



# FBAR Penalty Case Workshop

7/10/2013

FBAR Coordinators

(b) (6)

Part 1 of 2

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You need to Allow the Evidence to Guide the FBAR 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 FBAR 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 FBAR Investigation heavily depends upon the facts of the case.

## **New FBAR Regulations**

- On October 26, 2010 the Financial Crimes Enforcement Network (FinCen) restructured the Bank Secrecy Act regulations without making substantive changes to regulations (see 75 FR 65806)
- The restructuring of the regulations renumbered the regulations:
  - Section 103.11 (Definitions) renumbered to section 1010.100
  - Section 103.24 (Reports of foreign financial accounts) renumbered to section 1010.350
  - Section 103.27 (Filing of reports) renumbered to section 1010.306
  - Section 103.32 (Recordkeeping requirements) renumber to section 1010.4202

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On October 26, 2010 the Financial Crimes Enforcement Network (FinCen) restructured the Bank Secrecy Act regulations without making any substantive changes to regulations. See 75 FR 65806 for the restructured Bank Secrecy Act regulations.

The restructuring of the regulations renumbered the regulations. Not all of the regulations apply directly to FBARs. For purposes of FBAR reporting, it is important to take note of the following renumbered sections: 31 CFR section 103.11 (Definitions) was renumbered to section 1010.100; 31 CFR section 103.24 (Reports of foreign financial accounts) was renumbered to section 1010.350; 31 CFR section 103.27 (Filing of reports) was renumbered to section 1010.306; 31 CFR section 103.32 (recordkeeping requirements) was renumber to section 1010.420.

The important point about the regulations is, because of the restructuring of the Bank Secrecy Act regulations, you will be unable to locate nearly all of the old Section 103 regulations, references to which you may find on the prior-year FBAR forms. You should be not concerned by this because the renumbered regulations are identical to the old Section 103 regulations, so there is no need to search for the old regulation sections.

On February 24, 2011, the Financial Crimes Enforcement Network (FinCEN) issued new FBAR regulations (see 76 FR 10234). The new regulations substantially changed and expanded old regulation section 31 CFR 103.24 (reports of foreign financial accounts). The new section number is 1010.350. Where old section 103.24 was a single paragraph, new section 1010.350 is now several pages because the new regulations provide very specific definitions and much more guidance related to the FBAR filing requirements.

## **FBAR- Electronic Filing Only –(Effective 7/1/2013)**

### **What is happening?**

- Effective July 1, 2013, filers must electronically file the FBAR through the BSA E-File System at <http://bsae filing.fincen.treas.gov/main.html>.

### **How does this affect my examination?**

- Starting on July 1, 2013, you should stop accepting paper FBARs.

### **What if I receive a paper FBAR on or after July 1, 2013?**

- Inform the filer of the new electronic filing requirement and direct the filer to use the BSA E-File System to file the FBAR.
- Unless FinCEN grants an exemption to the filer, after June 30, 2013, a filer must e-file the FBAR to be in compliance with the FBAR reporting requirements.

### **How can I verify a person e-filed an FBAR?**

- After e-filing the FBAR, the filer receives a confirmation message that contains the BSA ID number. The filer can provide you with the BSA ID number. The BSA ID number replaces the Document Control Number (DCN) previously used to identify filed FBARs.
- E-filed FBARs accepted by the BSA E-file System appear on the Currency and Banking Retrieval System 33(CBRS) within 48 hours. Prior to recommending an FBAR penalty (or issuing an FBAR warning letter), research CBRS to confirm the filing.

### **What if a filer has questions about E-file?**

- Examiners should provide the following information to the filer:
- Help in completing the FBAR is available Monday - Friday, 8 a.m. to 4:30 p.m. Eastern Time, at (866) 270-0733 (toll-free inside the U.S.) or (313) 234-6146 (not toll-free, for callers outside the U.S.). Filers also may send questions regarding the FBAR to [FBARquestions@irs.gov](mailto:FBARquestions@irs.gov). Filers residing outside the United States may also contact U.S. embassies and consulates for assistance.
- For E-Filing system questions, filers should call the FinCEN E-Filing Help Desk at (866) 346-9478, option 1 (M-F, 8-6 Eastern time) or contact the help desk by email at [BSAEFilingHelp@fincen.gov](mailto:BSAEFilingHelp@fincen.gov).

If unable to E-file, filers may contact the FinCEN Regulatory Helpline at 800-949-2732 to request an exemption.

E-Filed FBARs accepted by the BSA (Bank Secrecy Act) should appear on CBRS within 48 hours.

## Indications of FBAR Violations

- CBRS does not show an FBAR, but the taxpayer
  - Checks the signature authority boxes on Form 1040, Sch. B
  - For 2011 and later tax years, the taxpayer reports a foreign bank account on Form 8938, *Statement of Foreign Financial Assets*
  - Receives interest income paid by a foreign bank
- You discover a foreign bank account during the income tax examination

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What are some of the ways you may be able to identify a potential FBAR violation during an examination? One example is where the taxpayer files Form 1040 and attaches Sch. B. On Sch. B there is a series of questions regarding foreign bank accounts. If the taxpayer checks the yes box for any of these questions, and CBRS does not show that the taxpayer filed an FBAR, you may have an FBAR violation.

For 2011 and later tax years, if the taxpayer attaches Form 8938, *Statement of Foreign Financial Assets*, to his income tax return, and CBRS does not show that the taxpayer filed an FBAR, you may have an FBAR violation.

Of course, while your doing the examination if you discover a foreign bank account, and CBRS does not show that the taxpayer filed an FBAR, you may have an FBAR violation.

Remember that CBRS is the database that contains all of the FBAR filings.

Once you have an indication of an FBAR violation, it is time to consider starting an FBAR penalty investigation.

## Investigating FBAR Violations

- The **Goal** of the **FBAR Penalty Investigation** is to **Gather Evidence** to Arrive at a **Decision** regarding the **Appropriate FBAR Penalties**
- **Consider Reasonable Cause From the Start of the Case**
  - Request Reasonable Cause Statement on Initial IDR # 1
  - For Clarity, Insist on a Written Statement from TP
- **Many Investigations will result in Non-Willful Penalties Only** because the **IRS cannot Prove Willfulness**
- **FBAR cases must be reviewed by FBAR Coordinators and approved by Counsel prior to issuance of an RAR.**

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We are going to discuss some general FBAR Information in the next few Slides.

First **FBAR** is the acronym for the (Foreign Bank and Financial Account Report), **Form TD F 90.22-1**

and it is NOT an IRS Form (TD = Treasury Department Form)

FBAR refers to both the form itself and the civil penalties for failing to file the form.

Next the FBAR Penalty Case File is a Separate Case File.

The general Authority for the Secretary of the Treasury to require US persons to keep FBAR records and file reports of their foreign transactions is governed Under Title 31 § 5314 as opposed to Title 26 Case Law.

The specific filing requirement for the FBAR is contained in the regulations for the Bank Secrecy Act, Treasury Regulations 31 CFR 1010.350 (formerly 31 CRF 103.24).

## **FBAR Statutes**

- **Due Date** is **June 30** of the Year Following the Reporting Year (Calendar-Year Reporting)
  - Example: 2006 FBAR was due June 30, 2007, so the FBAR Penalty Statute Expires on June 30, 2013
- An **FBAR** is **Not Filed** Until FBAR is **Received** by DCC (Detroit Computer Center)
- Timely-Mailed-is-Timely-Filed Rule-**N/A to FBARs**
- FBAR Statute is 6YR and **Runs Whether FBAR Filed or Not**
- **Do Not use 872** to Extend FBAR Statutes instead use Special Statute Extension on FBAR Library Website

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The monetary penalty may not exceed \$10,000 per Non-Willful Violations per Account.

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 FBAR Penalty is asserted if there is

- 1) Reasonable Cause for the Violation **and**
- 2) The TP files a correct FBAR

Any FBAR Penalty is only asserted on one entity or person at a time and it cannot be a joint penalty assessed on both the husband and wife together.

Only one SSN can have an FBAR Penalty so if a Husband has one foreign account in his name and a wife has a Foreign Account in her name two separate FBAR Penalty case files must be done.

For the statute extensions first---the reason why both the IRS and the taxpayer must sign a consent prior to the expiration of the statute of limitations for tax assessments Under Title 26 in order for it to be valid is because it is required by IRC section 6501(c)(4). There is no similar statutory restriction on FBAR consents under Title 31. While FBAR consents CAN be signed by both the taxpayer and the Service **after the expiration of the statute**, the better practice is of course to have the consent signed prior to the expiration of the statute if possible.

For your question about timely filing, Division Counsel's understanding is that the Service has not been asserting penalties for late-filed FBARs that are received not too long after the due date. So basically, if it appears to be almost timely, no FBAR penalty for late filing should be imposed.

## **Prior to the Related Statute Memo (RSM)**

- The Territory Manager (TM) must approve the FBAR penalty case by signing a Related Statute Memorandum (RSM), Form 13535, *Foreign Bank and Financial Accounts Report Related Statute Memorandum*
- Necessary to allow Title 26 information to be used in a Title 31 FBAR Penalty Case
- Prepare the RSM as soon as you discover the account
- Until the Territory Manager (TM) signs the RSM
  - Do not ask questions that relate only to the FBAR
  - Do not request information that relates only to the FBAR
  - Do not ask whether the taxpayer filed an FBAR
  - **Do not ask for a copy of the FBAR**
  - **May Ask for Copies of Foreign Accounts** related to Your Form 1040 Audit.
  - May ask whether the taxpayer owns a foreign bank account
  - May ask for the name and address of the foreign bank

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Before beginning and FBAR penalty investigation you must obtain the approval of your territory manager using a Related Statute Memorandum (RSM), Form 13535, *Foreign Bank and Financial Accounts Report Related Statute Memorandum*. You should prepare the Related Statute Memorandum as soon as you discover an unreported foreign bank account.

Until your territory manager approves the FBAR penalty case, you cannot ask any questions, or request any information or documentation that relates only to the FBAR. You also **may not ask** the taxpayer for a copy of the FBAR, or even whether he filed the FBAR. See IRM 4.26.17.2.

As we just stated, prior the securing a related statute memorandum from your territory manager you cannot ask any questions specifically related to the FBAR form; however, on an information document request for the income tax examination you may request information about foreign bank accounts if such information is relevant to the income tax examination.

Bank accounts, whether foreign or domestic, are relevant to many income tax examinations. On an IDR for an income tax examination, you may ask the taxpayer whether he has a foreign bank account. You may also ask for the name an address of the foreign bank, the name of the entity who owns the foreign bank account, and any other information that the taxpayer is required to keep that would be relevant to the income tax examination.

Remember, you cannot ask about the FBAR itself before your territory manager signs the related statute memorandum.

## **RSM Basics**

- RSM is a good-faith determination that the FBAR violation was in furtherance of a Title 26 violation
- Prepare a separate RSM for each co-owner of a joint account
- Prepare a separate RSM for each year there is a violation

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Now you are ready to prepare the Related Statute Memorandum so you can investigate potential FBAR violations. Your territory manager will determine whether the apparent FBAR violations are in furtherance of a Title 26 violation. Absent such a determination, the disclosure guidelines under Title 26 prevent you from using Title 26 information for Title 31 purposes. Since you discovered the potential FBAR violation during an income tax examination, you need the related statute determination to start an FBAR penalty investigation.

You send the related statute memorandum to your territory manager through your group manager. Prepare a separate RSM for each owner of a joint account. You also need a separate RSM for each year because the RSM will become the input document to track the FBAR case at the Detroit Computing Center. In most cases you should attach to the RSM a brief memorandum that outlines the facts of the case so your territory manager can make an informed decision.

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

## **RSM and Title 26 Violations**

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

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

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

## **RSM - Amended Return**

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.

## **RSM - Delinquent Return**

- 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 a timely FBAR was to conceal Title 26 violations that existed up to the time the taxpayer filed the delinquent return.

## **RSM - Information Return**

- 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.

## **FBAR Penalty Case Steps**

- 1) Discover a potential FBAR violation in Title 26
- 2) Secure a Related Statute Memorandum (RSM) in Title 31
- 3) Establish the **2** FBAR Administrative Controls
- 4) Investigate the FBAR Penalty Case
  - Use the FBAR 4318 for Penalty Case Structure
- 5) Determine the Appropriate FBAR Penalty
- 6) **Document Penalty Decision** in a **Memorandum to Area Counsel & Attach 886A-Case Summary**
- 7) **Issue** Form 13449 (FBAR **RAR**) **only after** case file **reviewed** by FBAR Coordinators **&** FBAR Penalty **approved** by FBAR Area Counsel.
- 8) Close the case

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**The Ultimate Goal** -of the Revenue Agent in an FBAR Penalty Case File is to Complete Step 6)

### **Separate Case File Closed Differently**

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

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

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 with a case summary to summarize the evidence you gathered. The case summary can be in either bullet or narrative form, or a combination of the two forms. Often it is better to summarize the evidence using bullets, and then to use a narrative to explain how the evidence supports the proposed penalty assessments.

Do not use the FBAR lead sheet as a substitute for the case summary.

**RAs can only Ask about & Request Copies of Foreign Bank Accounts & Cannot Ask about FBARS Filed or Copies Until the TM approves the RSM for a Separate Title 31 Exam.**

# **FBAR Administrative Controls**

- **Two separate administrative controls**
  - 1) Title 31 **DCC Database Controls**-Maintained by DCC  
→TM Approved RSM is faxed or e-mailed to DCC to create FBAR Case.
  - 2) Exam Controls on **ERCS**  
→Input Form 5345D
- See the **ERCS Guide** for Details - MFT for FBAR is C6
  - Establish each FBAR Case Year on ERCS
  - Input the FBAR Penalty Statute Date
  - Charge Time-Directly to the FBAR Case

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DCC (Detroit Computing Center) also known as ECC (Enterprise Computing Center) and Detroit

FBAR cases must have the RSM submitted for TM approval and then the approved RSM is faxed or E-mailed to DCC to establish the FBAR case.

Establish DCC database controls first (see next slide)...then, ERCS controls.

Copy of FMD, RSM and fax or E-mail conformation should be attached to Form 5345-D when submitted for ERCS controls.

We will discuss in detail later in this presentation about the ERCS Guide.

| <b><u>YEAR</u></b> | <b><u>Due Dates SOL</u></b> |           |
|--------------------|-----------------------------|-----------|
| 2005               | 6/30/2006                   | 6/30/2012 |
| 2006               | 6/30/2007                   | 6/30/2013 |
| 2007               | 6/30/2008                   | 6/30/2014 |
| 2008               | 6/30/2009                   | 6/30/2015 |
| 2009               | 6/30/2010                   | 6/30/2016 |
| 2010               | 6/30/2011                   | 6/30/2017 |
| 2011               | 6/30/2012                   | 6/30/2018 |
| 2012               | 6/30/2013                   | 6/30/2019 |

## **DCC Database Controls**

- IRM 4.26.17.3
- **Fax or E-mail the RSM to DCC to establish the FBAR Case on the DCC Database**
- **FBAR Monitoring Document (FMD)-Form 13536**
  - Case Name
  - Owner of the Foreign Account
  - Representative
  - Examination information, including contact Information
  - Case Disposition
- **Send FMD to Detroit as Often as Necessary to Update the DCC Database Controls (Every Change)**

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FBAR cases must have the RSM submitted for TM approval and then the approved RSM is faxed or E-mailed to DCC to establish the FBAR case.

Be sure to send an updated FMD when an FBAR case is reassigned from another Revenue Agent.

Change POA-Send New FMD  
Change Statutes-Send New FMD  
New Manger-Send New FMD

The FMD establishes the FBAR Case for OVDI Opt Outs when sent to the DCC (Detroit Computing Center) or ECC (Enterprise Computing Center) which are abbreviations for the same thing.

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 - Power of Attorney

- May only use Form 2848 after the delegated official signs the related statute memorandum
- **Form 2848, Line 3 Must Specifically Designate FBAR Matters** After RSM signed, then follow normal POA processing procedures.
  - Column 1: "Matters relating to Foreign Bank & Financial Accounts Report (FBAR)"
  - Column 2: "TD F 90-22.1-FBAR Exam "
  - Column 3: The Relevant Calendar Years.
- Date-stamp the original Form 2848 and retain it in the FBAR penalty case
- Send to the CAF unit if it covers income tax matters
- Update the power of attorney section of the FMD and email or fax it to the (do not send the power of attorney to Detroit)

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

You need to secure a separate power of attorney for the FBAR case. On line 3 of Form 2848, the document must state that the power of attorney relates to FBAR penalties by showing "Matters relating to Foreign Bank & Financial Accounts Report (FBAR)" in column 1, "TD F 90-22.1-FBAR Exam" in column 2, and listing each relevant calendar year in column 3.

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

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

## **7 Elements Necessary To Prove In Any FBAR Court Case File**

- 1) **TP** was a **United States Citizen, Resident,** or **Person Doing Business** in the United States.
- 2) **TP** had a **Financial Interest** in, or **Signatory** or **Other Authority** over a **Bank, Securities** or **Other Financial Accounts** during the years in question.
- 3) **Bank** had **Balance > \$10,000** at **any time** in United States Dollars (USD).
- 4) **Bank** was **in a Foreign Country**.
- 5) **TP Failed** to **Disclose** the **Bank Account**.
- 6) **Failure** to **Report** was **Willful** or **Non-Willful**.
- 7) The **Penalty Amounts** were **Proper**.

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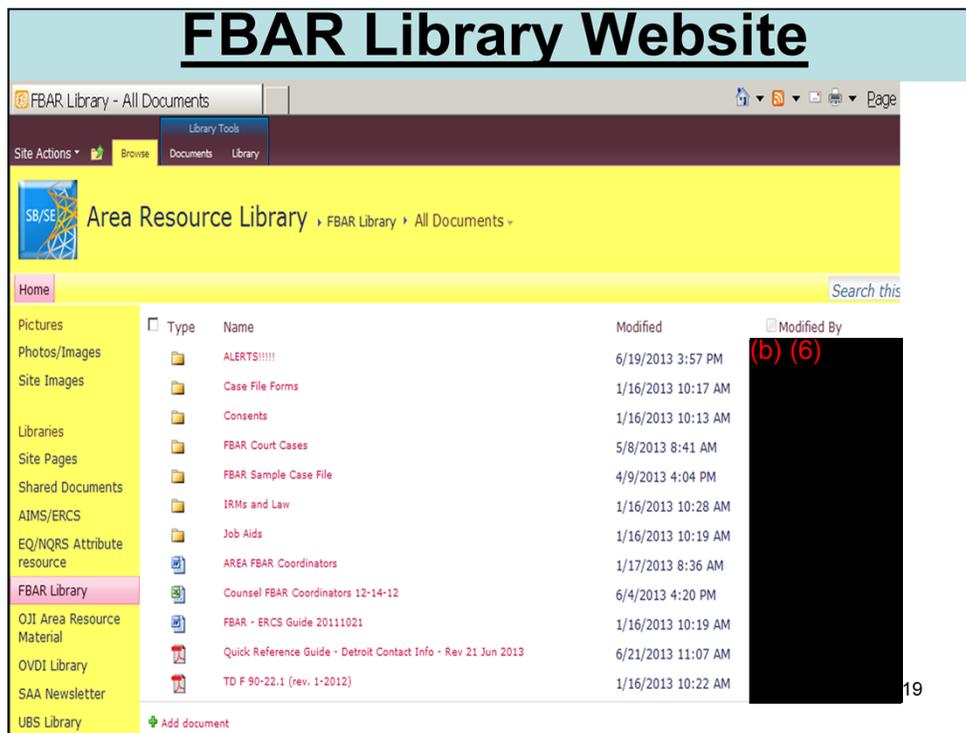
These Steps are Outlined in the John McBride Case File that we will discuss later that Contain the 7 Necessary Elements To Prove In Any FBAR Court Case.

## (Tools Available)-NEW--FBAR LIBRARY Website

- [FBAR Library - All Documents](#)
  - FBAR ERCS Guide
  - FBAR Quick Reference Guide
- [Case File Forms](#)
  - FBAR Form 4318
  - FBAR\_Citizenship\_Lead\_Sheet
  - Penalty\_FBAR\_Lead\_Sheet
- [Consents](#)
- [FBAR Court Cases](#)
- [FBAR Sample Case File](#)
- [IRMs and Law](#)
- [Job Aids](#)
  - FBAR Penalty Mitigation Comps After 10222004.xls
  - Official exch rates revised 1282013.xls
  - Closing FBAR Case with “No Action” Due to Statute Issue  
When Other Years Remain Open

These are just a few of the FBAR Tools available on the FBAR Library Website.

Now move the meeting show the real FBAR Library Website.



(Tools Available)-NEW--FBAR LIBRARY Website

FBAR Library - All Documents

FBAR ERCS Guide

FBAR Quick Reference Guide

ALERTS!!!!!!

Case File Forms

FBAR Form 4318

Form 13449

FBAR\_Citizenship\_Lead\_Sheet

Penalty\_FBAR\_Lead\_Sheet

Consents

FBAR Court Cases

FBAR Sample Case File

IRMs and Law

Job Aids

FBAR Penalty Mitigation Comps After 10222004.xls

Official exch rates revised 1282013.xls

Closing FBAR Case with "No Action" Due to Statute Issue When Other Years Remain Open

# FBAR-ERCS Guide

## FBAR-ERCS Guide

**Background:**

In the past, FBAR files typically were not established on ERCS. Time spent working the FBAR issues were charged to activity code 545. This activity code is a miscellaneous direct exam time (DET). The problem with this is that the time would not be applied to a specific taxpayer or year, and more importantly would mean that statute expiration dates could not be properly tracked. With increased focus on offshore compliance issues, FBAR case files are becoming more common, and therefore agents and managers need a better way to track these cases. Establishing the FBAR examinations on ERCS will not have an affect on AIMS. This guide was designed to assist the examiner and secretary with establishing and closing these exams on ERCS.

**Agent Duties:**

Before commencing an FBAR examination, the examiner is required to get the Territory Manager's approval via a Related Statute Memorandum (RSM). Without this approval, the agent is to not question the taxpayer regarding issues related to FBARs. Upon receiving approval, the examiner should prepare a Form 5345-D to establish the case on ERCS for proper case tracking. Input time to the established modules on your 4502 as opposed to AC 545. Keep in mind, you may have to seek a separate RSM for a spouse as well as establish a separate ERCS record.

Enter the following information on the Form 5345-D (the pro-forma version attached on page 2 already contains some of this information):

1. Fill-in the taxpayer's name and address. (Only TPH or TPW)
2. Check the "Control Non-AIMS DET Item" box
3. Enter the PBC, SBC, EGC, and ERCS examiner information
4. Enter the taxpayer's TIN (TPH or TPW's as appropriate)
5. The MFT is C6
6. For the type of form, enter "FBAR"
7. In the middle section of the form, enter all of the FBAR years being established for the listed taxpayer as follows in this table:

|                |             |             |             |             |             |
|----------------|-------------|-------------|-------------|-------------|-------------|
| Tax Period     | 200412      | 200512      | 200612      | 200712      | 200812      |
| Activity Code  | 545         | 545         | 545         | 545         | 545         |
| Source Code    | 99          | 99          | 99          | 99          | 99          |
| Status Code    | 10          | 10          | 10          | 10          | 10          |
| Statute Date*  | 06-30-2011* | 06-30-2012* | 06-30-2013  | 06-30-2014  | 06-30-2015  |
| Tracking Code  | Same as Key |
| Project Code   | Same as Key |
| Related Return | Y           | Y           | Y           | Y           | Y 20        |

\*If FBAR statute extensions were received ensure that you input the extended ASED in place of the default.

### Agent Duties:

Before commencing an FBAR examination, the examiner is required to get the Territory Manager's approval via a Related Statute Memorandum (RSM). Without this approval, the agent is to not question the taxpayer regarding issues related to FBARs. Upon receiving approval, the examiner should prepare a Form 5345-D to establish the case on ERCS for proper case tracking. Input time to the established modules on your 4502 as opposed to AC 545. Keep in mind, you may have to seek a separate RSM for a spouse as well as establish a separate ERCS record.

Enter the following information on the Form 5345-D (the pro-forma version attached on page 2 already contains some of this information):

1. Fill-in the taxpayer's name and address. (Only TPH or TPW)
2. Check the "Control Non-AIMS DET Item" box
3. Enter the PBC, SBC, EGC, and ERCS examiner information
4. Enter the taxpayer's TIN (TPH or TPW's as appropriate)
5. The MFT is C6
6. For the type of form, enter "FBAR"
7. In the middle section of the form, enter all of the FBAR years being established for the listed taxpayer as follows in this table:

# FBAR-ERCS Guide

| Examination Request-ERCS (Examination Returns Control System) Users (IRM References: 4.4.23, 4.10.5.4)   |                     |               |  |             |              |  |                              |                |  |  |     |  |                                   |                                  |
|--|---------------------|---------------|--|-------------|--------------|--|------------------------------|----------------|--|--|-----|--|-----------------------------------|----------------------------------|
| Transcripts Reviewed (Initial box): <input type="checkbox"/> AMDISA <input type="checkbox"/> IMFOLT/R/BMFOLT <input type="checkbox"/> INOLE(G/T)   |                     |               | Use an AIMS label if available<br>Taxpayer Name/Name Control: <u>Taxpayer, Joe</u>   |             |              |  |                              |                |  |  |     |  |                                   |                                  |
| Check One Box Only<br><input type="checkbox"/> Request AIMS Control Masterfile<br><input type="checkbox"/> Control Penalty Investigation<br><input type="checkbox"/> Request AIMS Control Non-Master File  |                     |               | Street: <u>123 Main St</u><br><small>(Address is only required for AMF control)</small><br>City: <u>Center</u> State: <u>FL</u> ZIP Code: <u>33505</u> |             |              |  |                              |                |  |  |     |  |                                   |                                  |
| PBC: <u>XXX</u> SBC: <u>XXXXX</u> EGC: <u>XXXX</u>   |                     |               | Examiner's ERCS Emp ID: <u>XXXX</u>  |             |              | Examiner's ERCS Emp. Name: <u>Agent, Revenue</u>   |                              |                |  |  |     |  |                                   |                                  |
| TIN: <u>123-45-5789</u> MFT: <u>C6</u> Form Type: <u>FBAR</u> <small>(A separate F-8346D is required for each TIN and MFT)</small>   |                     |               |  |             |              |  |                              |                |  |  |     |  |                                   |                                  |
|  | Tax Period (YYYYMM) | Activity Code | Source Code  | Status Code | Statute Date | Tracking Code (if applicable)  | Project Code (if applicable) | Tech Svcs Code | Claim Amount (Required if Source Code is 30) | Special Message/ Push Code (Required if Source Code is 22, 24, 46) | POD | Related Return Indicator (Enter code if/whether filed) | Aging Reason Code (if applicable) | Input on ERCS (Initial and Date) |
| 1  | 200412              | 545           | 99   | 10          | 06-30-2011*  | 1234   | 5678                         |                |  |  |     | Y  |                                   |                                  |
| 2  | 200512              | 545           | 99   | 10          | 06-30-2012*  | 1234   | 5678                         |                |  |  |     | Y  |                                   |                                  |
| 3  | 200612              | 545           | 99   | 10          | 06-30-2013   | 1234   | 5678                         |                |  |  |     | Y  |                                   |                                  |
| 4  | 200712              | 545           | 99   | 10          | 06-30-2014   | 1234   | 5678                         |                |  |  |     | Y  |                                   |                                  |
| 5  | 200812              | 545           | 99   | 10          | 06-30-2015   | 1234   | 5678                         |                |  |  |     | Y  |                                   |                                  |
| <input type="checkbox"/> TEFRA Indicator: (MFTs 06 and 38 only)<br>(Y=Yes, N=No, S=Survey)<br><input type="checkbox"/> Do you want the original return? (Y/N)<br>(Y= Original return, N= Do not want original return)<br><input type="checkbox"/> Do you want labels? (Y/N)<br>(Y= will receive 5545 and labels, N= will not receive 5545 and labels)<br><input type="checkbox"/> Joint Committee? (Y/N)<br><input type="checkbox"/> Foreign Control? (Y/N)<br><input type="checkbox"/> Is case LMSB/CIC? (N/P/S)<br>(N = Not applicable, P = Primary/Secondary, S = Support)<br><input type="checkbox"/> Control PBC (Used for Collateral Exams Only) |                     |               |  |             |              | RELATED RETURN INFORMATION<br><small>(Enter information for Primary/Key Case)</small>                          |                              |                |  |  |     |  |                                   |                                  |
| Printed Name   |                     |               |  |             |              | Taxpayer Name: <u>Taxpayer, Joe and Jane</u>   |                              |                |  |  |     |  |                                   |                                  |
| Examiner's Signature   |                     |               |  |             |              | TIN: <u>123-45-5789</u> MFT: <u>C6</u> Tax Period: <u>200812</u> Source Code: <u>XXX</u>                       |                              |                |  |  |     |  |                                   |                                  |
| Date   |                     |               |  |             |              | Tracking code: <u>1234</u> Project Code: <u>5678</u> Aging Reason Code: <u>XXX</u>                             |                              |                |  |  |     |  |                                   |                                  |
|  |                     |               |  |             |              | Reason for Request: <u>TO CONTROL AN FBAR INVESTIGATION RELATED TO A TREATY (or CVDI OPT-OUT/REMOVAL) CASE</u> |                              |                |  |  |     |  |                                   |                                  |
|  |                     |               |  |             |              | Follow-Up Actions: _____   |                              |                |  |  |     |  |                                   |                                  |
|  |                     |               |  |             |              | 21   |                              |                |  |  |     |  |                                   |                                  |
| Form <b>5345-D</b> (Rev. 01-2011) Catalog Number 39204U publish.no.irs.gov Department of the Treasury-Internal Revenue Service   |                     |               |  |             |              |  |                              |                |  |  |     |  |                                   |                                  |

MFT Code is C6

| <b>FBAR QUICK REFERENCE GUIDE</b>   |   |
|---|---|
| <b>Detroit Computing Center (DCC)<br/>Contact Information</b>   |   |
| <b>Item</b>   | <b>Where to Send</b>  |
| <b>Related Statute Memorandum (RSM)<br/>FBAR Monitoring Document (FMD)<br/>Consent to Extend FBAR Statute</b> | Email: *SBSE BSA Compliance-FBAR Penalty Coordinator<br>Fax: 313-234-2278<br><b>NOTE:</b> Email is preferred/most reliable, so use RSMs and FMDs with electronic signatures. For handwritten signatures, consider scanning the document or E-Faxing it to yourself. Then forward the pdf file via email.  |
| <b>Delinquent/Amended FBARs</b>   | Internal Revenue Service - CTR Operations<br>Edit and Error Resolution Mailroom<br>P.O. Box 32621<br>Detroit, MI 48232-0621   |
| <b>Checks to pay for FBAR Penalties</b>   | <b>If sent by USPS</b><br>Internal Revenue Service<br>Attention: FBAR Coordinator Nancy Beasley<br>P.O. Box 33115<br>Detroit, MI 48232-0115<br><br><b>If sent by UPS [Overnight for priority items]</b><br>Internal Revenue Service<br>Attention: FBAR Coordinator Nancy Beasley<br>985 Michigan Ave, 4th floor<br>Detroit, MI 48226                      |
| <b>Closed Case Files</b>  | <b>If file weighs 13 oz. or less [use USPS]</b><br>Internal Revenue Service<br>Attention: FBAR Coordinator Nancy Beasley<br>P.O. Box 33113<br>Detroit, MI 48232-0113<br><br><b>If file weighs more than 13 oz. [use UPS]</b><br>Internal Revenue Service<br>Attention: FBAR Coordinator Nancy Beasley<br>985 Michigan Ave, 4th floor<br>Detroit, MI 48226 |
| <b>Note:</b> Send unagreed, appealed cases to Appeals through Tech Services                                   |   |

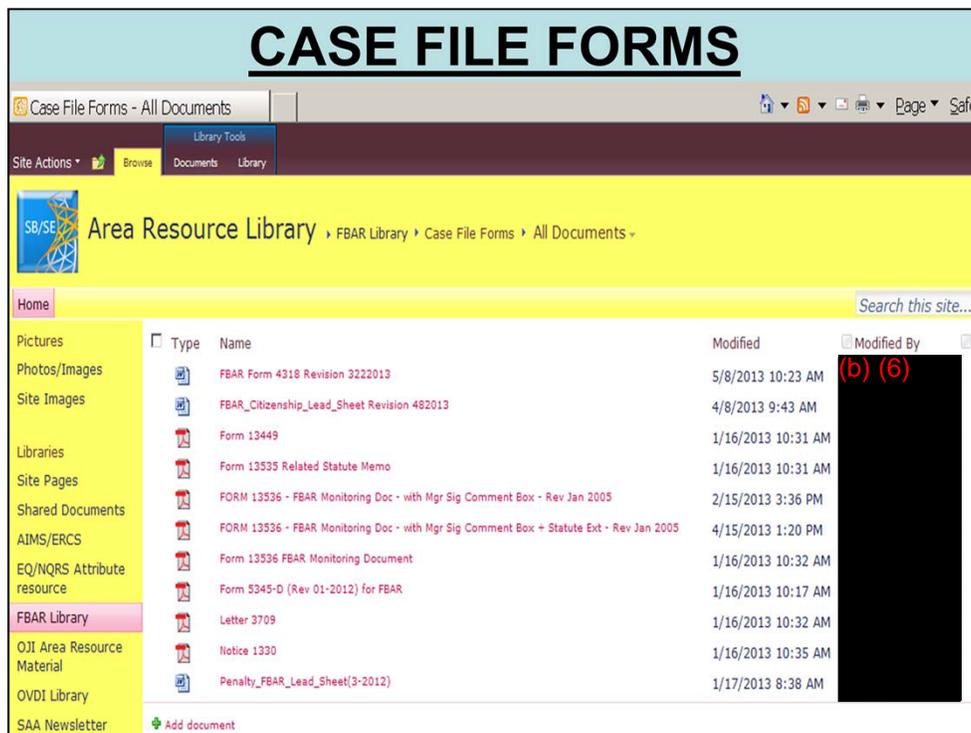
22

The FBAR Quick Reference Guide Shows where the RSM & FMD & Statutes Go by E-mail or Fax.

Delinquent/Amended FBARs Mailed to.

Checks to Pay FBAR Penalties Mailed to

Closed Case Files Go to depending on being less than or more than 13 ounces in weight.



Click into FBAR Form 4318 showing its Structure and Links.

The Form 4318 FBAR was designed with the Revenue Agent in mind putting the smaller necessary parts of the case file for Counsel Review up Front and the more extensive and larger parts in the back of the case file in the 600 Sections.

Click into the FBAR Citizen Lead Sheet to Explain the Goal

Click into the Form 13449 (FBAR RAR) to explain definition of boxes on page 2 and how they relate to page 1.

# FORM 4318-FBAR

| FBAR Examination Workpapers – Index                                   |             | Examiner   | Grade | Total Time Charged to Case             |      |      |
|---|-------------|--|-------|--|------|------|
| Taxpayer name and address (city, state, ZIP code)                     |             | Taxpayer's TIN<br>TP Business Phone:<br>TP Cell Phone:<br>TP Fax Number:   |       | Mutual Commitment Date (MCD) (mm/yyyy) |      |      |
| POA contact information (Name, street address, city, state, ZIP code) |             | Tax Return Form Number   |       | Penalty Period(s)                      |      |      |
| Phone:  |             |  |       |  |      |      |
| Fax:  |             |  |       |  |      |      |
| Reference   | Description |  |       |  |      |      |
| Administrative/Planning   | 100         | Activity Record—Form 9984—Examining Officer's Activity Record—RG's Lead Sheet Available  |       |  |      |      |
|   | 101         | FMD, Form <a href="#">13536</a> —[Requires manager's "date closed from group"]—(Emailed or Faxed)                              |       |  |      |      |
|   | 102         | (RSM) Related Statute Memorandums— <a href="#">Form 13535</a>  |       |  |      |      |
|   | 103         | Counsel Approval Memorandum, Legal Opinions & Title 31 Summons   |       |  |      |      |
|   | 104         | Summary Memorandum & 886A-Case Summary-Explaining FBAR Violations & Penalty Computations                                       |       |  |      |      |
|   | 105         | <a href="#">Form 13449</a> (FBAR Penalty RAR Under Title 31) & Payments TP Made(Copies)-Do Not Use <a href="#">Form 3244</a>   |       |  |      |      |
|   | 106         | <a href="#">Form ID F 90-22.1</a> - Secured Delinquent FBAR's (Copies or Facsimiles of Audit Years Filed )                     |       |  |      |      |
|   | 107         | Statute Extensions (if Applicable)- <a href="#">Consent To Extend FBAR Statute</a>   |       |  |      |      |
|   | 108         | (POA) Power of Attorney— <a href="#">Form 2848</a>   |       |  |      |      |
|   | 109         | CBRS Research (FBAR Facsimiles Filed For Years Not Under Audit)  |       |  |      |      |
|   | 110         | <a href="#">Form 906</a> (if Applicable)   |       |  |      |      |
|   | 111         |  |       |  |      |      |
|   | 112         |  |       |  |      |      |
|   | 113         |  |       |  |      |      |
|   | 114         |  |       |  |      |      |
| 115   |             |  |       |  |      |      |
| Enact   | 200         | Read <a href="#">IRM 4.26.16-FBAR Law</a> & <a href="#">IRM 4.26.17-FBAR Procedures</a> for Updated FBAR Penalty Case Details. |       |  |      |      |
|   | 205         | Fraud Development Lead Sheet (For <a href="#">Willful FBAR Penalty &amp; Document FTA Approval</a> )                           |       |  |      |      |
| Reference   | Description | Title 31-FBAR Penalty Assessments-Form 13449   |       |  |      |      |
|   |             | TY   | TY    | TY                                     | TY   | TY   |
|   |             | 2006   | 2007  | 2008                                   | 2009 | 2010 |
| Identified Issues   | 400         | Penalty FBAR Lead Sheet  |       |  |      |      |
|   | 401         | FBAR Citizenship Lead Sheet  |       |  |      |      |
|   | 402         |  |       |  |      |      |
|   | 403         |  |       |  |      | 24   |
|   | 404         |  |       |  |      |      |

Click into FBAR Form 4318 showing its Structure and Links.

The Form 4318 FBAR was designed with the Revenue Agent in mind putting the smaller necessary parts of the case file for Counsel Review up Front and the more extensive and larger parts in the back of the case file in the 600 Sections.

# FORM 4318-FBAR

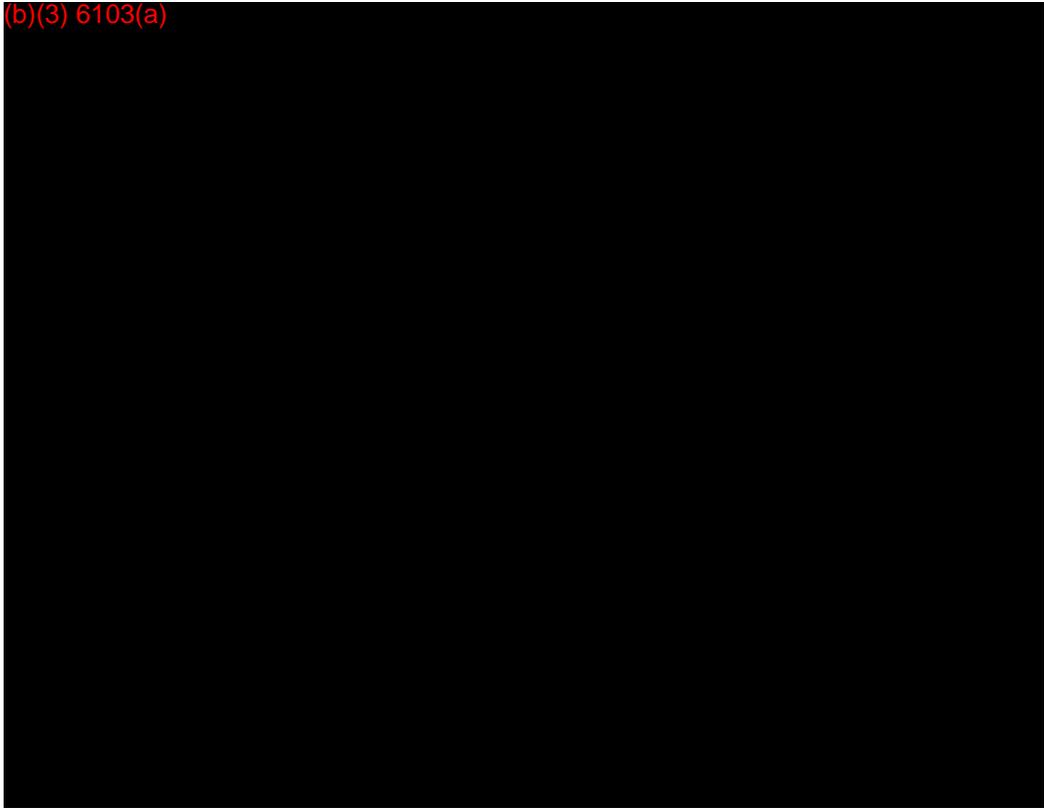
| FBAR Tax Examination Workpapers Index - <i>Continued</i> |             |  |    |    |    |    |    |
|--|-------------|--|----|----|----|----|----|
| Reference  | Description | TY   | TY | TY | TY | TY | TY |
| Additional Issues  | 500         |  |    |    |    |    |    |
|  | 501         |  |    |    |    |    |    |
|  | 502         |  |    |    |    |    |    |
|  | 503         |  |    |    |    |    |    |
|  | 504         |  |    |    |    |    |    |
|  | 505         |  |    |    |    |    |    |
|  | 506         |  |    |    |    |    |    |
|  | 507         |  |    |    |    |    |    |
|  | 508         |  |    |    |    |    |    |
|  | 509         |  |    |    |    |    |    |
|  | 510         |  |    |    |    |    |    |
|  | 511         |  |    |    |    |    |    |
|  | 512         |  |    |    |    |    |    |
|  | 513         |  |    |    |    |    |    |
| 514  |             |  |    |    |    |    |    |
| Miscellaneous  | 600         | FBAR Penalty Mitigation Computations (After 10/22/2004) Spreadsheet-(if Applicable)  |    |    |    |    |    |
|  | 601         | Foreign Account Records (Copies of <a href="#">Relevant Foreign Bank Statements on Date of Violation</a> )                                 |    |    |    |    |    |
|  | 602         | Analysis-Unreported Foreign Income & Tax Omitted (Attributable to Foreign Accounts at Issue)   |    |    |    |    |    |
|  | 603         | TAX RETURNS [Copies Original Related Forms 1040 (Pages 1 & 2, & Schedule B)] & 1040Xs  |    |    |    |    |    |
|  | 604         | RAR (Revenue Agent Report) for Related Forms 1040  |    |    |    |    |    |
|  | 605         | Correspondence (Letters <a href="#">929</a> , <a href="#">937</a> , <a href="#">4265</a> , <a href="#">3709</a> , & <a href="#">3800</a> ) |    |    |    |    |    |
|  | 610         | (IDR) Information Document Requests—Form 4564—RGS Lead Sheet Available   |    |    |    |    |    |
|  | 615         | Official Exchange Rates Spreadsheet (if Applicable)  |    |    |    |    |    |
|  | 640         | -  |    |    |    |    |    |
|  | 645         | -  |    |    |    |    |    |
|  | 650         | Case Building Cover Sheet & Materials (Form <a href="#">5345-D</a> )   |    |    |    |    |    |

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Click into FBAR Form 4318 showing its Structure and Links.

The Form 4318 FBAR was designed with the Revenue Agent in mind putting the smaller necessary parts of the case file for Counsel Review up Front and the more extensive and larger parts in the back of the case file in the 600 Sections.

(b)(3) 6103(a)



The **Goal** --To **establish the Taxpayer as a U.S. Person**-- Defined in Title 31 CFR § 1010.350 and **Subject to an FBAR filing requirement** for Specific Calendar Years.

RA needs to secure the Proof Necessary that the TP is either a U.S. Citizen or U.S. Resident Alien.

The **Taxpayer** is a **United States (US) Person as defined in Title 31** CFR § 1010.350, :Title 31 C.F.R. § 1010.100 (iii), **and Title 26 U.S.C. § 7701(b)** for FBAR filing requirement purposes and verified by IRS Sources of IDRS Command Code DDBKD showing Citizenship Code B-Legal Alien-Authorized to Work during the calendar years 2006, 2007, and 2008.

# FBAR\_Citizenship\_Lead\_Sheet

| FBAR Citizenship Lead Sheet   |  |
|---|--|
| <p><i>The following techniques are not intended to be all-inclusive nor are they mandatory steps to be followed. Judgment should be used in selecting the techniques that apply to each taxpayer.</i></p> <p><b>The Goal</b> –To establish the Taxpayer as a <b>U.S. Person</b>– Defined in <b>Title 31 CFR § 1010.350</b> and Subject to an <b>FBAR filing requirement for Specific Calendar Years</b>.</p> <p><b>RA</b> needs to secure the <b>Proof Necessary</b> that the TP is either a U.S. Citizen or U.S. Resident Alien</p>  |  |
| <b>Audit Steps:</b> (Document audit steps taken or to be taken.)  | <b>Workpaper Reference</b>                                       |
| 1. Get a <b>Copy of United States (U.S.) Passport</b> with photo and Passport Number (if Applicable and Available) for the Relevant FBAR Years  | N/A  |
| 2. Get a <b>Statement by the Taxpayer</b> that shows he is a <b>U.S. Citizen</b> , either an <b>admission of citizenship</b> , or a statement about the location of the person's birth, is acceptable for the Relevant FBAR Years.  | N/A  |
| 3. <b>Print IDRS Command Code DDBKD</b> (Requested by Counsel) which has the indicator (Code "A") that means the person is a U.S. Citizen for the Relevant FBAR Years.<br><br><b>(See Instructions on How to Do Command Code DDBKD at 401-2.1)</b><br><br><b>The Citizenship Codes on DDBKD and MFTRAU are Defined as Follows:</b><br><b>A</b> —United States (US) Citizen<br><b>B</b> —Legal Alien—Authorized to Work<br><b>C</b> —Legal Alien—Not Authorized to Work<br><b>D</b> —Other Alien<br><b>E</b> —Alien Student—Restricted Work Authorized<br><b>F</b> —Conditionally Legalized Alien—Status Not Known | See 401-2.1 For Instructions<br><br>Example at 401-2.3           |
| 4. <b>Print IDRS Command Code MFTRA U</b> to request a Social Security Administration transcript called <b>NUMIDENT</b> on an individual which has the indicator (Code "A") that means the person is a U.S. Citizen for the Relevant FBAR Years.<br><br><b>(See Instructions on How to Do Command Code MFTRAU at 401-2.2)</b>   | See 401-2.2 For Instructions<br><br>Example at 401-2.4 & 401-2.5 |
| 5. Get a <b>Statement by the Taxpayer</b> that he was a <b>U.S. Resident Alien</b> during the Relevant FBAR Years.  | N/A  |
| 6. Get <b>Other Records</b> that shows the <b>TP has U.S. Resident Alien Status</b> like addresses on a drivers license, IDRS addresses, voting registration records, and statements by other witnesses, such as return preparer, or family members, about their knowledge of where the person lived during the Relevant FBAR Years.  | N/A  |
|   | 27   |
| FBAR Citizenship Lead Sheet<br>Rev. 03/2013   | Workpaper # 401 -1.2   |

The DDBKD is a useful IDRS Tool that Area Counsel likes to see that labels the Taxpayer as

A= US Citizen

B=Legal Alien-Authorized to Work

C=Legal Alien-Not Authorized to Work

D=Other Alien

E= Alien Student-Restricted Work Authorized

F=Conditionally Legalized Alien-Status Not Known

If the citizenship code is blank on the DDBKD, it may show on a MFTRA U (NUMIDENT)

Sanitized Copies of Real Life Examples of both the DDBKD and MFTRA U are in the Sample Case File 401 Workpaper Section.

# FBAR\_Citizenship\_Lead\_Sheet

| FBAR Citizenship Lead Sheet   |  |
|---|--|
| <p>7. <b>Determine if the Taxpayer has Resident Alien Status</b> which is determined in IRC Section 7701 by <b>Meeting any 1 of 3 Tests:</b></p> <p>i) IRC 7701(b)(1)(A)(i)-<b>Lawfully Admitted For Permanent Residence- "Green Card" Test.</b></p> <p>ii) IRC 7701(b)(1)(A)(ii)-<b>Substantial Presence Test</b></p> <p>iii) IRC 7701(b)(1)(A)(iii)-<b>First Year Election</b></p> <p><b>IRC Section 7701(b)(3) Defines the Substantial Presence Test</b> and that an individual meets this test if the individual is <b>present in the United States for at least 31 days during the current year and at least 183 days for the three-year period ending on the last day of the current year using a weighted average</b></p>  | N/A  |
| <p>8. Determine days for which an alien is an exempted individual for the substantial presence test. See IRC §§7701(b)(3)(D)(ii), 7701(b)(7), and definitions in regulations §301.7701(b)-3(b).</p>   | N/A  |
| <p>9. To possibly confirm that the taxpayer has U.S. Resident Alien Status <b>(Not Necessary if the previous audit steps show the TP is a US Person)</b> the RA can request on any Case to Send <b>Form 13931</b> via secure e-mail message attachment to <b>"SSE International TECS Coordinator"</b> to get the taxpayer's TECS (Treasury Enforcement Communication System). The Historical Travel Information per the <b>Requirements and Instructions</b> can be found at <b>SB/SE TECS Historical Travel Information Website</b> and Guidance at <b>IRM 5.1.18.14.7</b> &amp; the <b>Attached Workpapers 401-3.1 and 401-3.2</b>.</p> <p><b>TECS historical travel information will do the following:</b></p> <ol style="list-style-type: none"> <li>1. Learn possible address information to attempt taxpayer contact or identify assets</li> <li>2. Determine a taxpayer's status regarding his/her contention regarding his/her US residency or non-residency</li> <li>3. Confirm the validity of information on the taxpayer's returns or collection information statement</li> </ol> <p>(b) (7)(E)</p> | <p>N/A</p> <p>See 401-3.1 &amp; 401-3.2 For instructions</p> |
| 28  |  |
| <p>FBAR Citizenship Lead Sheet Rev. 03/2013 <span style="float: right;">Workpaper # 401 -1.3</span></p>   |  |

## What is Treasury Enforcement Communication System (TECS)?

TECS is a database maintained by the Department of Homeland Security, and it is used extensively by the law enforcement community. It contains information about individuals and businesses suspected of, or involved in, violation of federal law. TECS can provide useful information about taxpayers so employees can attempt taxpayer contact or locate asset information.

(b) (7)(E)

# Penalty\_FBAR\_Lead\_Sheet

|                  |             |
|------------------|-------------|
| Taxpayer-Name: # | Examiner: # |
| TIN: #           | Date: #     |
| Tax-Form: #      |             |
| Tax-Year(s): #   |             |

| FBAR Penalties: Post-10/22/04; SB/SE Examiners Lead Sheet: # |                     |           |             |           |
|--|---------------------|-----------|-------------|-----------|
| Tax-Period   | Previously-Assessed | Per-Examo | Adjustments | Reference |
| X  | X                   | X         | X           | X         |
| X  | X                   | X         | X           | X         |
| X  | X                   | X         | X           | X         |

**Conclusion:** (Reflects the final determination on the issue.)

The following techniques are not intended to be all-inclusive nor are they mandatory steps to be followed. Judgment should be used in selecting the techniques that apply to each taxpayer.

| Audit-Steps: (Document audit steps taken or to be taken.)  | Workpaper-Reference |
|--|---------------------|
| <p>1. General Info - Report of Foreign Bank &amp; Financial Accounts: TD-F 90-22.1 (FBAR):</p> <ul style="list-style-type: none"> <li>a. FBAR Form TD-F 90-22.1 is due June 30 following the calendar year in which reporting requirements were met.</li> <li>b. FBARS are Treasury forms, not regular IRS forms. Form TD-F 90-22.1 can be found in the IRS Forms Repository by entering Catalog # 12996D.</li> <li>c. FBARS are filed with the Enterprise Computing Center in Detroit (ECC), not IRS campuses.</li> <li>d. Income tax audits - Title 26 examinations; FBAR inquiries - Title 31 examinations.</li> <li>e. FBAR Code &amp; Regs - 31 USC §§ 5314 &amp; 5321; 31 CFR §§ 1010.350 &amp; 1010.306 &amp; 1010.420 &amp; 1010.320 &amp; 1010.340. Formerly: 31 CFR §§ 103.24 &amp; 103.27 &amp; 103.32 &amp; 103.57 &amp; 103.59, respectively.</li> <li>f. April 2003, Title 31 FBAR enforcement authority was delegated from FinCEN to IRS.</li> <li>g. Info gathered in a Title 26 audit cannot be used in a Title 31 inquiry unless there is a Related Statute determination by the Territory Manager [see Steps # 3 &amp; 4].</li> <li>h. Penalties for periods after 10/22/2004 are computed differently than under prior law.</li> </ul> | X                   |
| <p>2. Determine if FBAR was required [31 USC §§ 5314; 31 CFR §§ 1010.350 &amp; 1010.306 &amp; 1010.420. Formerly: 31 CFR §§ 103.24 &amp; 103.27 &amp; 103.32].</p> <ul style="list-style-type: none"> <li>a. Taxpayer is a "US person". [IRM 4.26.16.3.1]</li> <li>b. US person had a financial account. [IRM 4.26.16.3.2]</li> <li>c. Financial account was in a foreign country. [IRM 4.26.16.3.3]</li> <li>d. US person had financial/signatory/other authority over the foreign financial account. [IRM 4.26.16.3.4 &amp; IRM 4.26.16.3.5]</li> <li>e. Aggregate foreign account balances, in dollars, exceeded \$10,000 at any time in the calendar year. [IRM 4.26.16.3.6]</li> </ul>  | X                   |

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The Penalty\_FBAR\_Lead\_Sheet is in RGS Leadsheets and on the FBAR Library Website.

# Consents

Consents - All Documents

Site Actions | Browse | Documents | Library | Wade Timothy E

Area Resource Library > FBAR Library > Consents > All Documents

Search this site...

| Type | Name  | Modified           | Modified By | Checked Out To |
|------|---|--------------------|-------------|----------------|
|      | Consent to Extend FBAR Statute 4-23-12              | 1/16/2013 10:16 AM | (b) (6)     |                |
|      | Del Ord-25-13                                       | 1/16/2013 10:16 AM |             |                |
|      | sample 2006 FBAR SOL Extension Request Cover Letter | 1/16/2013 10:16 AM |             | 30             |

**Do Not Use Form 872**

**Instead use Special FBAR Consent form Found on FBAR Library Website under Consents.**

# FBAR Court Cases

FBAR Court Cases - All Documents

Site Actions ▾ Browse Documents Library

Area Resource Library ▸ FBAR Library ▸ FBAR Court Cases ▸ All Documents ▾

Home Search t

| <input type="checkbox"/> | Type | Name   | Modified           | <input type="checkbox"/> Modified By |
|--------------------------|------|--|--------------------|--------------------------------------|
|                          |      | 131_S.Ct_2068 Global-Tech Appliances(wilful blindness) | 5/23/2013 10:30 AM |                                      |
|                          |      | McBride Case   | 5/8/2013 8:42 AM   |                                      |
|                          |      | T_C_Memo_2006_106 Mostafa v. Comm(reasonable cause)    | 5/23/2013 10:30 AM |                                      |
|                          |      | Williams Case  | 5/8/2013 8:50 AM   |                                      |

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 Shared Documents  
 AIMS/ERCS  
 EQ/NQRS Attribute resource  
 FBAR Library

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Two FBAR Court Cases we will briefly discuss!

**We now come back to Power Point Slides.**

| IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH<br>CENTRAL DIVISION  |  |
|---|--|
| UNITED STATES OF AMERICA,<br><br><p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> JON MCBRIDE,<br><br><p style="text-align: center;">Defendant.</p>   | <b>FINDINGS OF FACT,<br/>CONCLUSIONS OF LAW, AND ORDER</b><br><br>Case No. 2:09-cv-378 DN<br><br>District Judge David Nuffer |
| <p>Plaintiff United States of America brought this case to collect a civil penalty assessed to Defendant Jon McBride for his alleged willful failure to report his interest in four foreign bank accounts during tax years 2000 and 2001 as required under 31 U.S.C. § 5314 and related regulations. The matter was tried to the bench on May 21-22, 2012, and the court took the matter under advisement. The parties have submitted competing proposals as to the facts and legal conclusions that should be reached.<sup>1</sup> Having carefully considered the parties' proposals, along with the record of the hearing and applicable law, the court enters the following findings of fact and conclusions of law.</p> <p style="text-align: center;"><b>FINDINGS OF FACT</b></p> <p><b>A. McBride Was the Co-Owner of The Clip Company.</b></p> <p>1. Jon McBride is a citizen of the United States, was a citizen of the United States in 2000 and 2001, and has been since at least 1999. (Tr. 310:12-15, May 22, 2012).</p> |  |
| <p><small><sup>1</sup> Proposed Findings of Fact and Conclusions of Law [submitted by United States of America], docket no. 101, filed July 23, 2012; Defendant Jon McBride's Proposed Findings of Fact and Conclusions of Law, docket no. 104, filed August 22, 2012.</small></p>  |  |

The John McBride FBAR Willful Penalty Case is a very in-depth look into FBAR case law covering the 7 Elements Necessary To Prove in Any FBAR Court Case as stated previously in Slide 7.

**The Court was unwilling to excuse McBride's failure to read the tax return in full when signing, citing knowledge of a "plainly evident duty" to do so.**

McBride also had actual knowledge because the marketing materials from the financial management firm explicitly noted a duty to report interest in foreign accounts, the court said.

**McBride's use of a tax return preparer to prepare his personal federal income tax returns did not negate his willfulness**, the court said, because MrBride had **deliberately kept the information from the accountant**, which at a minimum **constitutes Reckless Disregard**.

**"As Long as the accountant is asking the question, once you don't give those records, you're done. It's a great case"**

**An improper motive or bad purpose is not necessary to establish FBAR Willfulness in the civil context as opposed to the criminal context.**

The **One District Court Case** that has directly addressed the question of **willfulness** and the **burden of proof** in a **Civil FBAR penalty case, *United States v. Williams***, concluded that the United States' burden of proof was **"the preponderance of the evidence"** on all questions before the court, including the question of whether the **taxpayer's failure to report in that case was "willful."**

**UNPUBLISHED**  
 UNITED STATES COURT OF APPEALS  
 FOR THE FOURTH CIRCUIT  
 No. 10-2230

UNITED STATES OF AMERICA,  
 Plaintiff - Appellant,  
 v.  
 J. BRYAN WILLIAMS,  
 Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, District Judge. (1:09-cv-00437-LO-TRJ)

Argued: March 21, 2012 Decided: July 20, 2012

Lost in District Court, but **parts of opinion are favorable.**

**Defined Willfulness:**

"[w]here willfulness is a statutory condition of civil liability, it is generally taken to cover not only knowing violations of a standard, but reckless ones as well." Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 (2007)

**Standard of Proof – Preponderance of the Evidence**

Did not disturb lower court definition of willfulness or standard of proof

**Approved rule that reckless disregard satisfies willfulness requirement for civil penalties**

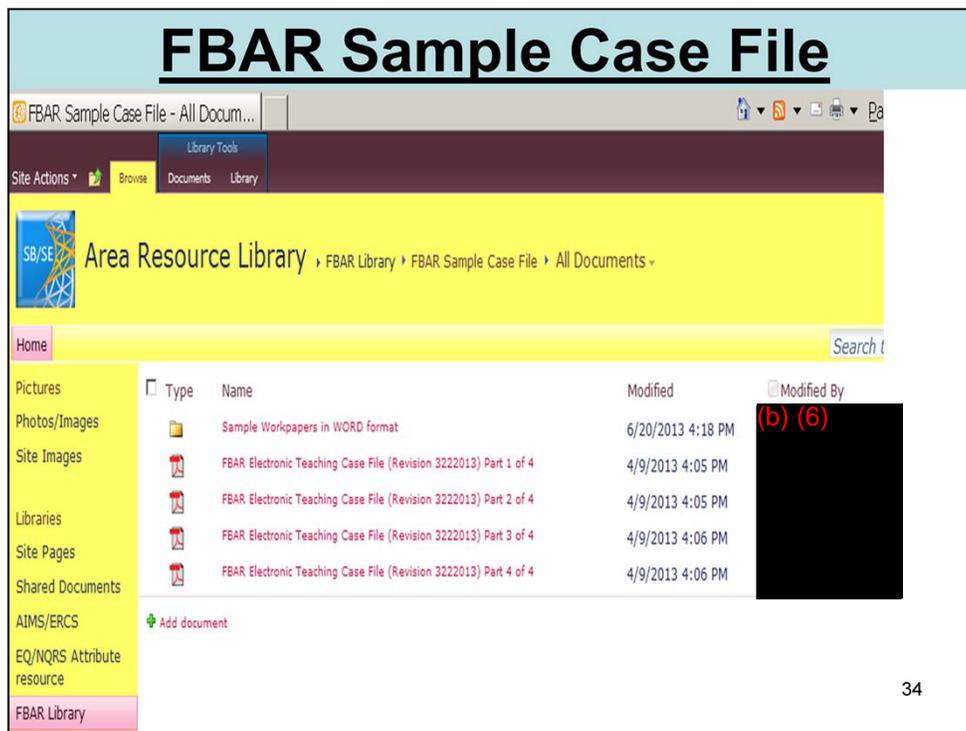
Held that finding of lack of willfulness was clearly erroneous and the Issue is **intent – not motive**

**Signature of return charges TP with knowledge of contents**

"at a minimum" line 7a's reference on Form 1040 Schedule B Instructions to Form TD F 90-22.1 put him on inquiry notice of filing requirement

TP testimony that he never read the words on the returns shows a **"conscious effort to avoid learning of filing requirements"**

Thus, with a false "no" on Schedule B = willful blindness



**Part 1 of 4** –Detailed Examples 4318 (**Sections 100 Thru Section 105**)

100-Activity Record Sample, 101-FMD Form 13536, 102-RSM Form 13535  
 103-Counsel Approval Memorandum, 104-Summary Memorandum & 886-A  
 ( Several Examples both Willful and Non-Willful)  
 105-Form 13449 (FBAR RAR)

**Part 2 of 4** -Detailed Examples 4318 (**Sections 106 Thru Section 400**)

106-Delinquent FBARS Secured, 107-Statute Extensions (Examples with  
 Letters to request & Contacts to get Copies of Real FBARs), 108-POA  
 109-CBRS Research, 110-Form 906, 400-Penalty FBAR Lead Sheet

**Part 3 of 4** -Detailed Examples 4318 (**Sections 401 Thru Section 602**)

401-FBAR Citizenship Lead Sheet-(Examples DDBKD TECS Request  
 Instructions)

600-FBAR Penalty Mitigation Spreadsheet

601-Foreign Account Records,602-Analysis Unreported Foreign Income & Tax  
 Omitted Spreadsheet ( **Spreadsheet Examples of What Counsel Wants**)

**Part 4 of 4** -Detailed Examples 4318 (**Sections 603 Thru Section 650**)

603-Tax Returns, 604-RAR Related 1040, 605-Correspondence

610-IDR, 615-Official Exchange Rates Spreadsheet

650-Case Building-Form 5345-D (Do not recommend printing sample case file).

# FBAR Sample Case File

Sample Workpapers in WORD form...

Library Tools

Site Actions Browse Documents Library

SB/SE Area Resource Library > FBAR Library > ... Sample Workpapers in WORD

Home

- Pictures
- Photos/Images
- Site Images
- Libraries
- Site Pages
- Shared Documents
- AIMS/ERCS
- EQ/NQRS Attribute resource
- FBAR Library**
- OJI Area Resource Material
- OVDI Library
- SAA Newsletter
- UBS Library
- Lists
- Tasks
- Contacts
- SharePoint Job Aids

| <input type="checkbox"/> | Type | Name   |
|--------------------------|------|--|
| <input type="checkbox"/> |      | 205-Fraud_Development_Lead_Sheet                                     |
| <input type="checkbox"/> |      | 886a FBAR Case Summary for Counsel Example 1 Non-Willful Level 3     |
| <input type="checkbox"/> |      | 886a FBAR Case Summary for Counsel Example 2 Non-Willful Level 2     |
| <input type="checkbox"/> |      | 886a FBAR Case Summary for Counsel Example 3 Non-Willful Level 3     |
| <input type="checkbox"/> |      | 886a FBAR Case Summary for Counsel Example 4 Non-Willful Level 3     |
| <input type="checkbox"/> |      | 886a FBAR Case Summary for Counsel Example 5 Non-Willful Level 3     |
| <input type="checkbox"/> |      | 886a FBAR Case Summary for Counsel Example 6 Non-Willful Level 3     |
| <input type="checkbox"/> |      | 886a FBAR Case Summary for Counsel Example 7 Willful Level 4         |
| <input type="checkbox"/> |      | 886a FBAR Case Summary for Counsel Example 8 Willful Level 3 Alt Pos |
| <input type="checkbox"/> |      | 886a FBAR Case Summary Non-Willful Example (Revision 622013)         |
| <input type="checkbox"/> |      | 886a FBAR Case Summary Willful Example (Revision 5292013)            |
| <input type="checkbox"/> |      | Cover Memo FBAR Counsel Approval                                     |
| <input type="checkbox"/> |      | FBAR Penalty Outside Cover Sheet Revision 362013                     |
| <input type="checkbox"/> |      | FBAR_Citizenship_Lead_Sheet  |
| <input type="checkbox"/> |      | Form 4564 FBAR IDR 1   |
| <input type="checkbox"/> |      | Penalty_FBAR_Lead_Sheet(3-2012) Sample                               |

Add document

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# FBAR Sample Case File

## INTRODUCTION-NOTES

The **FBAR Electronic Teaching Case File** is a **Teaching Tool for FBAR Cases** that was created in the South Atlantic Area using A **Custom Designed FBAR Form 4318** that is thought to be **comprehensive in detail to complete** the most **Complex FBAR Cases**; however, **Not all sections are Mandatory** for some of the **Simple FBAR Cases**

The **FBAR Form 4318** has built-in links to forms used and is **Organized into** the following **Sections**:

| Form 4318<br>Workpaper<br>Section | FBAR-Form 4318-Description  |
|-----------------------------------|---|
| *100                              | Activity Record—Form 9984—Examining Officer's Activity Record—RGS Lead Sheet Available        |
| *101                              | FMD, Form 13536—[Requires manager's "date closed from group"]—(Emailed or Faxed)              |
| *102                              | (RSM) Related Statute Memorandums—Form 13535  |
| *103                              | Counsel Approval Memorandum, Legal Opinions & Title 31 Summons                                |
| *104                              | Summary Memorandum & 886A-Case Summary-Explaining FBAR Violations & Penalty Computations      |
| *105                              | Form 13449 (FBAR Penalty RAR Under Title 31) & Payments TP Made(Copies)-Do Not Use Form 3244  |
| 106                               | Form TD F 90-22.1- Secured Delinquent FBAR's (Copies or Facsimiles of Audit Years Filed )     |
| 107                               | Statute Extensions [If Applicable]- Consent To Extend FBAR Statute                            |
| 108                               | (POA) Power of Attorney—Form 2848   |
| *109                              | CBRS Research (FBAR Facsimiles Filed For Years Not Under Audit)                               |
| 110                               | Form 906 (If Applicable)  |
| 200                               | Read IRM 4.26.16-FBAR Law & IRM 4.26.17-FBAR Procedures for Updated FBAR Penalty Case Details |
| 205                               | Fraud Development Lead Sheet (For Willful FBAR Penalty & Document FTA Approval)               |
| *400                              | Penalty FBAR Lead Sheet   |
| *401                              | FBAR Citizenship Lead Sheet   |
| 600                               | FBAR Penalty Mitigation Computations (After 10/22/2004) Spreadsheet-(If Applicable)           |
| *601                              | Foreign Account Records (Copies of Relevant Foreign Bank Statements on Date of Violation)     |
| *602                              | Analysis-Unreported Foreign Income & Tax Omitted (Attributable to Foreign Accounts at Issue)  |
| *603                              | TAX RETURNS [Copies Original Related Forms 1040 (Pages 1 & 2, & Schedule B)] & 1040Xs         |
| *604                              | RAR (Revenue Agent Report) for Related Forms 1040   |
| *605                              | Correspondence (Letters 929, 937, 4265, 3709, & 3800)   |
| 610                               | (IDR) Information Document Requests—Form 4564—RGS Lead Sheet Available                        |
| 615                               | Official Exchange Rates Spreadsheet (If Applicable)   |
| 650                               | Case Building Cover Sheet & Materials (Form 5345-D)   |

\* = Mandatory Sections in All FBAR Cases

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The **FBAR Electronic Teaching Case File** is a **Teaching Tool for FBAR Cases** that was created in the South Atlantic Area using A **Custom Designed FBAR Form 4318** that is thought to be **comprehensive in detail to complete** the most **Complex FBAR Cases**; however, **Not all sections are Mandatory** for some of the **Simple FBAR Cases**

# FBAR Sample Case File

The **FBAR Electronic Teaching Case File** that follows **Contains a Format** that is **organized to Explain** each **pertinent FBAR Form 4318 Sections** with **teaching examples, Official Exchange Rate Spreadsheet** in § 615, and **FBAR Penalty Computation Spreadsheets** in § 600 with **CPE Examples built into the Spreadsheet Tabs for all Willful and Non-Willful FBAR Cases**. A **FBAR Citizenship Lead Sheet** concludes if the TP is a US Person per Title 31. The **FBAR Electronic Teaching Case File** is divided into **4 Electronic Files with Electronic Part 3 of 4 has FBAR CPE examples** that **must be printed in Landscape** *Not Portrait* for **Workpaper Sections 600-4 through 600-10**.

**Intent of the Author**-The **FBAR Penalty Lead Sheet** in § 400 is thought to be **Completed first** by the RA to **gather all the details** in the FBAR Case File, **then a Summary Memorandum** is Completed with **and 886A-Case Summary** being **attached to Condense and Summarize ONLY the Essential Facts** for **FBAR Counsel** in Workpaper § 104.

The **Examples of FBAR CASE SUMMARY 886-A** (Both Willful and Non-Willful) are in **4 Sections** like a real Counsel Court Case:

|  |  |
|--|--|
| <b>1-Discussion of FBAR Violations</b> | <b>3-Total Dollar Amounts of Penalties</b> |
| <b>2-Number of Penalty Assessments</b> | <b>4-Case Disposition</b>                  |

**For all FBAR Cases---Revenue Agent's should Also Address the following 6 Items---**Somewhere in the Case File:

- 1) The **Balance of the Account** in USD on the **Date of Violation (Willful Only)** or **Highest Account Balance & Date (Non-Willful)**
- 2) An **Analysis of Unreported Foreign Income** and the **Amount of Tax Omitted Attributable to Foreign Accounts at Issue**
- 3) **Reasonable Cause**,
- 4) **Examiner Discretion** for Lesser Penalties when Used,
- 5) **Why No Willful FBAR Penalties** in Non-Willful FBAR Penalty Cases, and
- 6) The **Source of the Foreign Currency Amounts and Exchange Rates Used** to Arrive at USD.

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The **FBAR Electronic Teaching Case File** that follows **Contains a Format** that is **organized to Explain** each **pertinent FBAR Form 4318 Sections** with **teaching examples of each Workpaper section, Official Exchange Rate Spreadsheet** in § 615, and **FBAR Penalty Computation Spreadsheets** in § 600 with **CPE Examples built into the Spreadsheet Tabs for all Willful and Non-Willful FBAR Cases**.

**Intent of the Author**-The **FBAR Penalty Lead Sheet** in § 400 is thought to be **Completed first** by the RA to **gather all the details** in the FBAR Case File, **then a Summary Memorandum** is Completed with **and 886A-Case Summary** being **attached to Condense and Summarize ONLY the Essential Facts** for **FBAR Counsel** in Workpaper § 104.

### **886A Case Summary (4 Parts)**

- 1) **Discussion of FBAR Violations (Critical Items Included)**
  - The **Balance of the Account** in USD on the **Date of Violation** (Willful Only) or **Highest Account Balance & Date** (Non-Willful)
  - An **Analysis of Unreported Foreign Income** & the **Amount of Tax Omitted Attributable to Foreign Accounts at Issue**
  - **Reasonable Cause**-Put in Argument 400 FBAR Section
  - **Examiner Discretion** for Lesser Penalties- When Used
    - Examiner's Manager (GM) Written Approval in Workpapers Per IRM 4.26.16.4.7 if a different Penalty Used than Mitigation Guidelines.
  - **Why No Willful FBAR Penalties** in Non-Willful FBAR Penalty Cases
  - The **Source of the Foreign Currency Amounts & Exchange Rates Used** to Arrive at USD
- 2) **Number of Penalty Assessments**
- 3) **Total Dollar Amounts of Penalties**
- 4) **Case Disposition**

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The Examples of FBAR CASE SUMMARY 886-A (Both Willful and Non-Willful) are in 4 Sections like a real Counsel Court Case:

**1-Discussion of FBAR Violations**

**2-Number of Penalty Assessments**

**3-Total Dollar Amounts of Penalties**

**4-Case Disposition**

**For all FBAR Cases---Revenue Agent's should Also Address the following 6 Items---In the 886A Case Summary and 400 Section:**

- 1) The Balance of the Account in USD on the Date of Violation (Willful Only) or Highest Account Balance & Date (Non-Willful)
- 2) An Analysis of Unreported Foreign Income and the Amount of Tax Omitted Attributable to Foreign Accounts at Issue
- 3) Reasonable Cause,
- 4) Examiner Discretion for Lesser Penalties when Used,
- 5) Why No Willful FBAR Penalties in Non-Willful FBAR Penalty Cases, and
- 6) The Source of the Foreign Currency Amounts and Exchange Rates Used to Arrive at USD.

# IRMs and Law

IRMs and Law - All Documents

Library Tools

Site Actions ▾ Browse Documents Library

SB/SE Area Resource Library ▸ FBAR Library ▸ IRMs and Law ▸ All Documents ▾

Home

| <input type="checkbox"/> | Type | Name                                 | Modified           |
|--------------------------|------|--------------------------------------|--------------------|
|                          |      | Post-Assessment Collection - Appeals | 6/3/2013 10:47 AM  |
|                          |      | 31 CFR chapter X                     | 1/16/2013 12:40 PM |
|                          |      | IRM 4.26.16                          | 1/16/2013 10:28 AM |
|                          |      | IRM 4.26.17                          | 1/16/2013 10:28 AM |

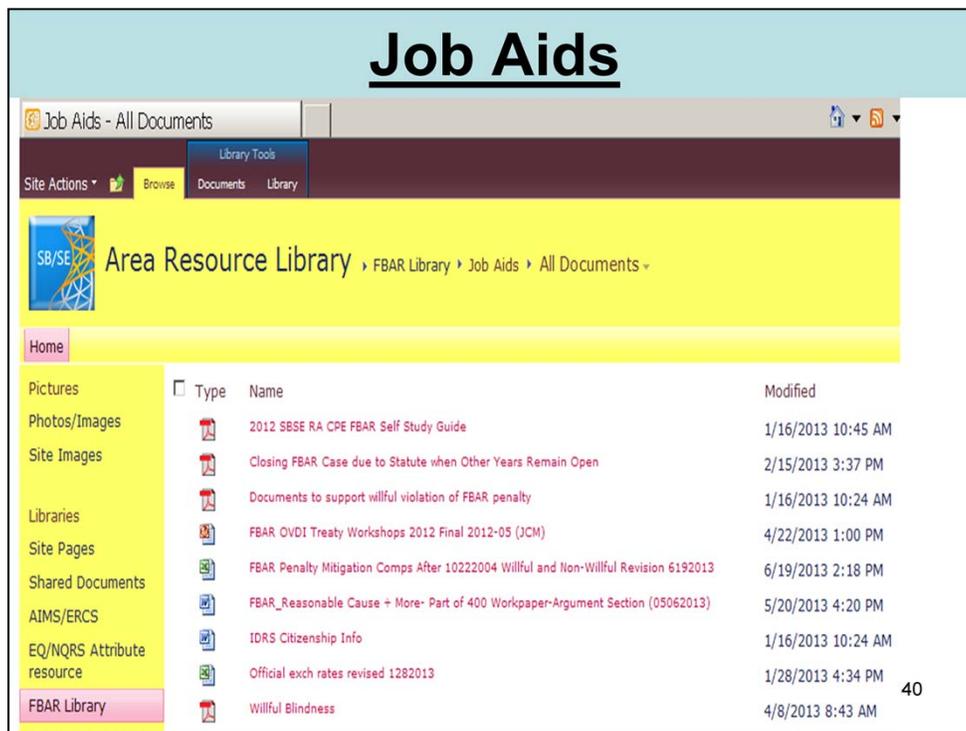
[Add document](#)

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[Shared Documents](#)  
[AIMS/ERCS](#)  
[EQ/NQRS Attribute resource](#)  
[FBAR Library](#)

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IRM 4.26.16 (Rev. 07-01-2008), Report of Foreign Bank and Financial Accounts  
**(FBAR)-LAW**

IRM 4.26.17 (Rev. 05-05-2008), Report of Foreign Bank and Financial Accounts  
**(FBAR)-Procedures.**



**Two Important FBAR Spreadsheets** should be noted and will be discussed next week in part 2 of 2 of this training on 6/6/2013 are:

- **FBAR Penalty Mitigation Comps After 10/22/2004 Willful and Non-Willful Revision 6192013**. (Found in FBAR Form 4318 Section 600)
- **Official Exchange Rates Revised 1/28/2013** (Found in FBAR Form 4318 Section 615)

**Custom Worksheet Tabs to Convert British Pounds (GBP), Swiss Francs (CHF), and (EUROS) into US Dollars for years 12/31/2002 through 12/31/2012.**

**Worksheet Tabs for various Countries to Convert Foreign Currency into US Dollars for 12/31/2003 through 12/31/2012.**

Note! Per IRM 4.26.16.3.6 the IRS must use the **Historical rates at 12/31** each year contained in these spreadsheets for **FBAR Penalties** from the **Financial Management Service (FMS)** at <http://fms.treas.gov/int.html>

**Closing FBAR Case with “No Action” due to Statute Issue when Other Years Remain Open**

When opening an FBAR case, a separate FBAR case file is set up apart from the Title 26 case file. This FBAR case file will cover all FBAR years and will include other documents such as Related Statute Memorandums (RSM), FBAR Monitoring Documents (FMD), Activity Record, correspondence, POA forms, IDRs, FBAR Lead Sheet, CBRS research, copies of relevant records from the Title 26 case, and any other relevant documents and workpapers.

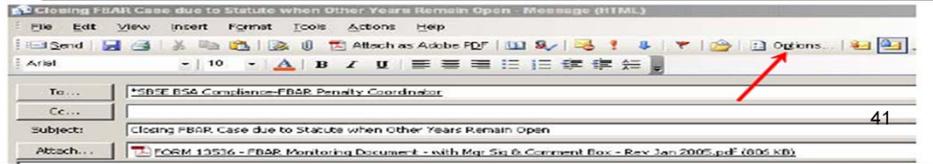
When closing an FBAR case, the entire FBAR case file is mailed with Form 3210 to DCC:  
Internal Revenue Service  
P.O. Box 33113  
Detroit, MI 48232-0113

**EXCEPTION:** If multiple FBAR years are open and established on the DCC Database, and  
(1) one of those years needs to be closed due to a statute issue, and  
(2) other years will remain open,

then the FBAR case file together with the remaining open years will remain with the examining agent and the year being closed due to a statute issue will be closed as follows:

- Complete FBAR Monitoring Document (FMD) Form 13536
- Include comment for DCC stating that FBAR case for a specific year is closing due to a statute issue and other years (specifically identifying the years) will remain open.
- Manager signs FMD
- Send FMD to DCC. Two options available:

| Email (preferred method)   | Fax  |
|--|--|
| <p>If digitally signed by manager (or signed by manager and scanned), FMD can be emailed to the following address:<br/>*SBSE BSA Compliance-FBAR Penalty Coordinator</p> <p>You should “Request a read receipt for this message” when you send the email. With the email open, select the “Options” button then check the box “Request a read receipt for this message.”</p> | <p>Fax to 313-234-2278.<br/>Please note that this is a community fax machine.</p> <p>DCC will not confirm receipt due to volume of documents received daily.</p> |



## Closing FBAR Case with “No Action” due to Statute Issue when Other Years Remain Open

There is a file on the FBAR Website in Job Aids that walks you through closing a case file like if your originally started the 2006 FBAR Year, then after consultation with your FBAR Coordinator it was decided not to pursue that 2006 FBAR Penalty due to a Statute Expiring, but we are still pursuing lets say the 2007 and 2008 FBAR Penalties Years that remain open, then we would follow those Job Aid procedures.

You should “**Request a read receipt for this message**” when you send the email. With the email open **select** the “**Options**” button then **check the box**

“Request a read receipt for this message.”

## **FBAR Reasonable Cause**

- Determination of **Reasonable Cause** is made **based upon the Facts and Circumstances in each situation**
- Did the TP act in Good Faith Considering experience, knowledge, and Education.
- Good Faith means no deception
- Good Faith Reliance on Tax Professional Means
  - Tax Professional was a Qualified Professional
  - Disclosed the Existence of the Foreign Account
  - Disclosed all Relevant Facts Regarding the Foreign Account
- Ignorance of FBAR Law Filing Instructions (Uninformed Belief) is not Reasonable Cause
- Mostafa v. Commissioner, T.C. Memo 2006-106

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The Mostafa Case Points Out-

“Petitioner’s mistake as to ignorance of the law does not amount to reasonable cause that would relieve her from the addition to tax.”

Taxpayers are obligated to inform themselves of their various filing obligations, and that ignorance of the filing duty is not reasonable cause.

The mere uninformed belief that no return is due, no matter how genuine, is not reasonable cause.

“I didn’t know I had to file” is not acceptable as a defense under Reasonable Cause.

### **FBAR Reasonable Cause is Not**

- An uninformed belief that a return is not due
- Lack of knowledge
- Age
- Poor Health
- Complexity of the Law
- Originally being from another country
- Being told by the Foreign Entity/Person that there are no U.S. filing requirements
- Being told by a U.S. professional that put the taxpayer in the structure that there are no U.S. filing Requirements
- Fully cooperating with the audit process
- Incurring substantial accounting/attorney fees

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The Secretary implemented the regulatory requirements with a 2 step reporting process.

- 1) Form 1040, Schedule B, Part III instructs TP to indicate an interest in a financial account in a foreign country by checking “Yes” or “No” in the appropriate box.
- 2) Form 1040 further refers taxpayers to Form TD F 90-22.1 (FBAR), which provides specific instructions for reporting a financial interest in or authority over bank accounts, securities accounts, or other financial accounts in a foreign country.

Failure to do this is no reasonable cause and leads into (b) (6) next talk on Willful Blindness.

## **FBAR Willful versus Non-Willful Penalty**

- The **primary difference** between **Willful and Non-Willful FBAR Penalties** is the **Degree of Fault by the Taxpayer**
- **Willful Penalty-Voluntary, Intentional violation of a Known Legal Duty**
  - An improper motive or bad purpose is not necessary to establish willfulness in civil context
  - **“Willful Blindness”** = Voluntary, intentional, reckless failure to discover a legal duty (willful ignorance, intentional avoidance of learning, blatant ignorance of the law, or conceal income)  
  
Global-Tech Appliances, Inc.v. SEB S.A., 131 S.Ct.2068-69(2011)
  - Show the TP was in position to acquire the knowledge in reading FBAR or 1040 instructions on Schedule B.
- **Non-Willful Penalty**-an involuntary, unintentional violation of a legal duty

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Because Title 31 § 5321 (a)(5) involves **Civil FBAR Penalties**, the applicable definition of willfulness is that which has been used in other civil contexts, including civil tax collection matters and compliance with reporting requirements.

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.

The Supreme Court recently confirmed that acting with “willful blindness” to the obvious or known consequences of one’s action also satisfies a willfulness requirement in **both the Civil and Criminal Contexts.**

Where a taxpayer makes a “conscious effort to avoid learning about reporting requirements”, evidence of such willful blindness is a sufficient basis to establish willfulness.

Willfulness may also “be proven through the inference from conduct meant to conceal or mislead sources of income or other financial information.”

**FBAR Willful Penalty-**  
**Proof of Voluntary and Intentional**

- No Reasonable Cause
- Deliberate Choices
- A motive to hide the accounts tends to show violation was deliberate and not accidental
- Absence of motive does not negate willfulness if other evidence shows violation was not accidental or unintentional.
- Bad motive Is not required.

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An improper motive or bad purpose is not necessary to establish willfulness in the civil context.

## **FBAR Willful Penalty-** **Proof of Known Legal Duty**

- **Direct Evidence**

- Statement by the person that he knew the filing requirements
- FBAR for a previous year, or incomplete FBAR for 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

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## **Factors Supporting Willful FBAR Penalty**

- Opened the foreign bank account
- Owner of, or a financial interest in, the foreign account
- Tax non-compliance
- Did not seek advice, or relied upon the advice of a promoter, foreign banker, or other unqualified tax professional.
- Violations persist after notification of FBAR reporting requirements
- Foreign account not disclosed to return preparer
- No business reason for the foreign account
- No family or business connection to the foreign country
- An offshore entity owns the account
- Previously-filed FBARs do not include all foreign accounts
- Illegal income in the foreign account
- Participated in an abusive tax avoidance scheme

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## **Factors Not Supporting Willful FBAR Penalty**

- Inherited the foreign bank account
- Only signature authority over the foreign bank account
- Tax compliance
- Relied upon the advice of a tax return preparer, a CPA, an attorney, or another qualified tax professional.
- Full compliance after notification of FBAR reporting requirements
- Foreign account disclosed to return preparer
- Business reason for the foreign account
- Family or business connection to the foreign country
- Person owns the account in his name

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## **FBAR Penalty Case Steps**

- 1) Discover a potential FBAR violation in Title 26
- 2) Secure a Related Statute Memorandum (RSM) in Title 31
- 3) Establish the **2** FBAR Administrative Controls
- 4) Investigate the FBAR Penalty Case
  - Use the FBAR 4318 for Penalty Case Structure
- 5) Determine the Appropriate FBAR Penalty
- 6) **Document Penalty Decision** in a **Memorandum** to **Area Counsel** & **Attach 886A-Case Summary**
- 7) **Issue** Form 13449 (FBAR **RAR**) **only after** case file **reviewed** by FBAR Coordinators **&** FBAR Penalty **approved** by FBAR Area Counsel.
- 8) Close the case

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**The Ultimate Goal** -of the Revenue Agent in an FBAR Penalty Case File is to Complete Step 6)

Show Electronic Penalty Case File Part 1 of 4.