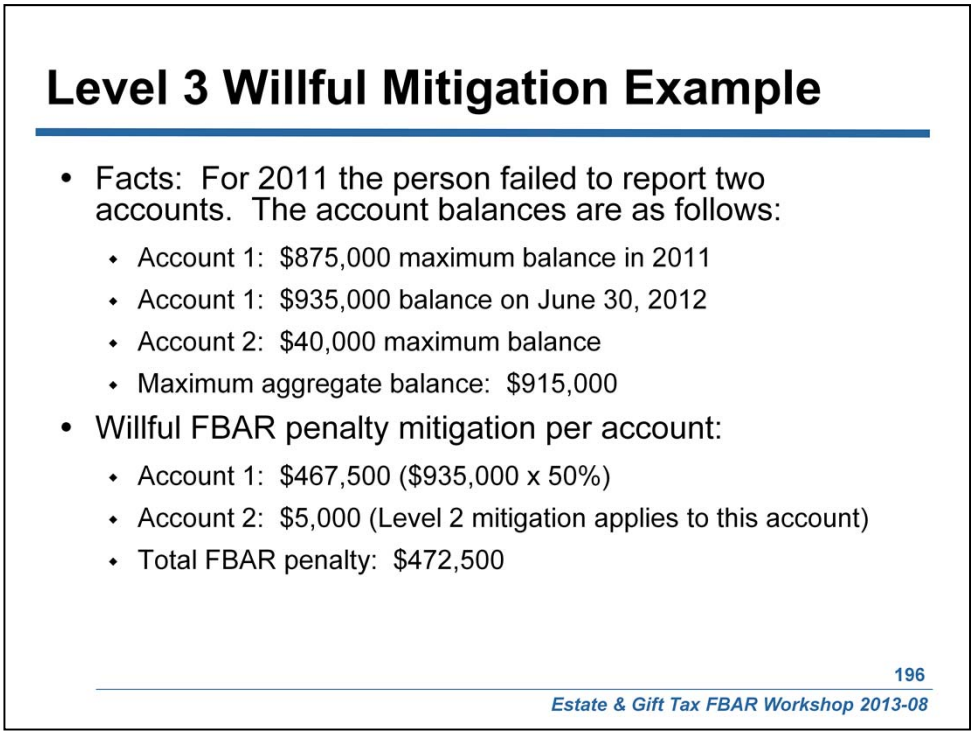
Level 3 willful FBAR penalty mitigation could apply to accounts held by a person that does not qualify for Level 1 willful mitigation because the maximum aggregate balance for all accounts to which the violations relate exceeded $50,000.

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.



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 are $472,500.

Level 4 Mitigation – Willful Penalties

- Level 4 mitigation applies where the 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)

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. The account balances are as follows:
  - Account 1: $1,370,000 maximum balance in 2011
  - 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 (sum of 2011 balances)
- Level 4 willful FBAR penalty per account:
  - Account 1: $630,000 ($1,260,000 x 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 are $730,000.

IRM Mitigation of Non-Willful FBAR Penalty

Level	Aggregate Balance	Penalty is
1-NW	< $50,000	$500 per violation – limited to $5,000 for all violations
2-NW	$50,000 up to $250,000	For each account violation: The lesser of $5,000 or 10% of the maximum balance during the year
3-NW	> $250,000	$10,000 for each account violation (statutory max)

This table is a summary of the table provided at IRM Exhibit 4.26.16-2, Normal FBAR Penalty Mitigation Guidelines for Non-Willful Violations Occurring After 10/22/2004 Per Person Per Year.

Level 1 Mitigation – Non-Willful Penalty

- Applies where the 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)

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 $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, where warranted.

Level 1 non-willful FBAR penalty mitigation is not complicated (and is similar to Level 1 Willful), so there is no example of Level 1 non-willful FBAR penalty mitigation.

Level 2 Mitigation – Non-Willful Penalty

- Level 2 applies where the maximum balance in the account to which the violation relates was at least $50,000 but did not exceed $250,000
- Penalty is the lesser of
  - $5,000 per violation, or
  - 10% of the maximum balance in the account

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. The maximum balance during the calendar year 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

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 are $6,500.

Level 3 Mitigation – Non-Willful Penalty

- Level 3 applies where the maximum balance in the account to which the violation relates exceeded $250,000 (during the calendar year)
- Penalty is $10,000 per violation (statutory maximum)

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. The he accounts balances are as follows:
  - Account 1: $875,000 maximum balance in 2011
  - 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

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 are $14,000.

Level 3 Non-Willful Penalty Example 2

- Facts: For 2011 the person failed to report two accounts. The accounts balances are as follows:
  - Account 1: $1,370,000 maximum balance in 2011
  - 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

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 are $20,000.

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

Reporting v Recordkeeping

- There may be both a reporting and a recordkeeping violation regarding each account.
- Penalty is calculated per account and per violation.
- 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 IRM §§ 4.26.16.4(3) and (4).

Ah yes, remember that for FBAR there are two broad categories of penalties—for failure to file, and for failure to keep the required records.

Reporting v Recordkeeping Violations

Reporting/Filing	Recordkeeping
• The violation date is the due date – June 30.	• The violation date is the date that the examiner first requests records.
•The amount in the account at the close of June 30th is the amount to use in calculating the penalty (before mitigation).	• 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 violation penalty.

How to Calculate Recordkeeping Penalties

- The penalty structure shown in the many previous slides also applies to the failure to keep FBAR records
- For more information on FBAR recordkeeping, see IRM 4.26.16.3.8 and .9

Examiner's Discretion

- If there was an FBAR violation but you determine that a penalty is not appropriate, you should issue the FBAR warning letter, Letter 3800.
- You 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).

Now we're going to talk about the discretion you have, as an examiner, in determining the appropriate penalty given the facts of your case.

Examiner's Discretion

Given the magnitude of the maximum penalties permitted for each violation,

- 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.

This is a very important slide.

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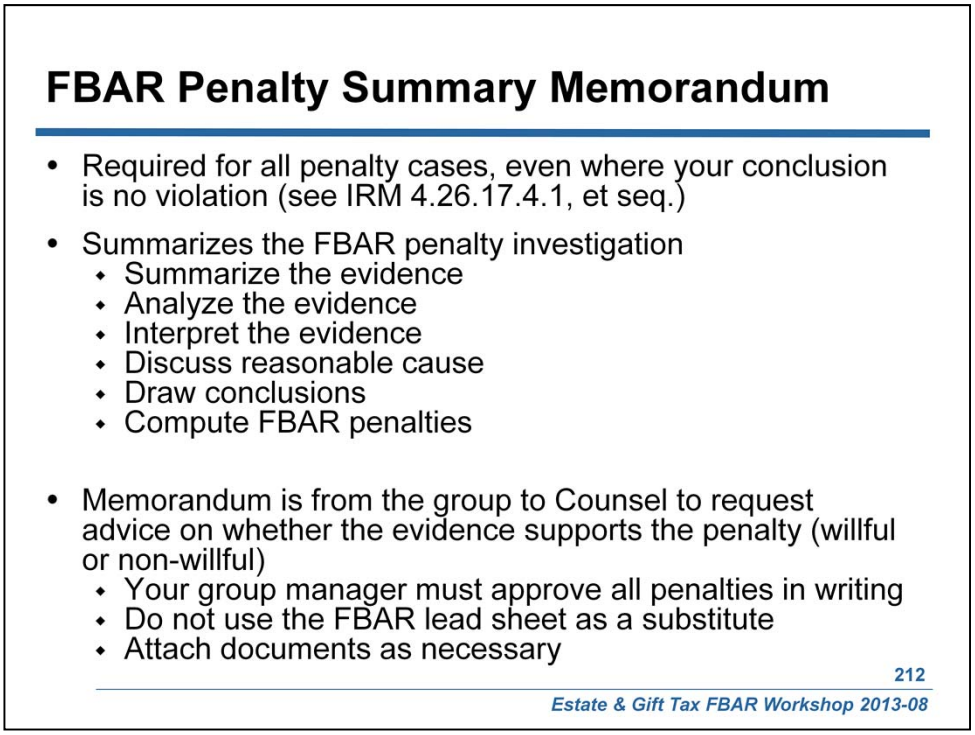
If You Are Asserting Penalties

- Recall that penalties should not be discussed with the taxpayer until after Counsel has reviewed your Summary Penalty Memorandum



The FBAR penalty Summary Memorandum ("Summary Memorandum" or "Summary Memo"), must be a form memo to Counsel, and Counsel will provide a written reply. Therefore, do not use the E&G FBAR lead sheet as a substitute for this memorandum: Prepare a separate, formal memorandum.

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.

Where necessary, attach supporting documents to the Summary Memo. Prior to sending the memo package to Counsel, you or your manager

should discuss with Counsel what documents to include.

Prior to sending the memo to Counsel, the FBAR coordinator needs to review it. A fraud technical advisor reviews only those penalty memos where you are proposing willful FBAR penalties.

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 Summary Memorandum (cont.)

- 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)
- For cases where the person contests the FBAR penalty assessment, may be used in the court proceedings

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 the 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.

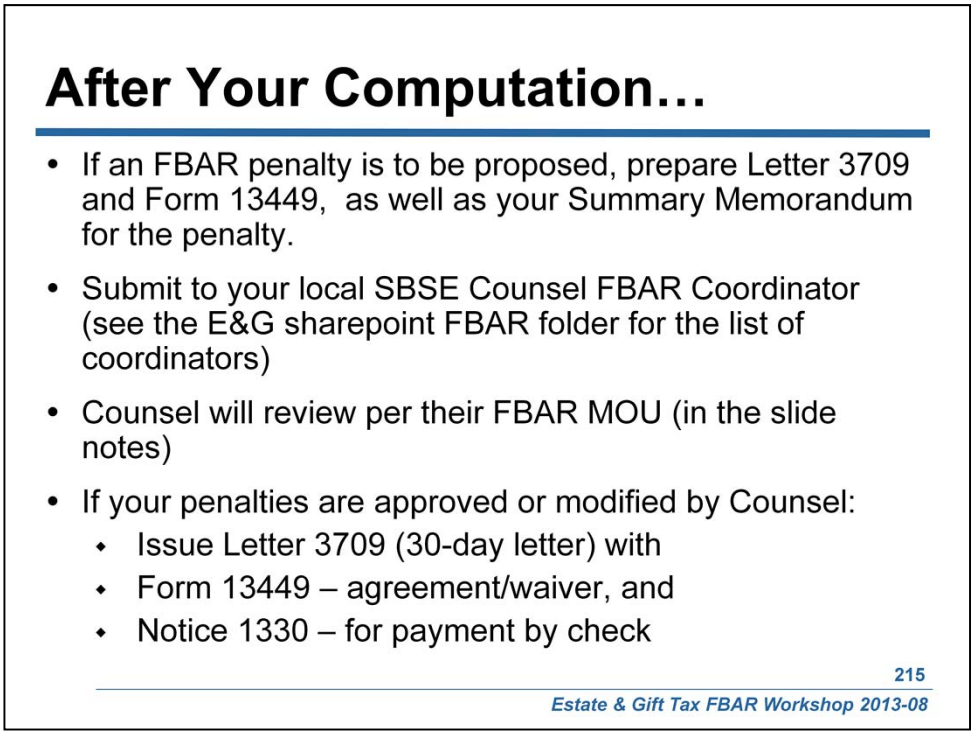
In the event the IRS assesses the FBAR penalties, and the person contests the assessments, the FBAR penalty memorandum will assist with preparing the case for trial.

Summary Memorandum Review

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

No Counsel review is required for:

- Special programs, e.g. LCCI
- No penalty is recommended
- Warning Letter cases (Letter 3800)



Note that as of August 2013, interim guidance being considered and/or being drafted regarding Letter 3709 and the provision of alternative positions with respect to willful FBAR penalties. When the guidance is issued, the E&G FBAR lead sheet will be updated.

Counsel Review

Memorandum of Understanding between SB/SE Deputy Director, Compliance Policy and Division Counsel, Small Business/Self-Employed Concerning Counsel Review of Proposed FBAR Penalties

This memorandum of understanding describes procedures for formal Counsel review of proposed FBAR penalties, including when Counsel review should occur, the time limits for review, and the manner of review. In addition to seeking formal review prior to proposing a penalty, examiners are encouraged to seek Counsel assistance during the course of FBAR examinations.

1. From the date of this memorandum, until July 1, 2004, Counsel FBAR Area Coordinators (Coordinators) will review all proposed FBAR penalties, except as noted below. On July 1, 2004, Division Counsel and Reporting Enforcement will consider whether review should be performed by local SBSE attorneys, with assistance as necessary from the Coordinators.

2. Counsel will not review, except as requested by SBSE, FBAR penalties in special program situations such as the Last Chance Compliance Initiative in which participants in the Initiative and pursuant to the initiative have agreed to the assertion of the FBAR penalty.

3. Counsel will not review cases, except as requested by SBSE, in which SBSE has determined that there is no FBAR issue or that the issuance of Letter 8300 (FBAR warning letter) rather than imposition of the FBAR penalty is appropriate.

4. FBAR examiners will submit FBAR cases for Counsel review prior to issuing Letter 3709 (FBAR 30-day letter) and Form 13449 (FBAR Agreement to Assessment and Collection).

5. Counsel will render its legal advice within 45 days. If coordination with an Associate Chief Counsel is necessary and will cause a delay, Counsel will inform the FBAR examiner of the potential delay. Counsel will also work with the client to establish a shorter time frame for review if expedited review is needed.

6. Counsel will prepare a written review of the FBAR case. If Counsel recommends issuance of the FBAR 30-day letter, the review should be designed to assist Appeals in the event that the case is appealed. If Counsel does not recommend issuance of the FBAR 30-day letter, the review should state the reasons for the disagreement. If the disagreement is based upon inadequate factual development, the review should recommend areas for further examination.

7. If, after Counsel review of a proposed FBAR penalty, the examiner determines additional factors that warrant reducing the proposed penalty, the examiner may reduce the penalty. The examiner will not, however, increase

penalties without obtaining further Counsel review.

8. Counsel will maintain records of the number of FBAR cases submitted for review, the number approved by Counsel, and the number returned by Counsel for further development or other reasons.

9. In July 2004, the Director, Reporting Enforcement and the Division Counsel will consider whether there should be any changes to this agreement.

Accepted and agreed to

This 23rd day of December, 2003

/s/ Thomas R. Thomas
Division Counsel
Small Business/Self Employed

/s/ Joseph R. Brimacombe
Deputy Director, Compliance Policy
Small Business/Self-Employed

Counsel Response to Your Memo

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

What Counsel Will Also Do:

- Render its legal advice within 45 days
- Prepare a written memorandum of review of the FBAR case

- If Counsel recommends issuance of a 30-day letter, the review will be designed to assist Appeals in the event the case is appealed
- If Counsel does not recommend issuance of Letter 3709, the review will state the reasons for the disagreement
- If Counsel's disagreement is based upon inadequate factual development, the review should recommend areas for further examination

If Your Taxpayer Appeals the FBAR Penalty

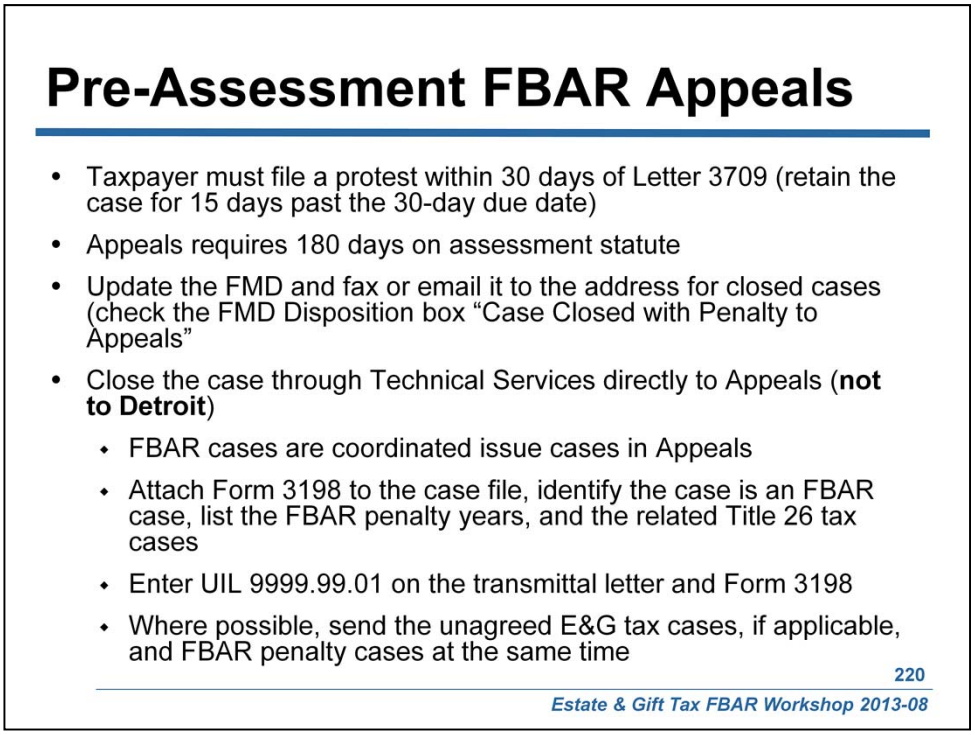
Q: Is it a pre-assessment appeal of the FBAR penalties? Or a post-assessment appeal?

A: The answer will depend on the taxpayer's actions and the time left on the FBAR statute.

FBAR Penalty Appeals

- Pre-assessment appeal rights
  - If timely response to FBAR 30-day letter (L3709), and
  - At least 180 days on the assessment statute
- Post-assessment, pre-payment appeal rights
  - If timely response to the FBAR 30-day letter but with less than 180 days on the assessment statute, and
  - requested appeal rights after Detroit assessed the penalty
- Taxpayer gets only one conference with Appeals
- May appeal collection actions to a U.S. District Court

Regarding that last bullet: The venue for FBAR penalties is the US District Court, not the US Tax Court.



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. If there's not at least 180 days remaining and the taxpayer wants pre-assessment appeal rights, he must sign the FBAR penalty statute extension, otherwise the taxpayer will not have pre-assessment appeal rights.

You must update the FBAR monitoring document (FMD, Form 13536) and check the Disposition box "Case Closed with Penalty to Appeals." After updating the FMD, your manager faxes or emails a copy to ECC 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 (and Counsel-approved) FBAR penalties, and list the related tax case(s) (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 estate and/or gift tax case(s), if applicable, 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 (there's 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

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 having the FBAR penalty assessed, your manager must contact the taxpayer or his representative to explain that Appeals has limited authority to settle the case. Your manager must document this contact on the activity record in the FBAR penalty case.

Post-Assessment Appeals (cont.)

- To assess the FBAR penalties, send the following documents to ECC (Enterprise 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

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 ECC/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 secure 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.

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

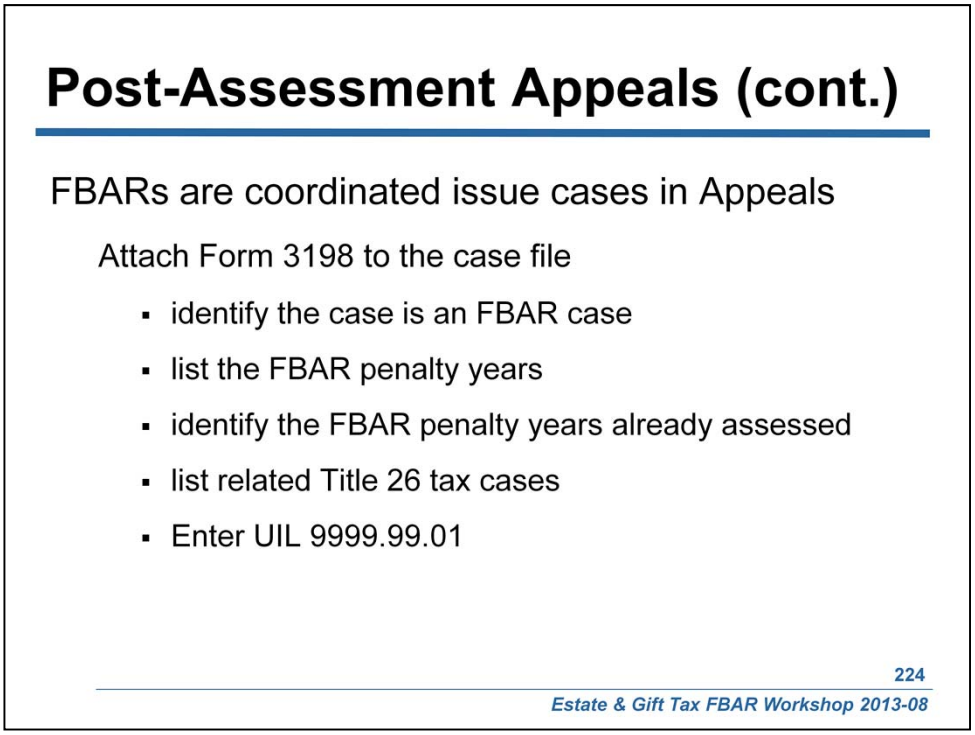
Post-Assessment Appeals (cont.)

- Detroit immediately assesses the FBAR penalty for the short-statute year ***only***
- 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)

After receiving the documents from the group, ECC/Detroit Computing Center immediately assesses the FBAR penalty. Detroit will assess only the 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.



FBARs 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 (and Counsel-approved) FBAR penalties
- identify the years where Detroit already assessed the FBAR penalties, and
- list the related E&G tax case(s), 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.)

- 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 Title 26 tax cases
- Update ERCS
- Close the case through Technical Services directly to Appeals (**not to Detroit**)

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 E&G 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 Penalty Case Outline

Introductory information

1. Discover a potential FBAR violation
2. Secure a Related Statute Determination (RSD)
3. Establish FBAR administrative controls and set up your FBAR case
4. Investigate the case
5. Determine the appropriate penalty
6. **Close the case**
7. **Appendices**

6. Procedures For Closing Your FBAR Case

- No Violation (IRM 4.26.17.4.1)
- Warning Letter Only (IRM 4.26.17.4.2)
- Penalties Asserted (IRM 4.26.17.4.3)
- Penalties Recommended – Agreed (IRM 4.26.17.4.4)
- Penalties Recommended – Unagreed (IRM 4.26.17.4.6)
- Penalties Recommended – Unagreed and Appealed (IRM 4.26.17.4.7)

6. Close the Case

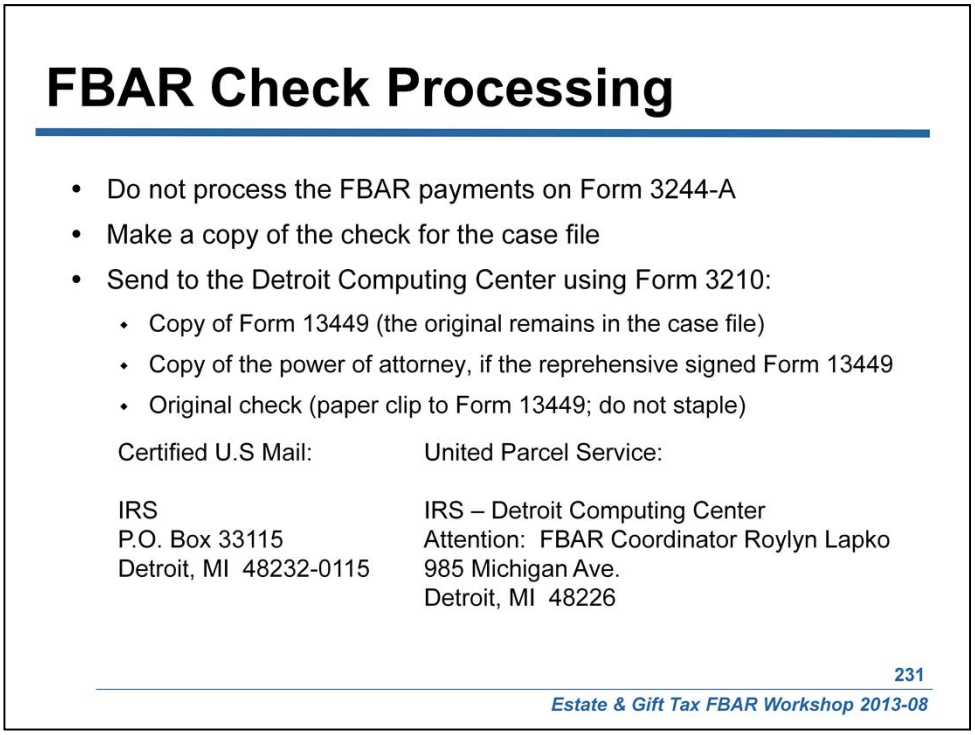
- Send correspondence to the taxpayer
  - FBAR warning letter (no penalties)
  - FBAR 30-day letter package (penalties; after Counsel approval)
- Wait for taxpayer to respond (30-day letter only)
- Close the case from the group
  - To Detroit: no violation cases, warning letter cases, agreed cases, and no-response cases (no response to Letter 3709)
  - To Appeals: unagreed appeal cases—whether pre- or post-assessment appeals

FBAR Penalty Case File

- Make sure each FBAR case file is separate from the estate and/or gift tax case files
- FBAR penalty cases and Title 26 cases have separate processing pipelines
- FBAR case file must include all relevant information from the estate and/or gift tax file(s), such as
  - Tax returns
  - Examination report
  - Bank statements, etc.
- Each FBAR year is a separate case file

Important FBAR Case Procedures

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

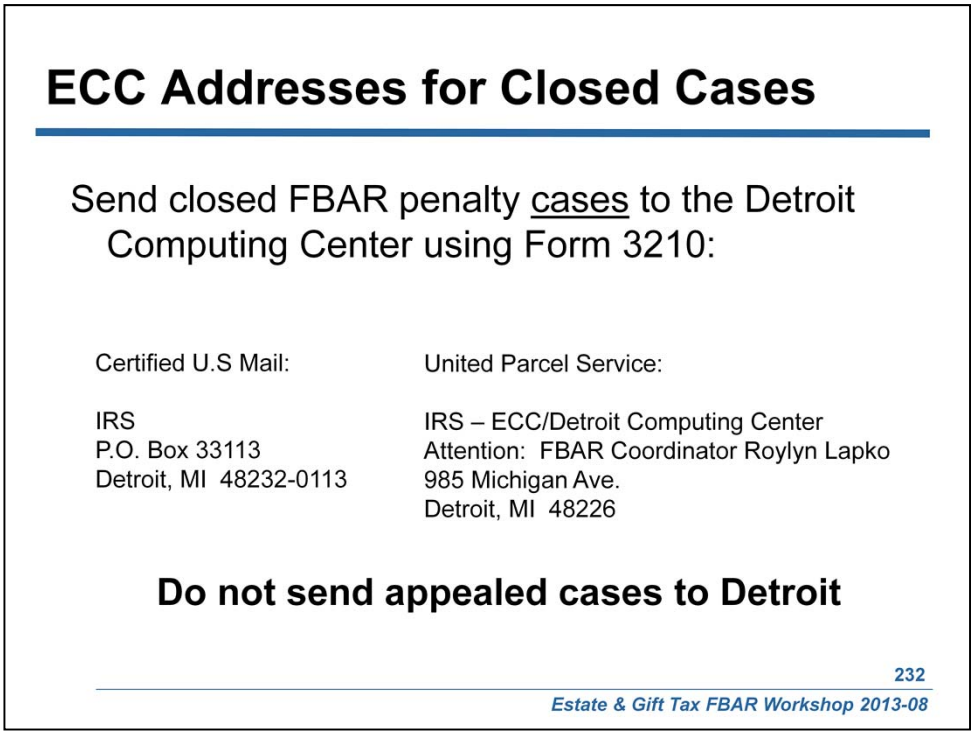


Do not use Form 3244-A to process FBAR penalty checks.

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



Except for appealed cases, using Form 3210, the group manager sends all closed FBAR penalty case files to the Detroit Computing Center.

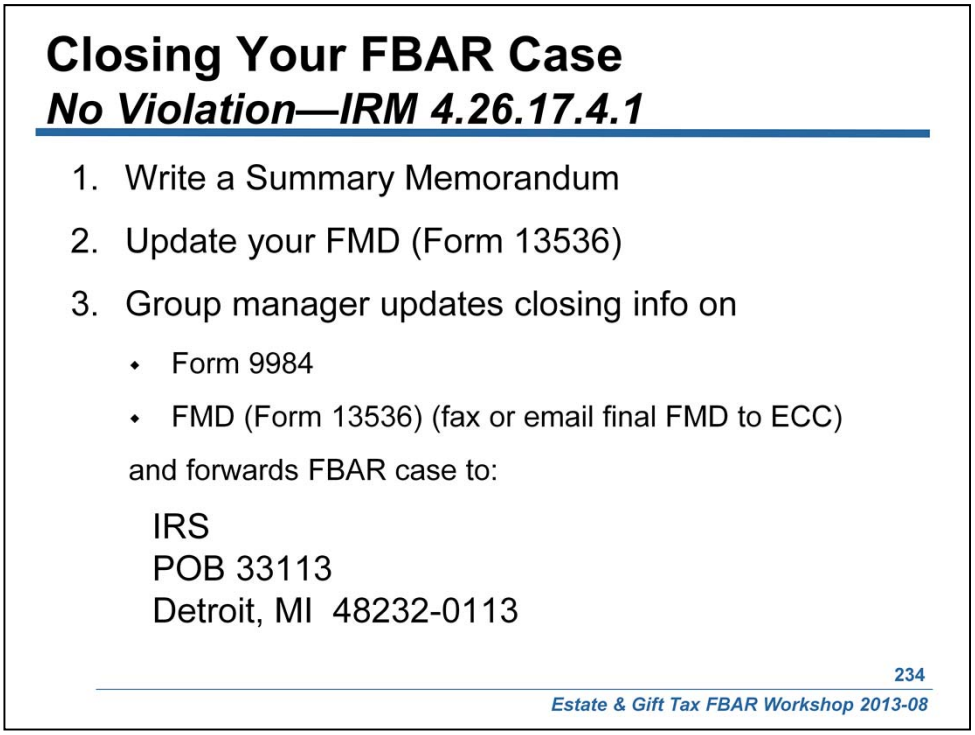
Do not send appealed cases to Detroit.

Closing the FBAR Case

Update and complete:

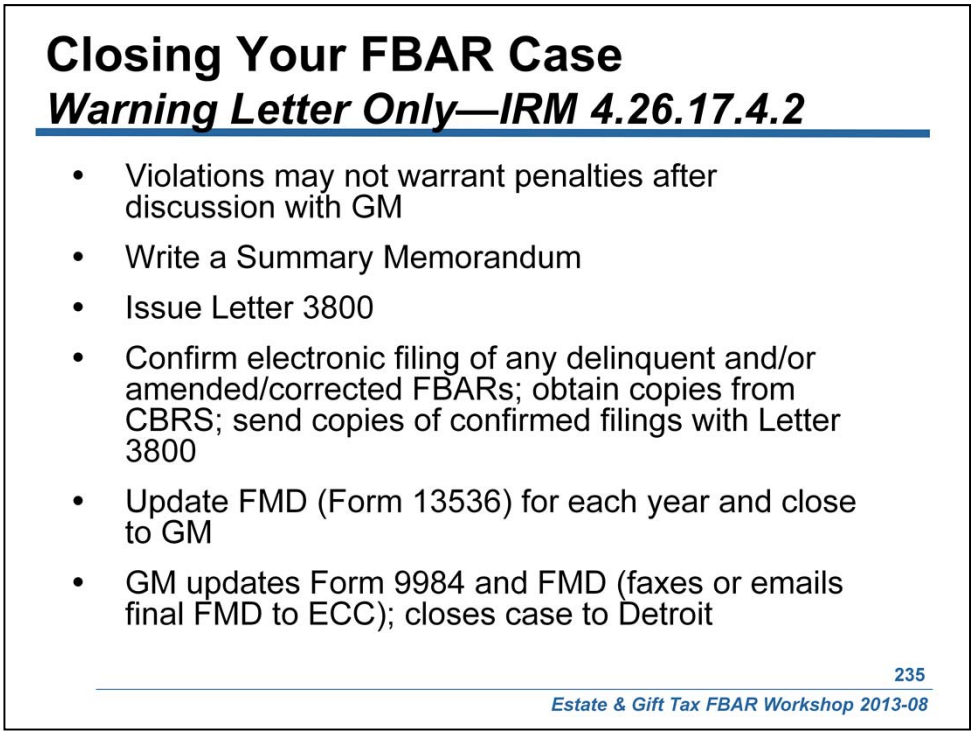
- Form 13536 (FBAR Monitoring Document, FMD)
  - Fax (313-234-2278) or email (*SBSE BSA COMPLIANCE-FBAR PENALTY COORDINATOR) to ECC
  - Place original FMD in the file
- Your FBAR penalty Summary Memorandum
  - Place it just behind Form 13536 (FMD), and
- Include copies of any delinquent FBARs you've secured (and properly processed)*

* Remember, all FBARs filed on or after 7/1/2013 are required to be filed electronically. You will have obtained copies of any original, amended, corrected, or delinquent FBARs via CBRS, or copies from the taxpayer (if you had an RSD).



Applicable IRM section is 4.26.17.4.1.

See E&G FBAR lead sheet, item #23



Applicable IRM section is 4.26.17.4.2.
See E&G FBAR lead sheet, item #24

- Violations didn't warrant penalties after discussion with group manager.

- Write a Summary Memorandum
    - Show years opened

    For each year opened, you will show:
    - Filing requirements
    - Aggregate balances
    - Penalty determination and the reason(s) for non-assertion
    - Your work paper references

- Issue Letter 3800, FBAR Warning Letter. Send the original and a copy to taxpayer; keep a copy for the case file.

- You will have had the taxpayer electronically file any delinquent, corrected, or amended FBARs. You would have done CBRS research to confirm the filings, and put copies in the file. See the document, EXAMINER GUIDANCE – FBAR E-File and Delinquent or Corrected FBARs, in the handout package. Send a copy of each confirmed filing back to the taxpayer with a copy of Letter 3800. See IRM 4.26.17.4.8.

Closing Your FBAR Case
Penalties Asserted—General Procedures

These procedures apply to all cases where penalties were asserted. **Items 1 and 2 below would have already been completed.**

1. Write a Summary Memorandum
2. Submit for mandatory Counsel review
3. After Counsel concurrence, issue appropriate letters and forms
4. Consider payment processing issues

Applicable IRM section is 4.26.17.4.3
See E&G FBAR lead sheet, item #25

1. Write a Summary Memorandum
   - Show years opened

   For each year opened, you will show:
   - Filing requirements
   - Aggregate balances
   - Penalty determination, the reason(s) for assertion/non-assertion
     - Any reasonable cause
     - Any mitigation
   - Your work paper references
   - See IRM 4.26.17.4

2. At this time (closing your FBAR case(s)), you would have already submitted your case with asserted penalties for mandatory Counsel review.
   - Counsel FBAR Coordinators are found in the FBAR folder on the E&G sharepoint
   - Counsel should render advice within 45 days.
   - Counsel review is not required for warning letter cases or no violation cases.
   - SB/SE examiners submit FBAR case file to SB/SE Counsel Area FBAR Coordinator

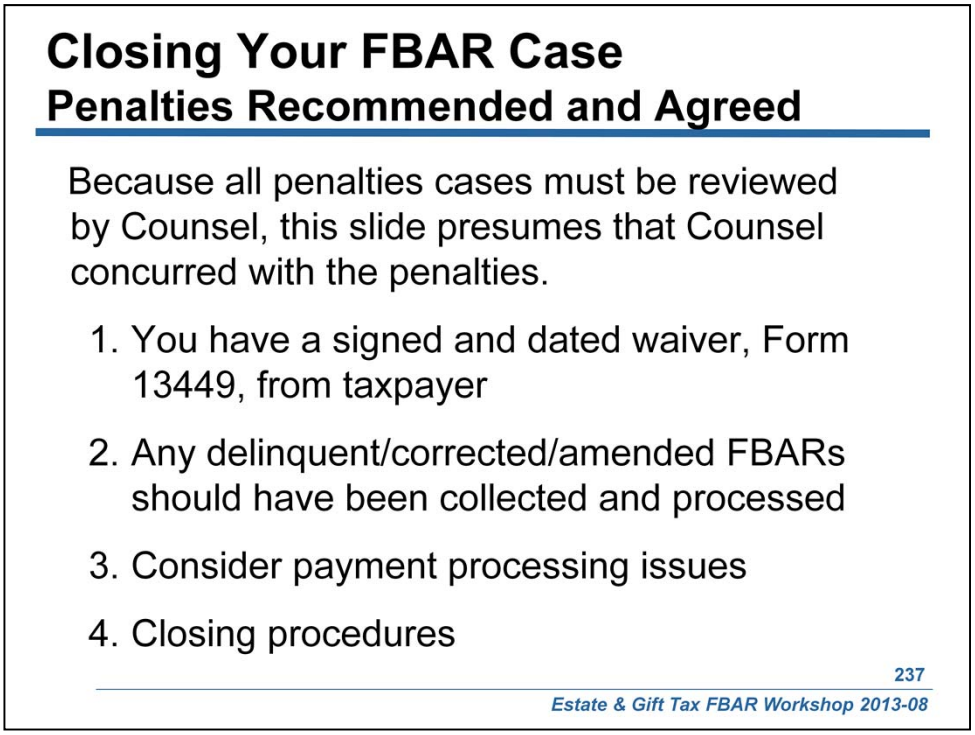
   - **Also see the slides in Topic 5 regarding submitting FBAR penalties cases to Counsel for review.**

3. After Counsel concurrence:
   - Issue Letter 3709, FBAR 30-day letter [2 copies to taxpayer]
   - Issue Form 13449, FBAR Agreement to Assessment (waiver)[FBAR report; 2 copies]
   - Include Notice 1330, Making FBAR Penalty Payment by Check

4. Consider the following payment issues. See IRM 4.26.17.4.3 (6)(c) through (e) and IRM 4.26.17.4.5 (1):
   - Checks are credited electronically, so cancelled checks not returned to the payer. If a receipt is requested, recommend payment by money order or cashier's check. **Form 809 tax receipts are not issued.**
   - Separate check/money order for any FBAR penalties, made out to United States Treasury, should be notated by the taxpayer with the taxpayer's TIN and year(s) penalties were applied.
   - Regarding interest:
     - There is no pre-assessment interest.
     - Interest does not accrue if penalty paid within 30 days after the penalty assessment is mailed.
   - Make a copy the check/money order for the FBAR case file.
   - **You send the payment**, copy of Form 13449, and Form 3210 to FBAR Payment address:
     - ★ Note this is a **different address** than where case files are sent.

     IRS
     PO Box 33115
     Detroit, MI 48232-0115

   ★ Do **NOT** use Form 3244 for FBAR payments. See IRM 4.26.17.4.5 (1)(e) for the consequences.



Applicable IRM section is 4.26.17.4.4
See E&G FBAR lead sheet, item #26

1. **<u>If you recommended penalties in your FBAR case and Counsel concurred, and the taxpayer has agreed</u>**, at this point you should have or obtain a signed and dated FBAR penalties waiver, Form 13449, from the taxpayer.

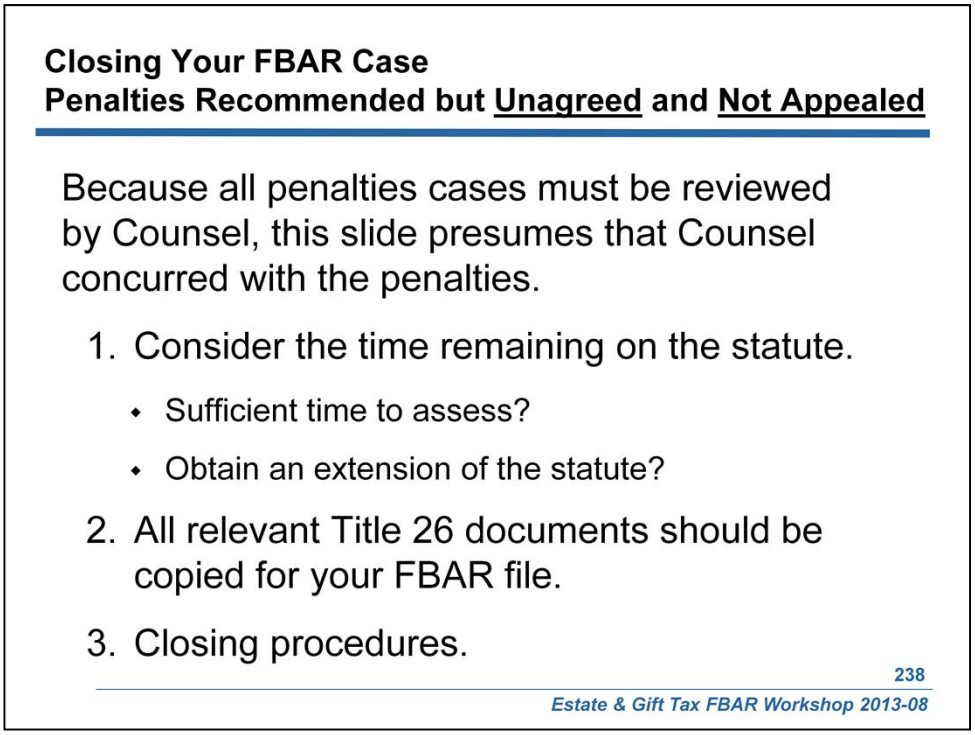
2. Any delinquent/corrected/amended FBARs received from taxpayer should have been processed per IRM 4.26.17.4.8.

3. Consider any payment processing issues:
   - See the previous slide, or
   - Step 25 on the E&G FBAR lead sheet
   - See also IRM 4.26.17.4.3 (6)(c) through (e) and 4.26.17.4.5 (1)

4. Regarding closing procedures:
   - Write a Summary Memorandum to indicate taxpayer's agreement with and payment of the penalties
   - Update your FMD, Form 13536
   - Use Letter 5080, FBAR Penalty Agreed Closing Letter
   - Close to Group Manager
   - Group Manager will update Form 9984 and FMD(Form 13536) with closure info. GM faxes or email the final FMD to ECC, and then will forward the FBAR case file with Form 3210 to (★ Note different address than where payments are sent):

   IRS

PO Box 33113
Detroit, MI 48232-0113



The applicable IRM section is 4.26.17.4.6
E&G FBAR lead sheet, item #27

Again, these instructions are for the instance where you'd have already submitted your penalty case to Counsel and received back their concurrence. The case is closing unagreed and the taxpayer is not appealing before closure.

1. Unless the expiration of the statute of limitations on the FBAR penalty is imminent, wait 45 days after issuance of Letter 3709 and Form 13449 for taxpayer to request an appeal.

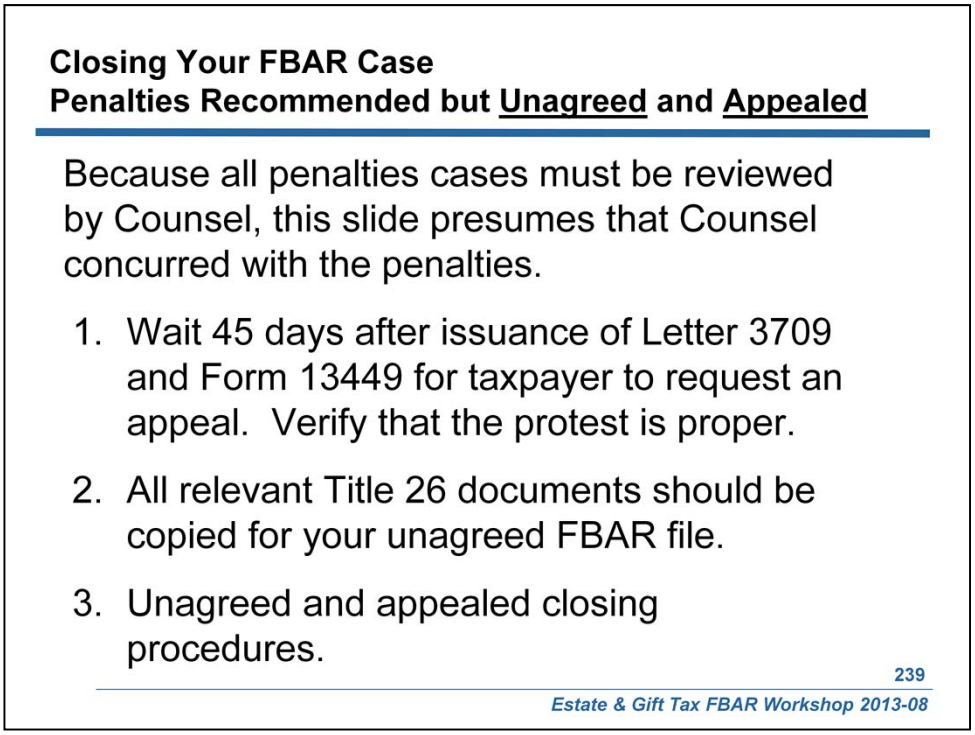
- In order to assess an FBAR penalty, there must be 30 days left on the statute.
- If the statute for your FBAR penalty case is to expire shortly before the 180 day limit for appeal (time to send the case to Appeals) or the 30 day limit for assessment, then:
  - An agreement to extend the statute may be reached.
  - Note that the consent to extend the statute on a related Title 26 tax case does not extend the FBAR statute.
  - Contact your SBSE Counsel FBAR Coordinator for assistance in preparing the consent to extend the FBAR statute.
  - If the taxpayer does not agree to extend the FBAR statute (to allow time to assess the penalty), a post-assessment appeal may be used instead of the usual pre-assessment appeal. (That is, after the penalty is assessed, the taxpayer may appeal.)
  - For additional information, see the FBAR Short Statute Procedures document in the handout package.

2. Ensure all documents needed from a Title 26 case are copied for the FBAR file.

3. The closing procedures are similar to other types of FBAR closures:
   - Update the FMD (Form 13536)
   - Write a Summary Memorandum, in this case to indicate no appeal.
   - Close case to Group Manager.
   - Group Manager will update Form 9984 and the FMD (Form 13536) for closing information. GM faxes or email the final FMD to ECC, and then will forward the FBAR file with Form 3210 to (★ Note different address than where payments are sent):

     IRS
     PO Box 33113
     Detroit, MI 48232-0113

★ Note: If the penalty has to be assessed because of an imminent statute, there is no right of post-assessment appeal for any assessed penalty over $100,000.



The applicable IRM section is 4.26.17.4.7
See E&G FBAR lead sheet, item #28

Again, these instructions are for the instance where you'd have already submitted your penalty case to Counsel and received back their concurrence. The case is closing unagreed and the taxpayer is appealing before closure.

The procedures on this slide (and the slide's notes) are for FBAR penalties that are unagreed and have been properly appealed before closure.

1.You must wait 45 days after issuance of Letter 3709 and Form 13449 for taxpayer to request an appeal.

- An appeal requires that the taxpayer provide 2 copies of a written protest to you, and that it be postmarked prior to the Letter 3709 response date; the protest must contain all the information listed in Letter 3709; and you must close to Appeals with at least 180 days remaining on the FBAR statute. [Review Step #27 on the E&G FBAR lead sheet if insufficient time remains.]

2.Ensure all documents needed from your Title 26 case are copied for the FBAR file.

3.The unagreed and appealed FBAR penalty closing procedures are:

- Include Report Transmittal, Form 4665, and include the following note at Other Information: "**FBAR category case; UIL 999.99-01; Appeals Coordinated Issue [ACI] Program**", and "**Appeals Officer must contact Appeals FBAR Coordinator prior to scheduling initial conference at 818-242-8143 x3014**".
- Update the FMD (Form 13536)
- Write a Summary Memorandum to indicate that taxpayer has appealed
- Close case to Group Manager
- Group manager will complete FMD (Form 13536) and will forward the FMD to ECC at:
  IRS
  PO Box 33113
  Detroit, MI 48232-0113
- Group Manager will document Form 9984 and close the FBAR case file to Appeals per regular closing procedures.

★ Note: If the penalty has to be assessed because of an imminent statute, there is no right of post-assessment appeal for any assessed penalty over $100,000.

Closing the Case on ERCS and IMS

- **ERCS:** *See the "Closing the Record" section (pages 5-6)of the FBAR-ERCS Guide in the Handout package.*

- **IMS:** *Use normal closing procedures.*

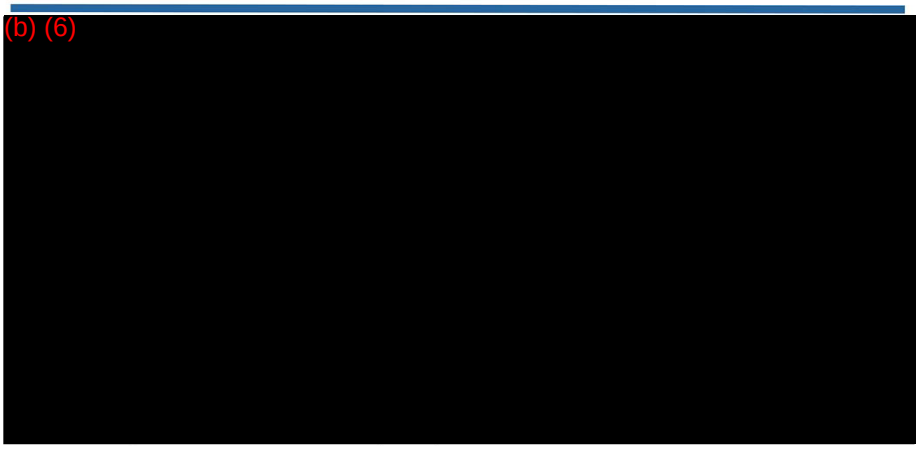
Closing Your FBAR Case
Sample Contents of the File

- See step #29 of the E&G FBAR lead sheet for the sample contents of an FBAR case that is ready for closure

See Step #29 of the E&G FBAR lead sheet for sample contents of an FBAR case ready for closure.

Questions? FBAR Resources

(b) (6)



- Kris Karliner, Attorney-Advisor, Estate & Gift Tax Policy, Los Angeles, CA (213) 576-3743

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

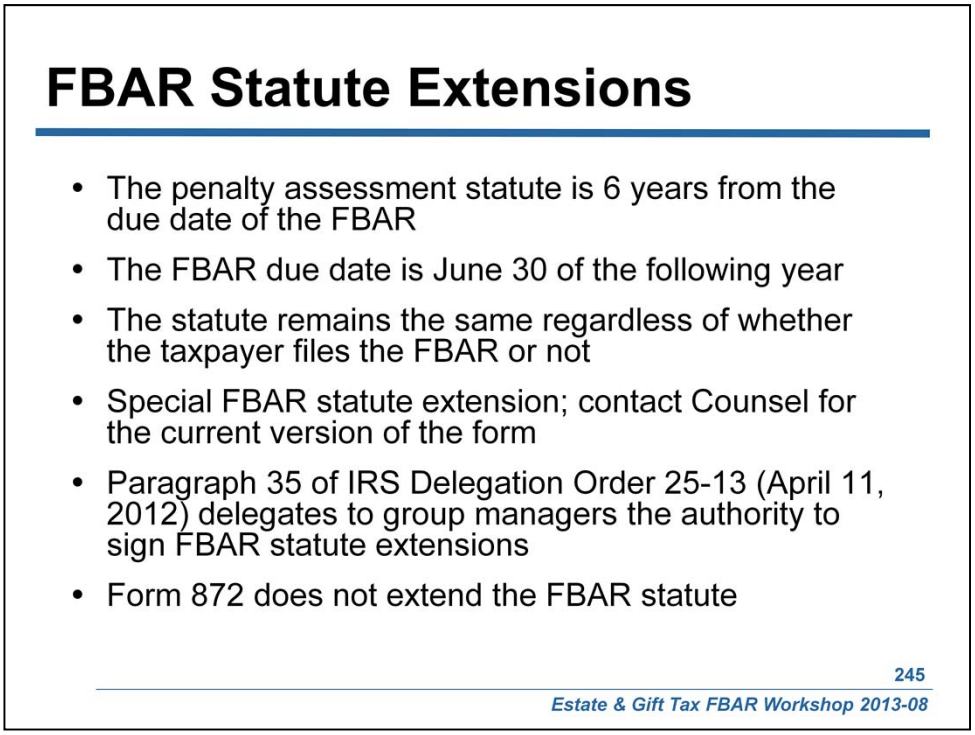
FBAR Penalty Case Outline

Introductory information

1. Discover a potential FBAR violation
2. Secure a Related Statute Determination (RSD)
3. Establish FBAR administrative controls and set up your FBAR case
4. Investigate the case
5. Determine the appropriate penalty
6. **Close the case**
7. **Appendices**

Appendix A

Additional FBAR Statute Information



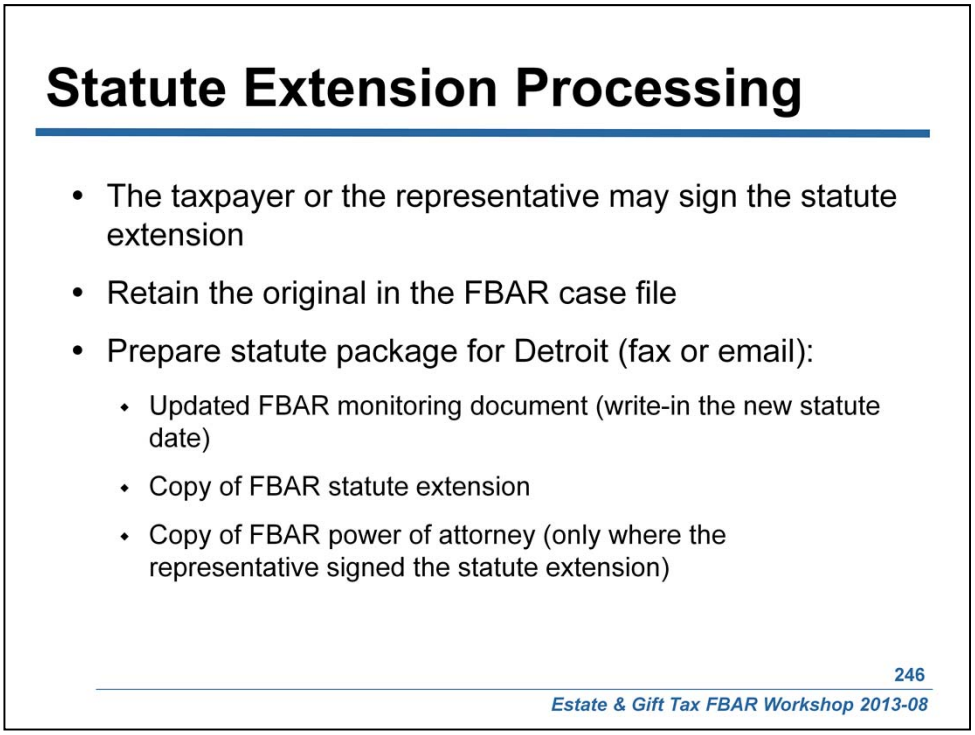
The FBAR penalty assessment statute is six years from the due date of the FBAR, and the due date of the FBAR is June 30 of the following year.

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.

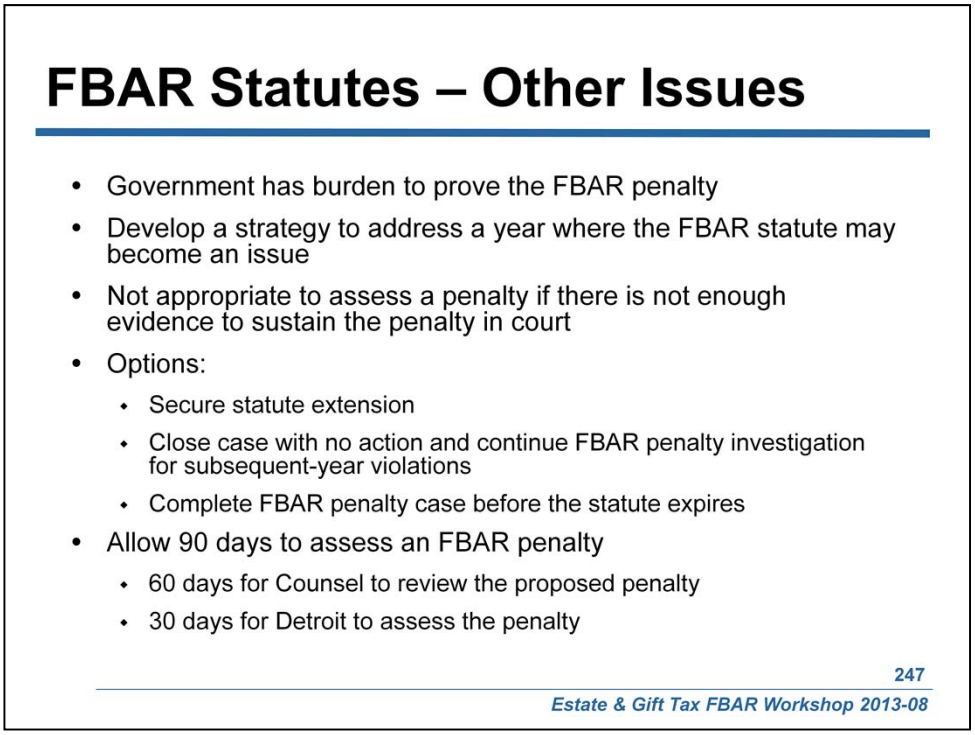


Either the taxpayer or the authorized representative may sign the FBAR statute extension.

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.

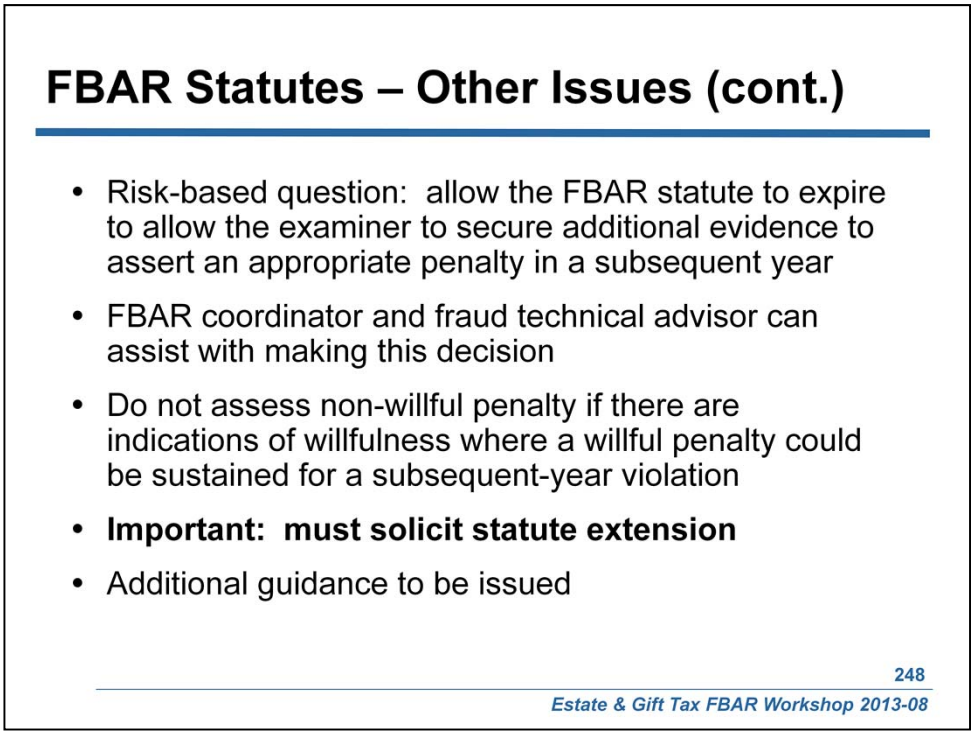


As in all penalty cases, the government has the burden of proof in an FBAR penalty case. For FBAR penalty cases where the assessment statute is going to expire within 180 days, you, your manager, the FBAR coordinator, and the fraud technical advisor need to develop a strategy to address the statute issue. 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.



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 risked-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.

Appendix B

Cases on Willfulness

Cases

On willful violations:

- Ratzlaf v. United States, 510 U.S. 135 (1994) on willful violation
- Sturman, 951 F.2d 1466 (6th Cir. 1991)
- U.S. v. Clines, 958 F.2d 578 (4th Cir. 1992)
- Williams v. United States, (EDVA Civil Action No. 1:09-cv-437, decision dated 9/1/10)
- **But see United States v. Williams, No. 10-2230 (4th Cir. 2012) (or see 2012 TNT 142-2 and 2012 TNT 141-13)**
- **Also see McBride, 908 F. Supp. 2d 1186 (DC Utah, 2012)**
  - **Consider that the rules discussed in McBride would likely carry over to non-willful cases where reasonable cause is at issue**

Willful Violation

Ratzlaf v. United States, 510 U.S. 135 (1994)

- dealt with the criminal penalty under § 5322 (anti-structuring provision of the BSA)
- addressed the standard for willfulness for BSA cases (adopted from tax cases)
- Justice Blackmun's dissent (footnote 5)

Willful Violation

Ratzlaf, 510 U.S. 135 (1994)

Justice Blackmun on the appropriate standard for willfulness – from Footnote 5 of Dissent:

> Knowledge of the reporting requirements" is easily confused with "knowledge of illegality" because, in the context of the other reporting provisions -- §§ 5313, 5314, and 5316 -- the entity that can "willfully violate" each provision is also the entity charged with the reporting duty; as a result, a violation with "knowledge of the reporting requirements" necessarily entails the entity's knowledge of the illegality of its conduct (that is, its failure to file a required report)…

- If you know you have to file an FBAR, then you should know it is illegal not to file.

Willful Violation

Sturman, 951 F.2d 1466 (6th Cir. 1991)

- a criminal tax case involving an FBAR violation
- the concept of willful blindness was applied (involves more than just checking the wrong box on Schedule B)

Willful Violation

Sturman, 951 F.2d 1466 (6th Cir. 1991)

- The 6th Circuit considered the complexity of the scheme to evade tax (involving the use of multiple domestic and foreign corporations and foreign bank accounts to conceal assets from the U.S. Government) in applying the concept of willful blindness to the FBAR violation

Willful Violation

U.S. v. Clines, 958 F.2d 578 (4th Cir. 1992)

- another criminal tax case involving an FBAR violation
- person engaged in the business of a financial institution (a foreign company that performed the services of a financial institution)

Willfulness – Williams v. United States, (EDVA Civil Action No. 1:09-cv-437, decision dated 9/1/10)

- Between 1993 and 2000 Williams deposited more than $7,000,000 in assets in the accounts, earning more than $800,000 in income over that period
- During the year in issue (2000, for which the FBAR was due 6/30/01), the Swiss:
  - focused on the accounts perhaps at the request of the U.S.,
  - interviewed Williams about the accounts,
  - froze the accounts at the request of the U.S. and
  - the U.S. was aware of the accounts

Williams v. United States (cont.)

- On his 2000 1040, Williams failed to include the income from the accounts and, on Schedule B, failed to check the FBAR question
- Williams failed to file the FBAR by June 30, 2001
- On October 15, 2002, Williams disclosed the accounts by filing his income tax return for the tax year 2001

Williams v. United States (cont.)

- On February 2003, Williams disclosed the accounts pursuant to an earlier version of the offshore voluntary account program (the OVCI program)
- On June 12, 2003, Williams pleaded guilty to one count of conspiracy to defraud the United States and to one count of criminal tax evasion in connection with funds held in the Swiss bank accounts during the years 1993 through 2000
- On January 18, 2007, Williams filed the TDF 90-22.1 form for all years going back to 1993, including tax year 2000

The Key Legal Holdings in Williams Are:

- The legal review standard is de novo, in which the Government must prove willfulness -- in this context the intent to violate a known legal duty

- That Williams intentionally failed to report income in an effort to evade income taxes is a separate matter from whether Williams specifically failed to comply with disclosure requirements contained in § 5314

Appendix C

Return Preparer Interview

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Appendix D

Taxpayer Interview

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