

FBAR Penalty Case Procedures

Tailored to Opt-Out & Removal Cases
February 13, 2013



Starting the FBAR Penalty Case

- Blanket RSM in the FBAR penalty case 
- The Detroit Computing Center (DCC) inputs each case into an FBAR database to monitor FBAR penalty statutes
- FBAR cases are not on AIMS
- Follow local procedures to establish the FBAR case on ERCS



2

Once the territory manager makes a related statute determination, you need to fax the related statute memorandum to the Detroit Computing Center at (313) 234-2278.

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

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

FBAR cases are not on AIMS.

Currently, not all Examination Areas establish FBAR cases on ERCS. If your area does establish FBAR cases on ERCS, follow local procedures to establish the FBAR penalty cases on ERCS.

FBAR Monitoring Document

- Form 13536, *Foreign Bank and Financial Accounts Report Monitoring Document (FMD)*
- Complete a separate FMD for each year 
- Fax the FMD to Detroit at (313) 234-2278 or email to *SBSE BSA Compliance-FBAR Penalty Coordinator.
- Print fax/email confirmation and keep in case file
- Fax/Email updates on FMD to DCC as necessary
- A final FMD will be sent to DCC when the FBAR penalty case is closed
- Information needed for reporting to Congress



3

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

Complete the entity information section of the form and fax the form to the Detroit at (313) 234-2278; as with the related statute memorandum, complete a separate FBAR monitoring document for each year. You may fax both the RSM and FMD at the same time.

As necessary, you will update the information on the FMD and fax 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.

If you remember, near the beginning of this presentation we discussed Title 31 reporting requirements. Well, one of the reporting requirements was for the Secretary of the Treasury to report to Congress on FBAR compliance efforts. The FinCEN database is the source of information used to prepare these reports, so it is important that the database

contains the most current information regarding the status of all FBAR penalty investigations.

FBAR Penalty Investigations

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



4

Now you have an approved FBAR penalty investigation. What are you going to do?

The goal of the FBAR penalty investigation is to gather evidence to arrive a decision regarding the appropriate FBAR penalties. You need to avoid starting a penalty investigation with the intent of proving a that a specific penalty applies. At the start of the investigation you may have some evidence that tends to show willfulness, or some evidence that that tends to show non-willfulness; however, 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 prove that the person acted willfully.

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

The rest of this presentation deals with the administrative requirements for FBAR penalty case processing and FBAR penalty assessments.

Working the FBAR Penalty Case

- RGS FBAR penalty lead sheet
- D:\RGSNT\leadsheets
- FBAR case time
 - Penalty case on ERCS – charge time to the case
 - Penalty case not on ERCS – Activity Code 545
- Gather evidence to arrive at a conclusion regarding the appropriate penalty
- Prepare summary memorandum to explain FBAR violations



Revision 3/2012



5

RGS has an FBAR penalty lead sheet that contains the FBAR penalty case procedures. This lead sheet is a very helpful reminder of the steps that you need to take in an FBAR penalty investigation.

When working on the FBAR penalty investigation, if the local procedures establish the FBAR penalty case on ERCS, charge your time directly to the FBAR penalty case. Otherwise, charge the time that you work on the FBAR penalty case to Activity Code 545.

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

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

Examination Techniques

- Interviews – taxpayer, preparer, 3rd parties
- Turbo Tax screen shots
- IDR
- Summons – Form 2039 vs BSA Summons
- Formal Document Request (T26 only)
- Exchange of Information Requests



Securing Delinquent FBARs

- Date stamp original delinquent FBARs
- Across the top write in red “Secured by Exam”
- Include a copy the delinquent FBARs with the date stamp and annotation in the FBAR case
- Using Form 3210, mail original FBARs:
IRS
CTR Operations
Edit and Error Resolution Mailroom
P.O. Box 32621
Detroit, MI 48232



7

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

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

Using Form 3210, mail the original delinquent FBARs to the Detroit Computing Center:

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

FBAR Power of Attorney

- May only use Form 2848 after the territory manager 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
- Update the power of attorney section of the FMD and fax/email to DCC



8

Form 2848 is a power of attorney form for Title 26 income tax cases. You may use Form 2848 for FBAR penalty cases only after the territory manager signs the related statute memorandum to allow you to start the FBAR penalty case.

You will need to secure a new power of attorney for the FBAR case. On line 3 of Form 2848, the representative must clarify that the power of attorney relates to FBAR penalties by writing “FBAR Examination” in column 1, writing “TD F 90-22.1” in column 2, and listing each relevant calendar year in column 3.

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, fax it to the Detroit Computing Center at (313) 234-2278 for input into the database.

FBAR Penalty Assessment Statute

- The due date of the FBAR is June 30 of the following year, so the penalty assessment statute is 6 years from this date
- The statute remains the same regardless of whether the taxpayer files the FBAR or not
- Special FBAR statute extension; contact Counsel for the current version of the form. No standard solicitation or return letter.
- Group managers authorized to sign FBAR statute extensions
- Form 872 and willfulness do NOT extend the FBAR



9

Recall from our previous discussion that the FBAR for a calendar year is due June 30 of the following year. The FBAR penalty assessment statute is six years from the due date of the FBAR.

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.

The FBAR Penalty Case File

- Separate from the income tax cases
- Blanket Related Statute Memorandum
- FBAR Monitoring Document
- Fax transmittal for first FMD sent to Detroit
- Original Power of Attorney for FBAR penalties
- Copies of delinquent FBARs
- FBAR workpapers, including activity record and FBAR lead sheet
- FBAR penalty summary memorandum



10

The FBAR penalty case file is a separate file, and contains the following documents:

The Related Statute Memorandum signed by your territory manager.

The most up-to-date versions of the FBAR Monitoring Document.

The Fax transmittal to show the date you sent the first FBAR Monitoring Document to Detroit.

The original Power of Attorney for the FBAR penalties, if any.

Copies of delinquent FBARs that you secured during the penalty investigation.

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

The FBAR summary memorandum, either to explain the FBAR penalties, or to explain the reasons for not asserting FBAR penalties.

The FBAR Penalty Case File, cont'd.

- Email concurrence from Area FBAR coordinator on case resolution
- Counsel memo approving FBAR penalties
- FBAR penalty documents, as applicable
 - FBAR warning letter, Letter 3800
 - Penalty assessment agreement, Form 13449
 - Copy of check to pay FBAR penalties (original sent to Detroit for processing)
 - Letter 3709 and appeal request (unagreed cases)



11

The FBAR penalty case file also contains one or more of the following documents, depending upon the outcome of the case.

For cases where you will assert an FBAR penalty, the file will have the memorandum from Counsel approving FBAR penalties. We will discuss the role of Counsel in FBAR penalty cases shortly.

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

For no penalty assessment cases the FBAR warning letter, Letter 3800;

For an agreed penalty case, the FBAR penalty assessment agreement, Form 13449, and a copy of the check to pay the FBAR penalty assessments (you send the original check to Detroit to be processed);

For no agreement and unagreed appealed FBAR cases, Letter 3709 and the taxpayer's request to appeal the FBAR penalties.

FBAR Penalty Case Workpapers

- FBAR penalty case separate from the income tax cases
- Include copies of relevant Title 26 information, including information to show tax deficiencies
- Organized and indexed workpapers are easier to follow, particularly if the penalty assessment goes to trial
- Must address each element of the penalty: U.S. Person, Financial interest, Signature or other authority, Foreign financial account, Aggregate balance
- No standard 4318



12

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

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

The workpapers must address each element of the FBAR reporting requirements to prove the person had an FBAR filing requirement. We previously listed these on a slide titled Key Terms. You may find it useful to organize your workpapers according to these elements.

Area FBAR Coordinator Review

- Review all FBAR cases – no action to willful penalties
- Prior to Counsel
- Email me FBAR penalty leadsheet, penalty computation, RAR
- I will email back concurrence, work with you to get more information, or provide a recommendation for a different resolution, if applicable
- New and evolving role/process



FBAR Penalty Summary Memorandum

- Counsel reviews all FBAR penalty proposals to determine whether the evidence supports the penalty the proposed penalty
- Prepare a memorandum for Counsel to summarize the evidence that support the proposed FBAR penalty (bullet or narrative form)
- For unagreed FBAR penalty cases, Appeals also will refer to this memorandum
- For cases where the person contests the FBAR penalty assessment, may be used in the court proceedings



14

At the conclusion of your FBAR penalty investigation, if you propose an FBAR penalty, either the willful penalty or the non-willful penalty, Counsel needs to review to your proposed FBAR penalties to determine whether the evidence you gathered is sufficient to sustain the penalties.

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

For unagreed FBAR cases where the person protests the penalties, the FBAR penalty memorandum will provide Appeals with a summary of the penalty case.

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.

FBAR Closing Procedures – All Cases

- Prepare the FBAR summary memorandum to explain the results of the penalty investigation
- Update the FBAR Monitoring Document by completing the Examination Information and Disposition sections
- Close the FBAR case to group manager
- Except for Appeal cases, send FBAR penalty case to the Detroit Computing Center using Form 3210:
IRS
P.O. Box 33113
Detroit, MI 48232-0113
- Follow local procedures to update ERCS



15

There are a few general case closing procedures that apply to all FBAR cases. The slide lists these general procedures.

Prepare the FBAR summary memorandum to explain the results of the penalty investigation.

Complete the Examination Information and Disposition sections of the FBAR Monitoring Document and update the other sections as necessary.

Close the FBAR penalty case file to your group manager.

Except for appealed cases, using Form 3210, the group manager sends the FBAR penalty case file to the Detroit Computing Center:

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

In those areas that establish the FBAR penalty case on ERCS, follow local procedures to update the status of the case on ERCS.

FBAR Procedures – No Violation

- Appropriate where there were no FBAR violations
- Close case following FBAR case closing procedures



16

To close a case where you found no FBAR violations, assemble the FBAR case file and close the case following the FBAR case closing procedures we just discussed.

For cases where you found FBAR violations but did not assert penalties you should send an FBAR Warning letter to the taxpayer.

FBAR Procedures – Warning Letter

- Issue a warning letter where you find violations but do not assess FBAR penalties
- For reasonable cause, the person must file corrected or delinquent FBARs
- Send L-3800 (FBAR warning letter)
- Retain a copy of L-3800 in the case file
- Close case following FBAR case closing procedures



17

You should send an FBAR warning letter in all cases where you find FBAR violations but you and your group manager determine that penalties are not warranted.

If you determine that there was reasonable cause for the FBAR violations, by statute the person also must file corrected or delinquent FBARs to avoid a penalty. If the person does not file corrected FBARs, then you need to assert non-willful FBAR penalties because the person has not complied with the statute.

Send Letter 3800, *Warning Letter Respecting Foreign Bank and Financial Accounts report Apparent Violations*, to the taxpayer. This letter lists the FBAR violations that you discovered during the penalty investigation.

Retain a copy of the Letter 3800 in the case file. Assemble the FBAR case file and close the case following the FBAR case closing procedures we previously discussed.

FBAR Procedures – Penalty Proposed

- Send FBAR summary memorandum, including proposed FBAR penalties, to Counsel (after getting Area FBAR coordinator approval.)
- Counsel must review all proposed FBAR penalty assessments
 - Counsel has 45 days to provide written legal advice
 - Counsel may not recommend a penalty amount
- Send FBAR penalty package
 - Letter 3709 (30-day letter for FBAR penalties)
 - Form 13449 (agreement to assess FBAR penalties)
 - Notice 1330 (FBAR penalty payments by check)



18

Remember that Counsel must approve all proposed FBAR penalty assessments. After you and your group manager determine the appropriate amount of the FBAR penalty to assess, you send the FBAR penalty summary memorandum to Counsel for review.

Counsel has 45 days to provide written legal advice regarding the proposed FBAR penalty assessments. The role of Counsel is to review the evidence to determine whether you have proven there is an FBAR violation and whether the evidence that you gathered supports the proposed FBAR penalty; Counsel may not recommend a specific penalty amount.

Once Counsel approves the proposed FBAR penalty, you are ready to send the FBAR penalty package to the taxpayer. The FBAR penalty package consists of:

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

FBAR Procedures – Agreed Case

- Taxpayer signs Form 13449 to agree to the FBAR penalty assessments
- Separate check for the FBAR penalties
- Follow the special processing procedures for checks to pay FBAR penalties (IRM 4.26.17.4.5)
- Do not process the FBAR payments on Form 3244-A
- Close case following FBAR case closing procedures
- DCC will assess the FBAR penalties, send the notice of the assessment, and forward the case for collection (if unpaid)



19

To agree with the FBAR penalty assessments the taxpayer signs Form 13449 and returns it to you, preferably with payment. The taxpayer has to send a separate check to pay the FBAR penalties because there are special check processing procedures. The Detroit Computing Center will process the FBAR penalty check, so it is important that you do not process the check using the regular IRS processing procedures because the FBAR penalty assessment will not be on Master File.

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

After you process the check for the FBAR payment, assemble the FBAR case file and close the case following the FBAR case closing procedures we previously discussed.

The Detroit Computing Center will assess the FBAR penalties, send the notice of the assessment to the taxpayer, and, if necessary, forward the case for collection.

FBAR Procedures – Check Processing

- Make a copy of the check for the case file
- Send the following to the Detroit Computing Center by certified mail:
 - Copy of Form 13449 (the original remains in the case file)
 - Original check (paper clip to Form 13449; do not staple)
 - Form 3210
- Different address for checks:
IRS
P.O. Box 33115
Detroit, MI 48232-0115



20

To process an FBAR penalty check, 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 by certified mail:

- a copy of the signed Form 13449; retain the original Form 13449 in the FBAR penalty case file.
- The original check, paper-clipped to the copy of Form 13449; do not staple the check to the form.
- Form 3210 to track receipt of the package.

There is a special address for checks. The address is IRS, P.O. Box 33115, Detroit, MI 48232-0115.

FBAR Procedures – Appealed Cases

- Taxpayer must file a protest within 30 days of Letter 3709 (retain the case for 15 days past the 30-day due date)
- Appeals requires 180 days on assessment statute
- Copy the FMD and send it to address for closed cases
- Follow case closing procedures, except the group closes the case directly to Appeals **not** to Detroit
 - FBAR cases are coordinated issue cases in Appeals
 - On transmittal letter, indicate the case is an FBAR case
 - Enter UIL 9999.99.01 on the transmittal letter



21

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

Appeals requires at least 180 days remaining on earliest FBAR penalty assessment statute. The taxpayer must sign the FBAR penalty statute extension, otherwise the taxpayer cannot appeal the FBAR penalty.

After updating the FBAR monitoring document, the group manager sends a copy to the Detroit Computing Center to the same address as for closed FBAR penalty cases.

Follow the regular case closing procedure to assemble the FBAR penalty case file for closing and, if necessary, to close the FBAR penalty case from ERCS. Your group manager will send the appealed FBAR penalty case file directly to Appeals following local procedures. Do not send appealed FBAR penalty cases to Detroit.

FBAR cases are coordinated issue cases in Appeals, so the transmittal letter must identify the case an FBAR penalty case. Your group manager needs to enter UIL 9999.99.01 on the transmittal letter so the Appeals officer knows to contact the Appeals FBAR Coordinator prior to starting the case.

FBAR Procedures – Unagreed Case

- Unagreed FBAR cases:
 - Taxpayer fails to respond to L-3709 within 45 days
 - Less than 180 days on the assessment statute and the taxpayer will not sign an FBAR penalty statute extension
- Follow the regular case processing procedures to close the FBAR penalty case to the DCC
- Detroit assesses the penalty, sends notice of assessment, and forwards the case for collection



22

Unagreed FBAR penalty cases are cases either where the taxpayer fails to respond the Letter 3709 within 45 days, or where the taxpayer appealed the penalty but there is less than 180 days on the assessment statute and the taxpayer refuses to extend the FBAR penalty assessment statute.

You close unagreed FBAR cases using the case processing procedures we previously discussed. The group manager will send the unagreed case to the Detroit Computing Center. Detroit will assess the FBAR penalty, send the notice of assessment to the taxpayer, and then will refer the case for collection.

The taxpayer will not have pre-assessment appeal rights unless he signs an FBAR statute extension to allow Appeals to consider the case.

Taking (civil) FBAR Penalties to Court

- District Court (?)
- Already assessed
 - TP pays and files a claim for refund
 - TP doesn't pay, IRS may file suit to collect and tp says he/she doesn't owe penalty



IRS FBAR Resources

- IRM 4.26.16 – FBAR law
- IRM 4.26.17 – FBAR Procedures
- RGS FBAR Penalty lead sheet (Rev. 03-2012)
- Area FBAR Coordinators
- FBAR Counsel



24

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

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

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

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

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

Questions?

