

<p>FBAR Penalty Cases</p>		<p>This section of the guide contains a brief summary of FBAR penalties and FBAR case procedures. Additional details regarding FBAR penalties is contained in the following guides:</p> <ul style="list-style-type: none"> <li>■ FBAR Penalty ERCS Guide</li> <li>■ FBAR Penalty Case File Procedures</li> <li>■ FBAR Penalty Investigative Techniques</li> </ul> <p>The FBAR portion of the Centra PowerPoint presentation on Quiet Disclosures also contains additional details on FBAR penalty cases.</p>
<p>FBAR Overview</p>		<p>FBAR is the acronym for the Foreign Bank and Financial Account Report, Form TD F 90.22-1, which a person must file to report foreign bank and financial accounts. FBAR may refer to both the form itself and the penalties for failing to file the form (for example, FBAR penalties).</p> <p>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 must file an FBAR.</p> <p>The IRM provisions for Title 31, FBAR law, and FBAR procedures are in IRM §§ 4.26.15, 4.26.16, and 4.26.17, respectively.</p> <p>Examiners responsibilities include:</p> <ul style="list-style-type: none"> <li>■ Investigate possible civil FBAR violations and</li> <li>■ Assess and collect civil FBAR penalties</li> </ul> <p>Due Dates, etc.:</p> <ul style="list-style-type: none"> <li>■ Filed on a calendar year basis</li> <li>■ Due by June 30 of the following year</li> <li>■ Filed by mailing it to Detroit Computing Center</li> <li>■ Not filed with Form 1040</li> <li>■ Filed when it is received in Detroit, not when it is postmarked. (IRC § 7503 does not apply)</li> </ul> <p>Statute of Limitations:</p> <ul style="list-style-type: none"> <li>■ 6 years from due date</li> <li>■ SOL runs even if no FBAR is filed</li> <li>■ 2005 and prior FBARs are expired</li> <li>■ 2006 FBARs expire on June 30, 2013</li> <li>■ Do not use Form 872 to extend SOL</li> </ul>

		<p>■ Counsel has approved an FBAR SOL extension</p>
Related Statute Determination		<p>The examiner must secure a related statute determination prior to using Title 26 income tax information in an FBAR penalty case. For Quiet Disclosure cases, the examiner should secure a related statute determination immediately, preferably before the initial contact with the taxpayer.</p> <p>Examiners use Form 13535, <i>FBAR Related Statute Memorandum</i>, to secure a determination that the FBAR violation may have been in furtherance of a Title 26 violation. The examiner prepares a separate related statute memorandum for each person required to file an FBAR for each year there is a violation.</p> <p>The related statute memorandum is a good-faith determination that the FBAR violation was in furtherance of a Title 26 violation. For quiet disclosure cases, the examiner may use one of the following explanations, with appropriate modifications, on the related statute memorandum:</p> <p><b>For a year where the taxpayer filed an amended income tax return:</b></p> <p><i>This taxpayer filed an amended income tax return on [insert date] to correct a previously-filed, inaccurate return that failed to include income from foreign sources. On [insert date] the taxpayer also filed a delinquent FBAR. Based upon the information shown on the amended return there is good-faith belief that the taxpayer's failure to file a timely FBAR was to conceal Title 26 violations that existed up to the time the taxpayer filed the amended return.</i></p> <p><b>For a year where the taxpayer filed a delinquent income tax return:</b></p> <p><i>This taxpayer filed a delinquent income tax return on [insert date] to report income from foreign sources. On [insert date] the taxpayer also filed a delinquent FBAR. Based upon the information shown on the delinquent return there is good-faith belief that the taxpayer's failure to file timely an FBAR was to conceal Title 26 violations that existed up to the time the</i></p>

	<p><i>taxpayer filed the delinquent return.</i></p> <p><b>For a year where the taxpayer filed only a delinquent foreign information return:</b></p> <p><i>This taxpayer filed a delinquent information return on [insert date]. The information on this return relates to an entity that may own, or an activity that may appear in, a foreign bank account. On [insert date] the taxpayer also filed a delinquent FBAR. There is good-faith belief that the taxpayer's failure to file a timely FBAR was to conceal Title 26 violations that existed up to the time when the taxpayer filed the delinquent information return.</i></p> <p>If the taxpayer filed both a delinquent information return and a delinquent or amended income tax return for a year, then it is only necessary to include in the related statute memorandum the language for the amended or delinquent income tax return.</p> <p>Once the designated official (currently the territory manager) makes a related determination, the examiner may use Title 26 information in the FBAR penalty case. Until that time, the examiner may not</p> <ul style="list-style-type: none"> <li>■ Ask the taxpayer specifically about the FBAR,</li> <li>■ Request a copy of the FBAR, or</li> <li>■ Request information, on an IDR, that relates only to the FBAR violation.</li> </ul>
<p>FBAR Power of Attorney</p>	<p>After the designated official signs the related statute memorandum, the taxpayer may use, and the examiner may accept, Form 2848 to designate a person to represent the taxpayer in matters related to the FBAR penalty.</p> <p>To designate a representative for FBAR-related matters, the taxpayer must place the following entries on Form 2848, line 3:</p> <ul style="list-style-type: none"> <li>■ Column 1: "FBAR Examination"</li> <li>■ Column 2: "TD F 90-22.1"</li> <li>■ Column 3: the relevant calendar years</li> </ul> <p>The taxpayer may use a single Form 2848 to designate a representative for both income tax matters and FBAR-related matters.</p>

		Examiners follow the regular procedures to process an FBAR-related Form 2848.
FBAR Monitoring Document		<p>The Detroit Computing Center, DCC, maintains a database of all open FBAR penalty cases. Examiners use Form 13536, <i>FBAR Monitoring Document</i>, to notify the DCC that they started an FBAR penalty case. The examiner prepares a separate FBAR monitoring document for each taxpayer and for each year where the designated official made a related statute determination. Examiners also use the FBAR monitoring document to notify the DCC of the examination results, including accepted referrals to criminal investigation and cases where the taxpayer appealed the FBAR penalty.</p> <p>To open the FBAR case, the examiner prepares the FBAR monitoring document, attaches a copy of the related statute memorandum, and faxes or scans and emails the documents to the DCC. The fax and email address appear in the next section.</p> <p>Additional information on the FBAR monitoring document is in the FBAR Penalty Case Procedures guide.</p>
DCC FAX and Email Address		<p>The DCC fax number for the FBAR monitoring document is (313) 234-2278.</p> <p>The email address for the DCC is <i>*SBSE BSA COMPLIANCE-FBAR PENALTY COORDINATOR</i>.</p>
FBAR ERCS Procedures		<p>The ERCS procedures for FBAR cases are in the FBAR Penalty ERCS guide.</p> <p>The examiner must establish a penalty case on ERCS for each year the designated official made a related statute determination; the FBAR cases on ERCS must match the FBAR cases on the DCC database.</p> <p>Examiners establish FBAR penalty cases on ERCS using MFT P9 and activity code 545.</p> <p>Examiner charge time working FBAR penalties directly to the case.</p>

<p>FBAR IDR</p>	<p>Provided the examiner secured a related statute determination prior to the first contact with the taxpayer, the initial IDR should solicit a list of foreign bank accounts subject to reporting on an FBAR. Do not assume the taxpayer reported all of his account on the filed FBAR, if any.</p> <p>On the initial IDR the examiner also should request from the taxpayer a statement of reasonable cause for failing to file the FBARs.</p> <p>There is no need to issue a separate FBAR IDR. As long as the designated official made a related statute determination, the examiner may include the FBAR-related items on the income tax IDR.</p>
<p>Working the FBAR Case</p>	<p><b>It is important that examiners do not propose FBAR penalties until Counsel has opined on whether the facts support a specific FBAR penalty. See the next section of this guide for additional information.</b></p> <p>The purpose of the FBAR penalty case is to determine whether the taxpayer is liable for an FBAR penalty or whether an FBAR warning letter is appropriate.</p> <p>Since the government has the burden of proof in all penalty cases, it is up the examiner to locate and secure the necessary evidence to support the FBAR penalty. FBAR coordinators, fraud technical advisors, Counsel attorneys, and national office FBAR analysts are available to assist examiners with their FBAR penalty investigations.</p> <p>In all FBAR cases the examiner must attempt to interview both the taxpayer and the return preparer (or return preparers).</p> <p>During the interview of the return preparer, the examiner should focus on the exchange of information between the return preparer and the taxpayer to identify the opportunities for the taxpayer to reveal the existence of the foreign bank account. Opportunities include both direct questions by the return preparer about the existence of the foreign bank account (for example, does the taxpayer have a foreign bank account), and indirect questions about the foreign bank account (for example,</p>

	<p>sources of interest or dividend income).</p> <p>The examiner should summons a copy of the tax return preparation files and workpapers for each year of the FBAR penalty investigation. If the return preparer claims privilege, contact Counsel for guidance.</p> <p>During the interview of the taxpayer, one focus of the interview will be the question of why the taxpayer did not reveal the foreign bank account to the only tax professional who may have been in a position to provide competent advice.</p> <p>Additional details regarding the FBAR penalty investigation, including investigative techniques, are contained in the FBAR Penalty Investigative Techniques guide.</p>
<p>FBAR Penalties and Mitigation</p>	<p>Once the examiner identifies an FBAR violation and completes the FBAR penalty investigation, there are two possible outcomes to the case:</p> <ul style="list-style-type: none"> <li>■ Issue a warning letter either because the violation does not warrant an FBAR penalty or the taxpayer had a reasonable cause, or</li> <li>■ Assess an FBAR penalty</li> </ul> <p>If a penalty is warranted, the examiner must decide whether the taxpayer's failure to file the FBAR was non-willful or willful. If the failure was non-willful, the maximum penalty is \$10,000 per violation. If the failure was willful, the penalty is the greater of \$100,000 or 50% of the account balance on the date of the violation. The date of the violation is the due date of the FBAR, which is June 30 of the subsequent year.</p> <p><b>Unlike Title 26 that defines a specific computation of all penalties (for example the civil fraud penalty is equal to 75% of the understatement of tax due to fraud), the Title 31 FBAR penalty statute only defines the maximum penalty. While the examiner has no authority to mitigate the Title 26 civil fraud penalty, for example from 75% to 40%, in appropriate cases, the examiner may assess less than the maximum statutory penalty. IRM section 4.26.16.4.6 and IRS Exhibit 4.26.16-2 contain the FBAR penalty mitigation guidelines.</b></p>

		<p><u>Reasonable Cause</u> – evidence of reasonable cause in an FBAR setting is similar to that in a Title 26 examination. Defenses may include:</p> <ul style="list-style-type: none"><li>• Reliance on professional advice,</li><li>• Ignorance of the FBAR filing requirement,</li><li>• Mistake as to law – not knowing the foreign, account fell within the reporting requirements, and</li><li>• Failure despite exercise of ordinary care.</li></ul> <p>Examiners should use general reasonable cause principles in determining whether or not to apply the FBAR penalty. Treas. Reg. 1.6664-4, Reasonable Cause and Good Faith Exception to § 6662 penalties, may serve as useful guidance in determining the factors to consider. Although this tax regulation does not apply to FBARs, the information it contains may still be helpful in determining whether the FBAR violation was due to reasonable cause and not due to negligence.</p> <p><u>Willfulness</u> – willfulness is defined as a voluntary, intentional violation of a known legal duty. <u>United States v Bishop</u>, 412 U.S. 346 1973. The burden of proof is on the government to prove willfulness with a preponderance of the evidence. <u>United States v Williams</u>, 110 AFTR 2d 2012-5298 (CA-4, 2012)</p> <p>Willfulness also includes the failure to inquire as to whether a law exists (“willful blindness”). “Willfully” includes conduct marked by careless disregard whether or not one has the right to so act.” Therefore, “willfulness” may be satisfied by establishing the individual's reckless disregard of a statutory duty, as opposed to acts that are known to violate the statutory duty at issue. An improper motive or bad purpose is not necessary to establish willfulness in the civil context. <u>U.S. v McBride</u>, Case No. 2:09-cv-378 DN. (USDC D. Utah, Central Division., 11/8/2012).</p> <p>FBAR coordinators, fraud technical advisors, Counsel attorneys, and national office FBAR analysts are available to assist examiners and group manager with matters related to the appropriate FBAR penalty to assert.</p> <p><u>Summary</u></p>
--	--	---

		<p>What's an examiner to do?</p> <ul style="list-style-type: none"> <li>■ 1 – was taxpayer required to file FBAR?</li> <li>■ 2 – did taxpayer file an FBAR?</li> <li>■ 3 – there is an FBAR violation</li> <li>■ 4 – is the violation due to reasonable cause and not negligence?</li> <li>■ 4a – if yes, issue a warning letter</li> <li>■ 4b – if no, consider appropriate penalty and whether mitigation applies</li> <li>■ 5 – what is the amount of the FBAR penalty? (willful v non-willful)</li> </ul>
FBAR Penalty Memorandum		<p>If the examiner and group manager determine that penalties are appropriate, the examiner must prepare a memorandum to summarize the FBAR penalty investigation and the penalty recommendation. The purpose of the FBAR penalty memorandum is to secure legal advice from Counsel on whether the facts of the case support the penalty determination.</p> <p>The FBAR coordinator must review this memorandum before it is sent to Counsel. Where the examiner proposes a willful FBAR penalty, a fraud technical advisor also must review the memorandum.</p> <p>Counsel requires 45-60 days to review the memorandum and render legal advice. If Counsel advises against asserting FBAR penalties, the examiner and group manager must consult an FBAR coordinator for guidance.</p>
Letter 3800, FBAR Warning Letter		<p>If the group manager and the examiner agree that no FBAR penalty is appropriate, they should discuss that decision with an FBAR coordinator. If all agree not to assert FBAR penalties, then the examiner must send an FBAR warning letter, Letter 3800 to the taxpayer.</p> <p>The warning letter is the conclusion of the FBAR penalty case. The FBAR Penalty Case File Procedures guide contains the details for closing FBAR penalties cases where the examiner issued a warning letter.</p>
FBAR 30-day Letter Package: Letter 3709		(b) (7)(E)

Form 13449		<p>(b) (7)(E)</p> <p>If the group manager and the examiner agree that it is appropriate to assert FBAR penalties, and Counsel concurs with this decision, the examiner prepares the FBAR 30-day package to send to the taxpayer.</p> <p>The FBAR 30-day package includes Letter 3709, the FBAR 30-day letter, and Form 13449, the agreement form for FBAR penalties. The FBAR Penalty Case File Procedures guide contains the details for issuing the FBAR 30-day letter.</p>
FBAR Appeals		<p>Taxpayers may appeal proposed FBAR penalties to Appeals.</p> <p>For the taxpayer to have pre-assessment appeal rights, Appeals must receive the case with at least 180 days on the FBAR penalty assessment statute.</p> <p>The taxpayer has post-assessment, pre-payment appeal rights in cases where there will be less than 180 days on the assessment statute when the case arrives in Appeals. For these cases:</p> <ol style="list-style-type: none"> <li>1. The examiner directs the DCC to assess the FBAR penalties;</li> <li>2. DCC sends to the examiner proof of the FBAR penalty assessment; and</li> <li>3. The examiner sends the case to Appeals.</li> </ol> <p>DCC will delay collection activity during the appeals process.</p> <p>The FBAR Penalty Case File Procedures guide contains the details for sending FBAR penalty cases to Appeals.</p>
No-Response FBAR Penalty Cases		<p>If the taxpayer fails to respond to the FBAR 30-day letter, the examiner closes the case to Detroit as an unagreed case. DCC will assess the proposed FBAR penalties and the taxpayer only has post-assessment, pre-payment appeal rights. If the taxpayer appeals the assessment, DCC will route the case to Appeals for consideration.</p>

		The FBAR Penalty Case File Procedures guide contains the details for closing a no-response FBAR penalty case.
Agree FBAR Penalty Cases		<p>To agree to the FBAR penalties, the taxpayer signs Form 13449 and returns it to the examiner.</p> <p>The FBAR Penalty Case File Procedures guide contains the details for closing an agreed FBAR penalty case.</p>
FBAR Penalty Payments		<p>Taxpayers who wish to pay the FBAR penalties must do with a separate check or money order. The taxpayer may pay multiple FBAR penalties with a single check or money order, but the taxpayer cannot use a single check or money order to make both a Title 26 and Title 31 payment.</p> <p>The examiner sends the check or money order to the DCC for posting. <b>FBAR penalty payments are not posted to the Master File.</b></p> <p>The FBAR Penalty Case File Procedures guide contains the details for processing FBAR penalty payments.</p> <p>If the examiner mistakenly posts an FBAR penalty payment to Master File, the group manager must contact a national office FBAR analyst for directions on how to transfer the payment to DCC.</p>