



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
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MEMORANDUM FOR ALL LB&I, SB/SE, AND TE/GE EMPLOYEES

FROM: Heather C. Maloy /s/ Heather C. Maloy  
Commissioner, Large Business and International

Karen M. Schiller /s/ Karen M. Schiller  
Commissioner, Small Business/Self-Employed

Sunita B. Lough /s/ Sunita B. Lough  
Commissioner, Tax Exempt and Government Entities

Interim Guidance for Report of Foreign Bank and Financial Accounts (FBAR) Penalties

The purpose of this interim guidance is to implement procedures to improve the administration of the Service's FBAR compliance program. This guidance is effective upon issuance and applies to all open cases where the FBAR penalty is considered.

When asserting an FBAR penalty, the burden is on the IRS to show that an FBAR violation occurred and, for willful violations, that the violation was in fact willful. The FBAR penalty provision of Title 31 establishes only maximum penalty amounts, leaving the IRS to determine the appropriate FBAR penalty amount based on the facts and circumstances of each case.

The procedures in Attachment 1 were developed to ensure consistency and effectiveness in the administration of FBAR penalties. They will help ensure FBAR penalty determinations are adequately supported and penalties are asserted in a fair and consistent manner. Examiners must continue to use their best judgment when proposing FBAR penalties. They must take into account all the available facts and circumstances of a case. See IRM 4.26.16.4.7, *FBAR Penalties – Examiner Discretion*, concerning the use of examiner discretion when proposing FBAR penalties.

Attachment 2 is a Civil FBAR Penalty Case File Checklist. Its use will help ensure consistency in FBAR penalty case file information.

This interim guidance will be incorporated into IRM 4.26.16, *Report of Foreign Bank and Financial Accounts (FBAR)*, and IRM 4.26.17, *Report of Foreign Bank and Financial Accounts (FBAR) Procedures*, no later than one year following its issuance.

If you have any questions about this guidance or the attachments, you may contact Rod Lundquist, FBAR Senior Analyst, BSA Policy. For additional assistance with technical issues, please contact your division's FBAR technical advisor: Debora Kellough, LB&I; Chris Roginsky, SB/SE; or Kimberly Malone, TE/GE.

Attachment 1: Procedures to Ensure Consistency and Effectiveness  
in the Administration of Civil FBAR Penalties

Attachment 2: Civil FBAR Penalty Case File Checklist

cc: Chief Counsel  
Chief, Appeals  
[www.irs.gov](http://www.irs.gov)

## Attachment 1

### Procedures to Ensure Consistency and Effectiveness in the Administration of Civil FBAR Penalties

#### (1) Procedures Applicable to All FBAR Cases

For all FBAR cases, examiners must:

- a. Determine a recommended penalty based on the guidance in IRM 4.26.16 and (2), (3), and (4) below.
- b. Consult with an Operating Division FBAR Coordinator.<sup>1</sup>
- c. Seek approval of the FBAR penalty from the group manager<sup>2</sup> after consultation with an Operating Division FBAR Coordinator.
- d. Coordinate with Counsel if a penalty for a willful FBAR violation is being recommended. See (6) below.
- e. Coordinate with a Fraud Technical Advisor if there is reason to believe a criminal referral may be warranted. See (7) below.

#### (2) Penalty Amount for Willful Violations

For each year for which it is determined that there was a willful violation, examiners must fully develop and adequately document in the examination workpapers their analysis regarding willfulness. The examiner's report should clearly state the years for which it was determined that an FBAR violation was willful.

For cases involving willful violations over multiple years, examiners will recommend a penalty for each year for which the FBAR violation was willful. In most cases, the total penalty amount for all years under examination will be limited to 50 percent of the highest aggregate balance of all unreported foreign financial accounts during the years under examination. In such cases, the penalty for each year will be determined by allocating the total penalty amount to all years for which the FBAR violations were willful based upon the ratio of the highest aggregate balance for each year to the total of the highest aggregate balances for all years combined, subject to the maximum penalty limitation in 31 U.S.C. § 5321(a)(5)(C) for each year.

*Example:* Assume highest aggregate balances of \$50,000, \$100,000, and \$200,000 for 2010, 2011, and 2012, respectively. The total penalty amount is \$100,000 (50

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<sup>1</sup> Operating Division FBAR Coordinators are revenue agents or technical specialists who have been designated by an Operating Division to assist examiners with their FBAR cases. The Operating Divisions will establish specific procedures for when and how to contact Operating Division FBAR Coordinators.

<sup>2</sup> Area manager for TE/GE cases. References in this document to group manager are deemed to refer to the area manager for TE/GE cases.

## Attachment 1

### Procedures to Ensure Consistency and Effectiveness in the Administration of Civil FBAR Penalties

percent of the \$200,000 highest aggregate balance during the years under examination). The total of the highest aggregate balances for all years combined is \$350,000. The penalty for 2010 is \$14,286 ( $\$50,000/\$350,000 \times \$100,000$ ). The penalty for 2011 is \$28,571 ( $\$100,000/\$350,000 \times \$100,000$ ). The penalty for 2012 is \$57,143 ( $\$200,000/\$350,000 \times \$100,000$ ). The penalty amounts for each year are subject to the maximum penalty limitation in 31 U.S.C. § 5321(a)(5)(C).

Examiners may recommend a penalty that is higher or lower than 50 percent of the highest aggregate account balance of all unreported foreign financial accounts based on the facts and circumstances. In no event will the total penalty amount exceed 100 percent of the highest aggregate balance of all unreported foreign financial accounts during the years under examination. The examiner's workpapers must support all willful penalty determinations and document the group manager's approval.

#### (3) Penalty Amount for Nonwillful Violations

For most cases involving multiple nonwillful violations, examiners will recommend one penalty for each open year, regardless of the number of unreported foreign financial accounts. In those cases, the penalty for each year will be determined based on the aggregate balance of all unreported foreign financial accounts, and the penalty for each year will be limited to \$10,000.

For some cases, the facts and circumstances (considering the conduct of the person required to file and the aggregate balance of the unreported foreign financial accounts) may indicate that asserting nonwillful penalties for each year is not warranted. In those cases, examiners, with the group manager's approval after consultation with an Operating Division FBAR Coordinator, may assert a single penalty, not to exceed \$10,000, for one year only. The examiner's workpapers must support such a penalty determination and document the group manager's approval.

For other cases, the facts and circumstances (considering the conduct of the person required to file and the aggregate balance of the unreported foreign financial accounts) may indicate that asserting a separate nonwillful penalty for each unreported foreign financial account, and for each year, is warranted. In those cases, examiners, with the group manager's approval after consultation with an Operating Division FBAR Coordinator, may assert a separate penalty for each account and for each year. The examiner's workpapers must support such a penalty determination and document the group manager's approval.

## Attachment 1

### **Procedures to Ensure Consistency and Effectiveness in the Administration of Civil FBAR Penalties**

In no event will the total amount of the penalties for nonwillful violations exceed 50 percent of the highest aggregate balance of all unreported foreign financial accounts for the years under examination. A nonwillful penalty will not be recommended if the examiner determines that the FBAR violations were due to reasonable cause and the person failing to timely file correct and complete FBARs later files correct and complete FBARs.

In ascertaining the penalty amount for nonwillful violations (assuming the reasonable cause exception does not apply), these steps should be followed:

- a. Examiners should first determine whether the mitigation threshold conditions in IRM 4.26.16.4.6.1 are met.
- b. If the mitigation threshold conditions are met, examiners should make a preliminary penalty calculation based upon the mitigation guidelines in IRM 4.26.16.4.6.2, except that the penalty for each year will be limited to \$10,000. This is the penalty amount, unless the facts and circumstances of a case warrant a different penalty amount.
  - i. If the facts and circumstances of a case warrant a lower penalty amount, examiners, with the group manager's approval after consultation with an Operating Division FBAR Coordinator, may assert a single penalty, not to exceed \$10,000, for one year only.
  - ii. If the facts and circumstances of a case warrant a higher penalty amount, examiners, with the group manager's approval after consultation with an Operating Division FBAR Coordinator, may assert a separate penalty for each account and for each year. In no event will the total amount of the penalties exceed 50 percent of the highest aggregate balance of all unreported foreign financial accounts for the years under examination.
- c. If the mitigation threshold conditions are not met, the mitigation guidelines do not apply and examiners should not make a preliminary penalty calculation based upon the guidelines. Examiners, with the group manager's approval after consultation with an Operating Division FBAR Coordinator, should assert a separate penalty for each account and for each year. In no event will the total amount of the penalties exceed 50 percent of the highest aggregate balance of all unreported foreign financial accounts for the years under examination.

## Attachment 1

### Procedures to Ensure Consistency and Effectiveness in the Administration of Civil FBAR Penalties

#### **(4) Co-Owned Accounts**

Where there are multiple owners of an unreported foreign financial account, examiners must make a separate determination with respect to each co-owner of the foreign financial account as to whether there was a violation and, if so, whether the violation was willful or non-willful. For each co-owner against whom a penalty is determined, the penalty will be based on the co-owner's percentage ownership of the highest balance of the foreign financial account. If examiners are unable to determine a co-owner's percentage ownership, the penalty will be based on the amount determined by dividing the highest account balance equally among the co-owners. If examiners believe, based on the facts and circumstances of a particular case, that the penalty should be allocated among the co-owners in some other manner, they may do so with the group manager's approval after consultation with an Operating Division FBAR Coordinator. The examiner's workpapers must support such a determination and document the group manager's approval.

#### **(5) Coordination with Operating Division FBAR Coordinators**

All FBAR cases must be reviewed by an Operating Division FBAR Coordinator after the examiner preliminarily determines the penalties to be asserted and before the examiner notifies the accountholder of the results of the FBAR examination and Letter 3709 and Form 13449 are issued. This includes willful penalty cases, nonwillful penalty cases, cases for which examiners preliminarily determine that reasonable cause exists, cases for which examiners preliminarily determine that a warning letter should be issued, and cases for which examiners preliminarily determine no FBAR violation.

#### **(6) Coordination with Counsel**

IRM 4.26.17.4.3 currently requires Counsel review once the penalties have been determined and before Letter 3709 and Form 13449 are issued. Counsel review is no longer required except for cases for which willful penalties have been determined. For those cases, after coordination with an Operating Division FBAR Coordinator, Counsel review is required. Counsel's review will be limited to providing advice on whether an FBAR violation occurred, whether the FBAR violation was willful, and whether the proposed penalty is within the statutory limitations of 31 U.S.C. § 5321(a)(5)(C). IRM 4.26.17.4.3 will be revised to conform with the Counsel coordination requirements set forth in this paragraph.

## Attachment 1

### Procedures to Ensure Consistency and Effectiveness in the Administration of Civil FBAR Penalties

#### **(7) Coordination with Fraud Technical Advisors**

Examiners will coordinate their FBAR case with a Fraud Technical Advisor (FTA) when they have reason to believe the case may warrant a criminal referral. FTAs have experience with fraud cases and can apply that experience to assist with the criminal referral to ensure it is adequately developed. Examiners will contact FTAs based on existing procedures.

#### **(8) Group Managers Determine Whether to Assert FBAR Penalties**

The final determination to assert or not assert FBAR penalties is made by the group manager. The group manager will make the determination after confirming that the examiner has coordinated with an Operating Division FBAR Coordinator, Counsel, and a Fraud Technical Advisor, as appropriate.

#### **(9) Group Managers Approve Related Statute Determinations**

IRM 4.26.17.2 provides for territory manager approval of related statute determinations. Related statute determinations will now be approved at the group manager level and will no longer require territory manager approval. IRM 4.26.17.2 will be revised to conform with the approval requirements set forth in this paragraph.

## Attachment 2

### Civil FBAR Penalty Case File Checklist

Each FBAR examination case file must include the following:

- Form 4318, *Examination Workpapers Index*. If an FBAR examination was conducted with respect to both a husband and wife, a separate case file should be maintained for each spouse. For TEGE examiners, Form 5773, *EP/EO Workpaper Summary Continuation Sheet*, is used in lieu of Form 4318.
- Examiner Activity Record.
- Form 13535, *Foreign Bank and Financial Accounts Report Related Statute Memorandum*.
- Copy of email or fax transmission report verifying date notification of related statute memorandum submitted to Detroit Computing Center (DCC).
- FBAR Lead Sheet and workpapers.
- FBAR penalty computations.
- Copies of FinCEN Query research.
- Copies of relevant records from the Title 26 case file.
- Copies of any delinquent FBARs annotated in red on the top “Secured by Examination,” if applicable. For e-filed FBARs, copies of research from FinCEN Query showing that the FBARs were filed.
- A summary memorandum explaining the FBAR violations. This memorandum should be sent to the taxpayer with the Letter 3709.
- Form 4665, *Report Transmittal*, for unagreed cases being sent to Appeals.
  - Appeals must receive the case file with at least 365 days remaining on the FBAR assessment statute of limitations before Appeals will consider a case preassessment. Include in the case file either a Form 13448, *Penalty Assessments Certification Summary (Title 31 “FBAR”)*, verifying that the FBAR penalty has been assessed or a properly executed consent to extend the statute.
  - The Form 4665 should not contain any statements or information intended to influence Appeals or that otherwise may violate the ex parte communication rules. In general, the Form 4665 should be limited to a neutral list of unagreed issues, without comment. See Rev. Proc. 2012-18, section 2.03(4), and IRM 8.1.10.3.2 for additional information. In particular, the examiner should not include any commentary regarding the merits of the penalty appeal. The case file compiled at the time of the original FBAR civil penalty determination should have sufficient documentation regarding the determination to sustain the penalty. No separate memorandum should be prepared for Appeals discussing the basis for the original penalty determination.



## Attachment 2

### Civil FBAR Penalty Case File Checklist

- Documentation that any required coordination with an Operating Division FBAR Coordinator or a Fraud Technical Advisor has occurred.
- For willful cases, Counsel's written advice memorandum.
- Form 13536, *FBAR Monitoring Document (FMD)*, providing closing information for the FBAR database. Include copy of email or fax transmission report.
- Copy of Letter 3800, *Warning Letter Respecting Foreign Bank and Financial Accounts Report Apparent Violations*, if applicable
- Copy of Letter 3709, *FBAR 30 Day Letter* (transmitting the summary memorandum explaining the FBAR violations and Form 13449, *Agreement to Assessment and Collection of Penalties Under 31 USC 5321(a)(5) and 5321(a)(6)*), if applicable.
- Original Form 13449, *Agreement to Assessment and Collection of Penalties Under 31 USC 5321(a)(5) and 5321(a)(6)*, if applicable.
- Notice 1330, *Information on Making FBAR Penalty Payment by Check*.
- Original Form 2848, *Power of Attorney and Declaration of Representative*, if applicable.
- Information Document Requests (IDRs) with certified mail receipts, if applicable.
- Copies of any payments.
- Copies of other correspondence:
  - Letter 4265, *FBAR Appointment Letter*, and
  - All other case-related correspondence with the account holder.

#### Outside of case folder:

- Form 3198, *Special Handling Notice for Examination Case Processing*.
  - List all related Title 26 income tax and penalty cases.
  - Include the project code and tracking code for the FBAR penalty case.

#### Additional FBAR information can be found in:

- IRM 4.26.16, *Report of Foreign Bank and Financial Accounts (FBAR)*
- IRM 4.26.17, *Report of Foreign Bank and Financial Accounts (FBAR) Procedures*