Quiet Disclosure FBAR Investigations

Welcome everyone. Today we are going to discuss FBAR investigations in quiet disclosure cases. This presentation is an overview of the FBAR penalty process for quiet disclosure case. Because comprehensive FBAR training would take far more time than we have, we are going to cover only the highlights.

Quiet Disclosure FBAR Materials

- This PowerPoint presentation
- The FBAR section of the Quiet Disclosure Workshop Guide
- Quiet Disclosure FBAR Penalty Procedure Guide (PowerPoint)
- Quiet Disclosure FBAR Investigative Techniques Guide (PowerPoint)
- FBAR ERCS Guide

IRS

In addition to this PowerPoint presentation and the FBAR section of the Quiet Disclosure Workshop Guide, there are two other PowerPoint presentations that will be sent to you.

The Quiet Disclosure FBAR Penalty Procedure Guide is a PowerPoint presentation that covers administrative matters related to FBAR investigations. The presentation I am giving today, as well the FBAR section of the workshop guide, cover the most important procedural information that you need to know to start, work, and close FBAR penalty cases. The procedure guide is a stand-alone guide to assist you with administrative matters related to FBAR penalty cases. For those of you who took the 2012 CPE FBAR module much of this guide will look familiar.

Quiet Disclosure FBAR Investigative Techniques Guide is a PowerPoint that covers investigative techniques for FBAR cases. This guide also a stand-alone guide to assist you with developing FBAR penalty cases.

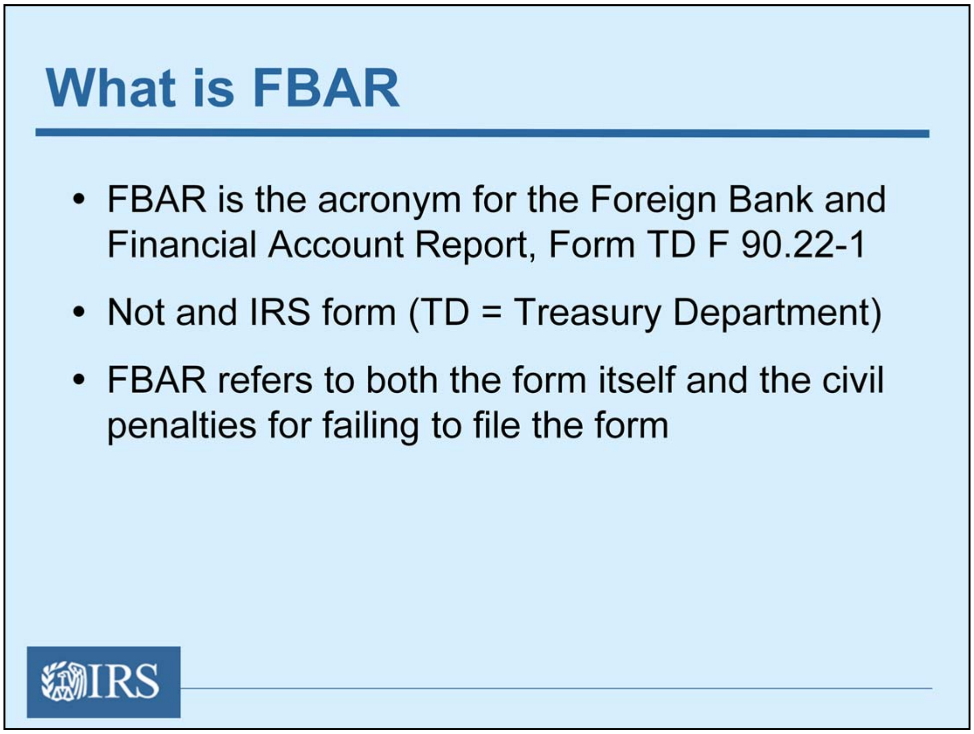
The notes sections of the two FBAR PowerPoint presentations contain additional information the information shown on the slide. The note sections were written to be the auditory portion of the online training courses.

The third stand-alone guide contains the procedures for establishing FBAR penalty cases on ERCS. As we will discuss shortly, all FBAR penalty cases are established on ERCS. I owe a hat-tip to our friends in South Atlantic who pioneered the FBAR-ERCS process, and who created this guide.

(b) (6) [redacted] will email these guides to you next week.

Error Correction

- Quiet Disclosure Workshop Guide
- FBAR ERCS Procedures section
- Page 34 (or 35)
- The MFT for FBAR cases is C6, not P9 as stated in the guide



What is FBAR?

F-B-A-R is the acronym for the Foreign Bank and Financial Account Report, Form TD F 90.22-1.

This is not an IRS form; it is a U.S. Treasury form, and you can tell that because the T-D in the name means it is a Treasury form.

We use the term FBAR to refer to both the form itself and the civil penalties for failing to file the form.

Statutory Authority

- The general authority for the Secretary of the Treasury to require U.S. persons to keep records and file reports of their transactions with foreign financial agencies is Title 31, §5314
- 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 CFR 103.24)

Title 31 does not specify the FBAR by name or form number. Section 5314 of Title 31 gives the Secretary of the Treasury the authority to require U.S. persons to file reports and keep records of their transactions or relationships with a foreign financial agency. The requirement to file an FBAR is found in 31 Code of Federal Regulations (CFR) section 1010.350 (formerly 31 CFR 103.24).

FBAR Resources

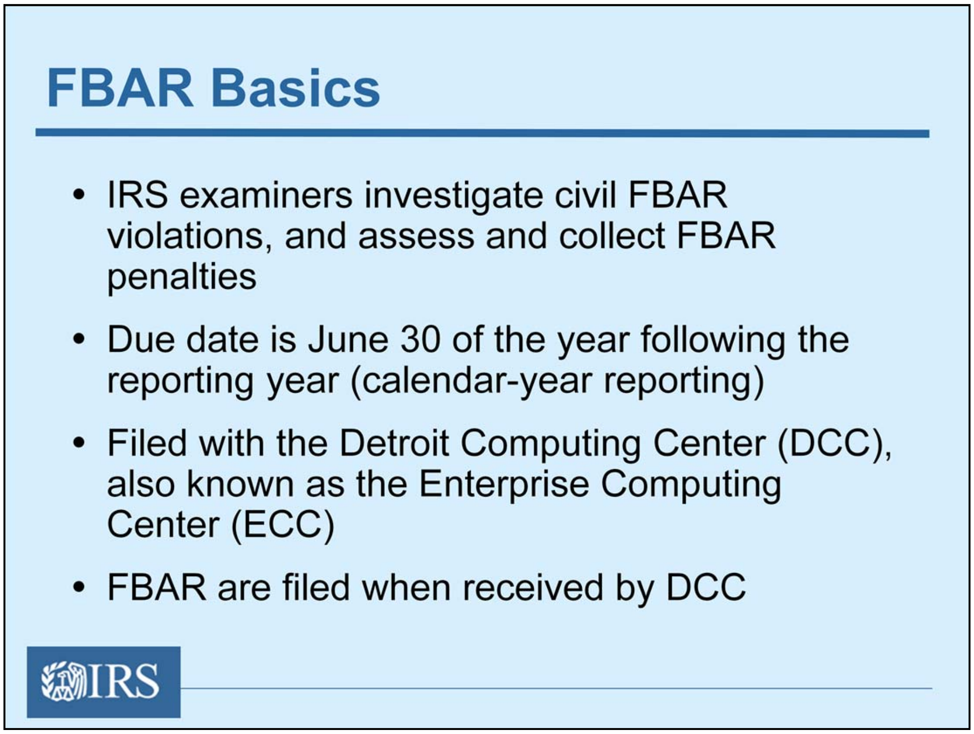
- IRM 4.26.16 (Rev. 07-01-2008), *Report of Foreign Bank and Financial Accounts (FBAR)*
- IRM 4.26.17 (Rev. 05-05-2008), *Report of Foreign Bank and Financial Accounts (FBAR) Procedures*
- RGS FBAR Penalty lead sheet (Rev. 03-2012)

In addition to the FBAR guides we previously discussed, there are other resources available to assist you with FBAR questions.

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

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

The FBAR penalty lead sheet in RGS is a good reference that summarizes much of the information that is in the Internal Revenue Manual. The current RGS FBAR Penalty lead sheet is the March 2012 revision, although some of the procedures on it are not current.

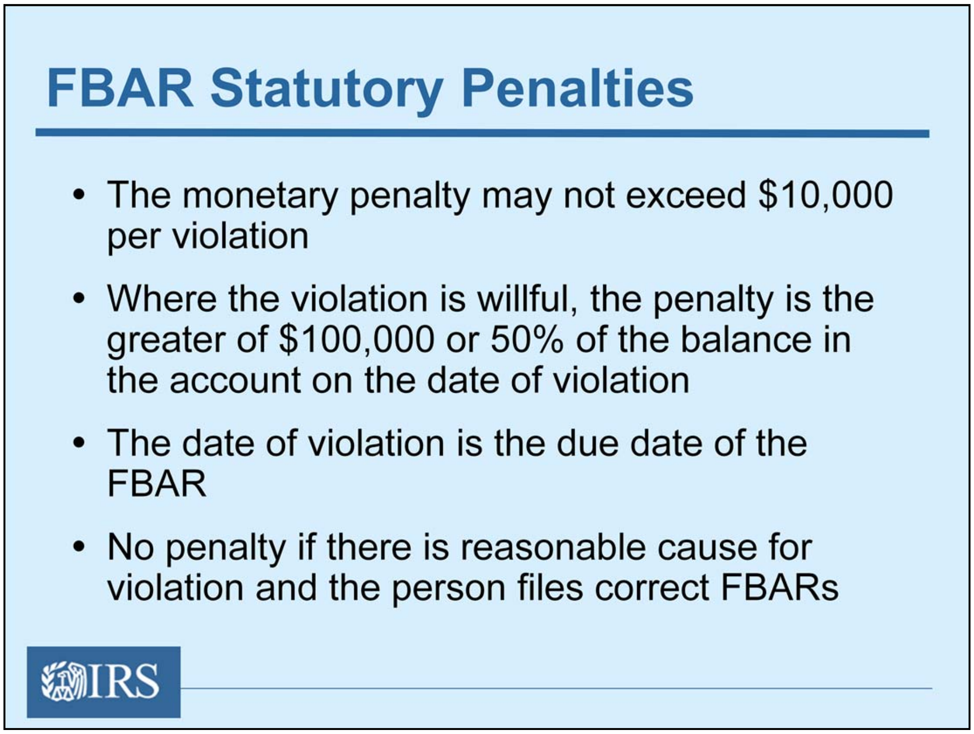


IRS examiners investigate civil FBAR violations, assess FBAR penalties, and collect FBAR penalties that are paid at the time of assessment; however, there is a separate Treasury agency that collects unpaid FBAR penalty assessments.

Persons file FBARs for each calendar year, and the due date of the FBAR is June 30 of the year following the year of reporting. So, for example, an FBAR to report foreign bank accounts held during 2012 is due June 30, 2013.

Persons file FBARs with the Detroit Computing Center (DCC), which is also known as the Enterprise Computing Center (ECC).

An FBAR is considered to be filed when it is received by the DCC; unlike with income tax filings, the postmark date is not the filing date. They are slowly converting to electronic FBAR filings.

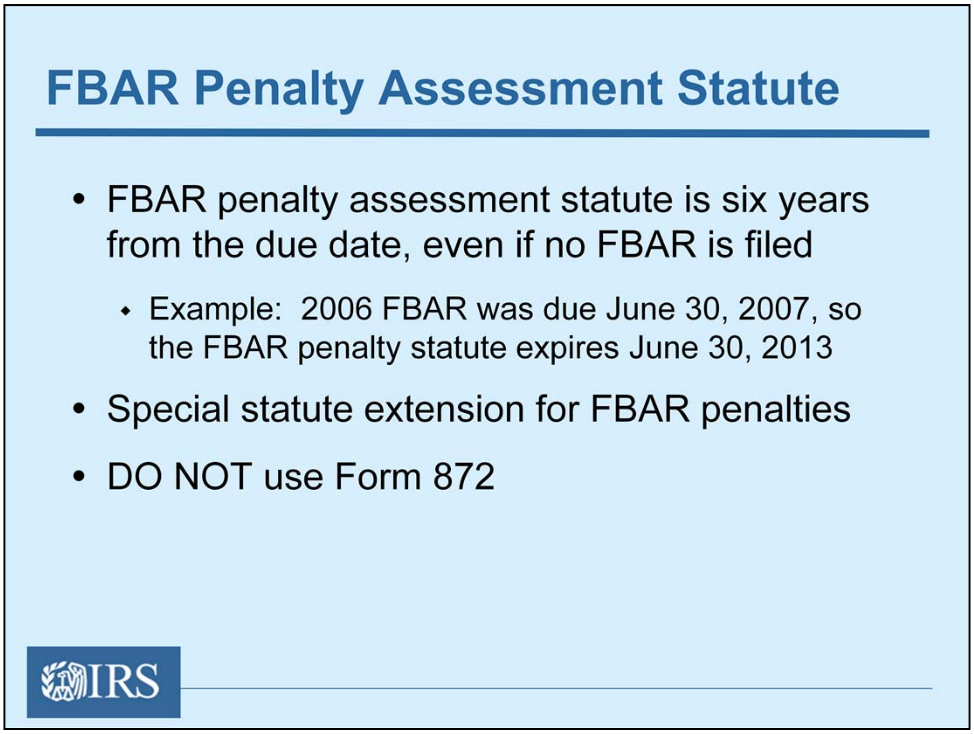


So, what are the penalties for failing to file and FBAR?

The monetary penalty may not exceed $10,000 per violation; however, 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. As you can see, the statute establishes two FBAR penalties: a non-willful penalty and a willful penalty.

The date of violation is the due date of the FBAR. If you recall from the previous slide, the due date of the FBAR is June 30 of the following year.

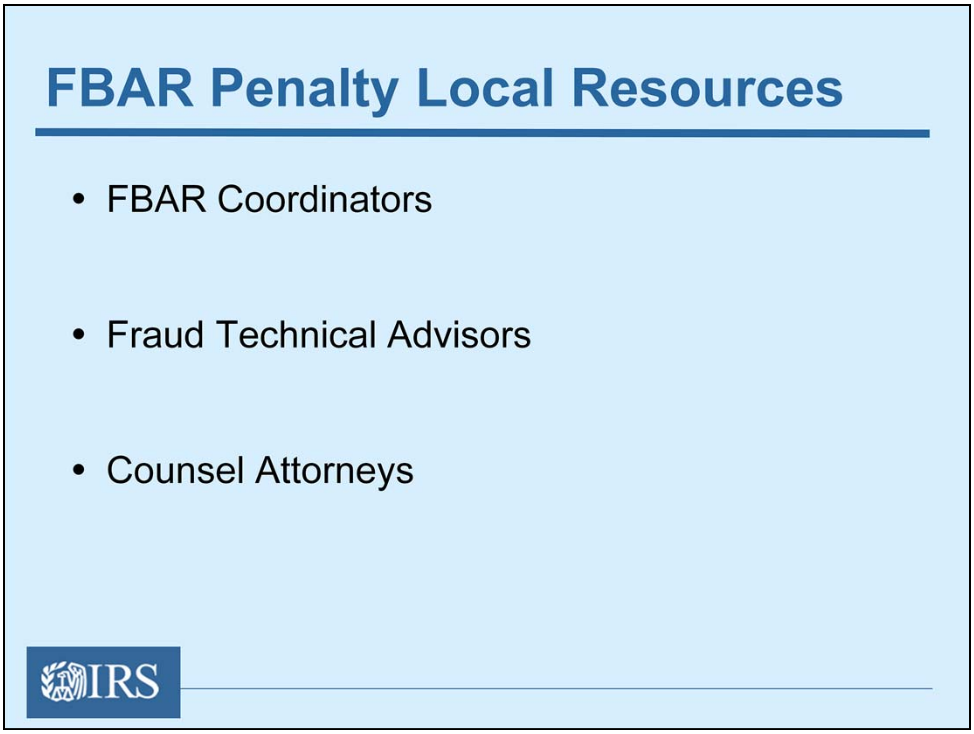
There is no penalty if there is reasonable cause for violation and the person files correct FBARs. Therefore, your FBAR penalty investigation will have to address the issue of reasonable cause. There is more on reasonable cause later in this presentation.



The FBAR penalty assessment statute is six years from due date of the FBAR, even if there is no FBAR filed.

For example, the penalty assessment statute for a 2006 FBAR, due June 30, 2007, is June 30, 2013.

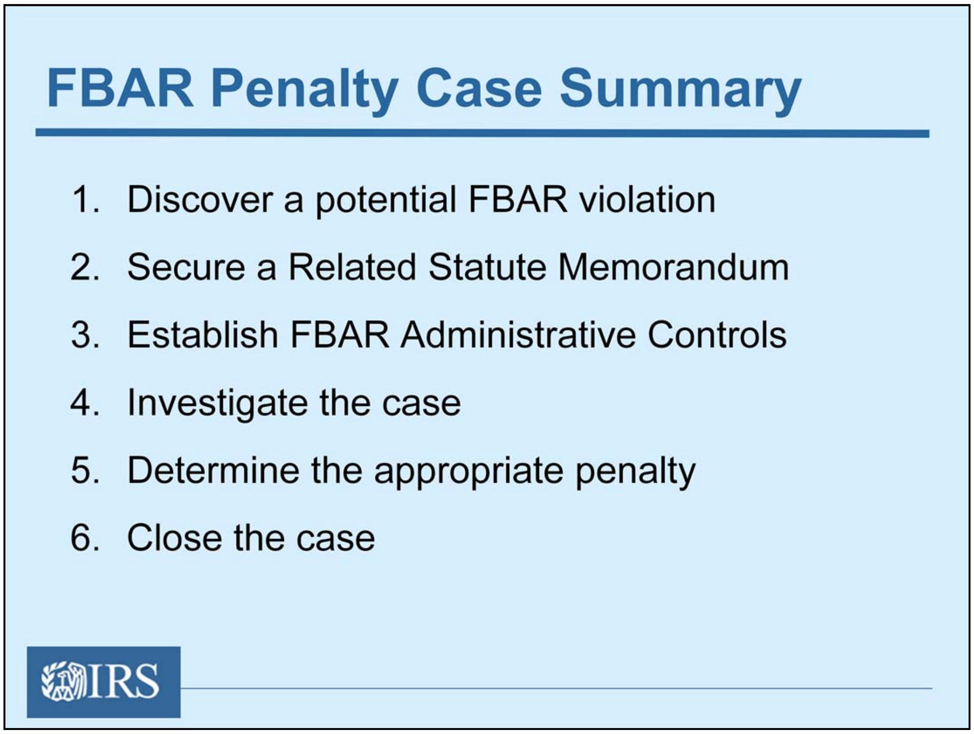
Counsel has approved a form to extend the FBAR penalty assessment statute. Form 872 does not extend an FBAR penalty statute.



Before we move on, I want to mention the local resources that are available to assist you with FBAR penalty investigations. Late last year Exam created FBAR Coordinators in each of the areas. The names of the coordinators for each area, based upon the current configuration of the Examination Areas, are included in the separate FBAR guides. The FBAR coordinators can assist you with developing FBAR penalty cases. It is a good idea to contact the FBAR coordinator early in the case-development process so you can leverage their expertise to assist you with developing the FBAR penalty case.

Also available to assist you with willful FBAR penalty investigations are fraud technical advisors. The development of a willful FBAR penalty case is similar to the development of a fraud penalty on an income tax case, so these advisors have valuable experience and can assist you with a willful FBAR penalty case.

Counsel also has attorneys who can assist you with FBAR penalty investigations. We strongly recommend you reach out to Counsel as soon as possible. Counsel can assist you with summons issues, interviewing the taxpayer, and other case-development issues.



To give some organization and structure to this presentation, I divided the FBAR penalty investigation process into six basic steps. As I stated previously, this presentation is an overview of the FBAR penalty process. The separate FBAR penalty guides contain much more information on the penalty investigation process.

The six steps we are going to discuss are:

Step 1: Discover a potential FBAR violation

Step 2: Secure a Related Statute Memorandum

Step 3: Establish FBAR Administrative Controls

Step 4: Investigate the case

Step 5: Determine the appropriate penalty

Step 6: Close the case

1. Potential FBAR Violation

- The amended or delinquent tax return states or implies a foreign source of the unreported income
- The taxpayer files a delinquent foreign information return
- The taxpayer admitted a violation by filing a delinquent FBAR (check CBRS)

IRS

Step 1 of an FBAR penalty investigation is to identify a potential FBAR violation.

This is an easy step for quiet disclosure cases because most, if not all, of these taxpayer already filed delinquent FBARs, admitting that they violated the law because they not filing timely.

Where the taxpayer did not file a delinquent FBAR, the potential for an FBAR violation is obvious; either the amended or delinquent income tax returns states or implies a foreign source of the unreported income or the taxpayer filed a delinquent foreign information return. If a copy of the delinquent FBAR is not already in the case file, you can research he Currency and Banking Retrieval System, or CBRS for short, to determine whether the taxpayer filed delinquent FBARs and to print an electronic version of the FBAR.

2. The Related Statute Memorandum

- Form 13535 (RSM)
- Necessary to allow Title 26 information to be used in a Title 31 FBAR penalty case
- Until RSM signed, examiners cannot
  - Ask the taxpayer specifically about the FBAR
  - Ask for a copy of the FBAR
  - Request information that only relates to the FBAR penalty
- Currently the territory manager signs the RSM

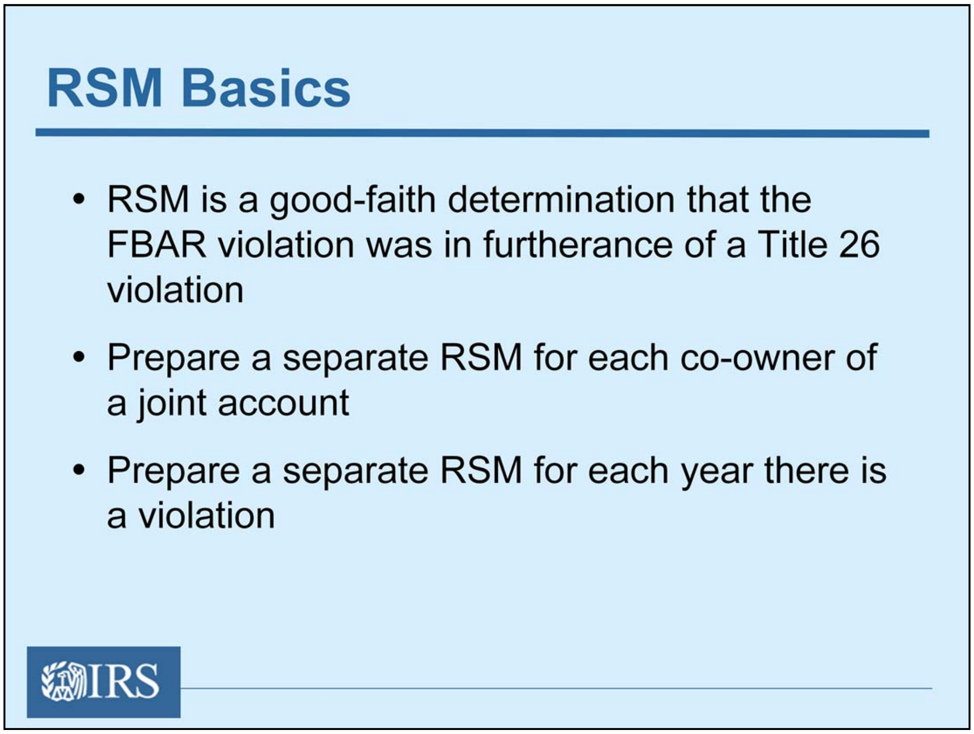
IRS

Step 2 of an FBAR penalty investigation is to secure the Related Statute Memorandum.

The Related Statute Memorandum is Form 13535; normally we refer to this memorandum as the R-S-M.

FBAR penalties are Title 31 penalties. The RSM is the document that allows you to use Title 26 income tax information for a Title 31 penalty case without running afoul of the Title 26 disclosure laws. Until the RSM is signed, you cannot ask the taxpayer specifically about the FBAR, ask for a copy of the FBAR, or request information that only relates to the FBAR penalty.

Currently, territory managers are the designated officials who make related-statute determinations and who sign RSMs; however, pending guidance may change the designated official.



The RSM is a a good-faith determination that the FBAR violation was in furtherance of a Title 26 violation. It is this relationship between the Title 31 FBAR violation and a Title 26 income tax violation that allows you to use protected Title 26 information to determine a Title 31 penalty.

You need to prepare a separate RSM for each co-owner of a joint account, and a separate RSM for each year there is a violation.

RSM and Title 26 Violations

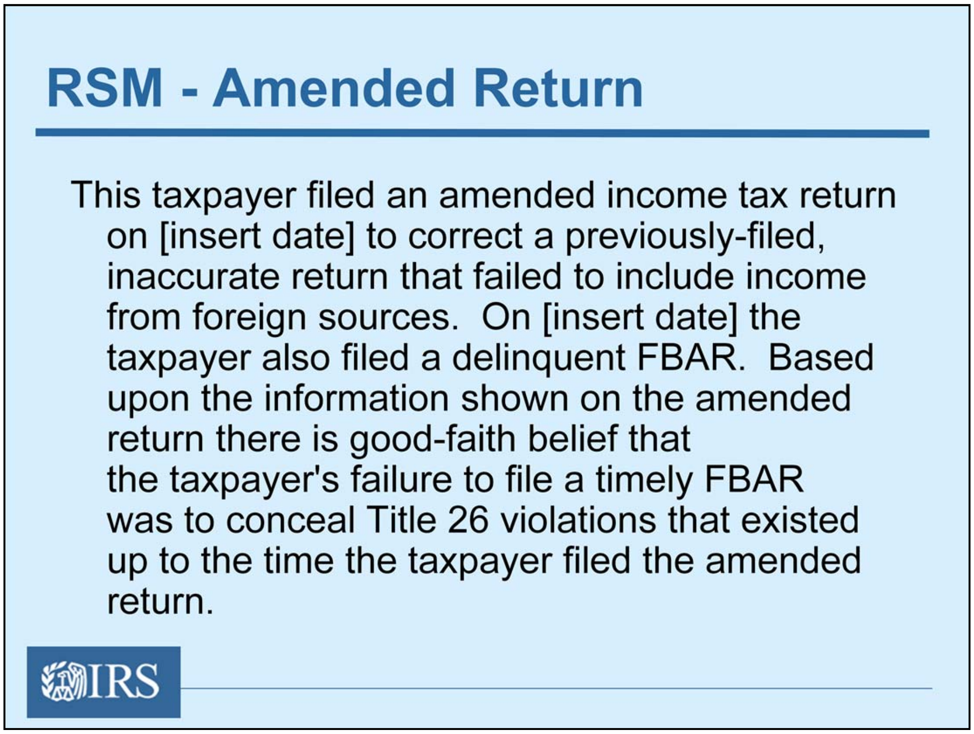
- Possible Title 26 violations
  - Unreported income related to the foreign account
  - Tax due from activity related to the account
  - Unfiled information returns related to the undisclosed foreign account
- The phrase “furtherance of a Title 26 violation” means at the time of the FBAR violation
-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

IRS

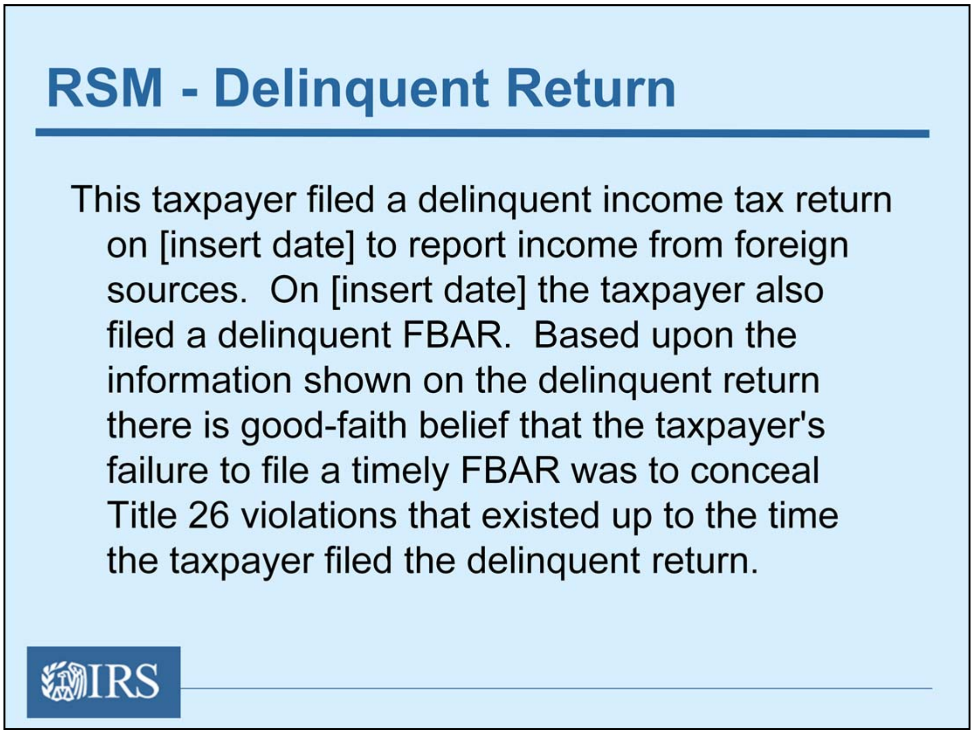
For purposes of the RSM, Title 26 violations include possible unreported income in an undisclosed account, tax due from an activity related to the undisclosed account, or a failure to file a Title 26 information return related to an entity that owns, or a transaction that appears in , the undisclosed account. Title 26 information returns include Forms 5471, 3520 and 3520-A.

The related statute memorandum uses the phrase “furtherance of a Title 26 violation,” and that phrase means a Title 26 violation at the time of the FBAR violation. Therefore, the fact that the taxpayer appears to be currently in compliance is not a factor that affects the validity of the related statute determination. This is an important point for quiet disclosure cases because many taxpayers already filed delinquent FBARs and corrected tax returns, so there may be some questions whether we could make a related statute determination in these cases.

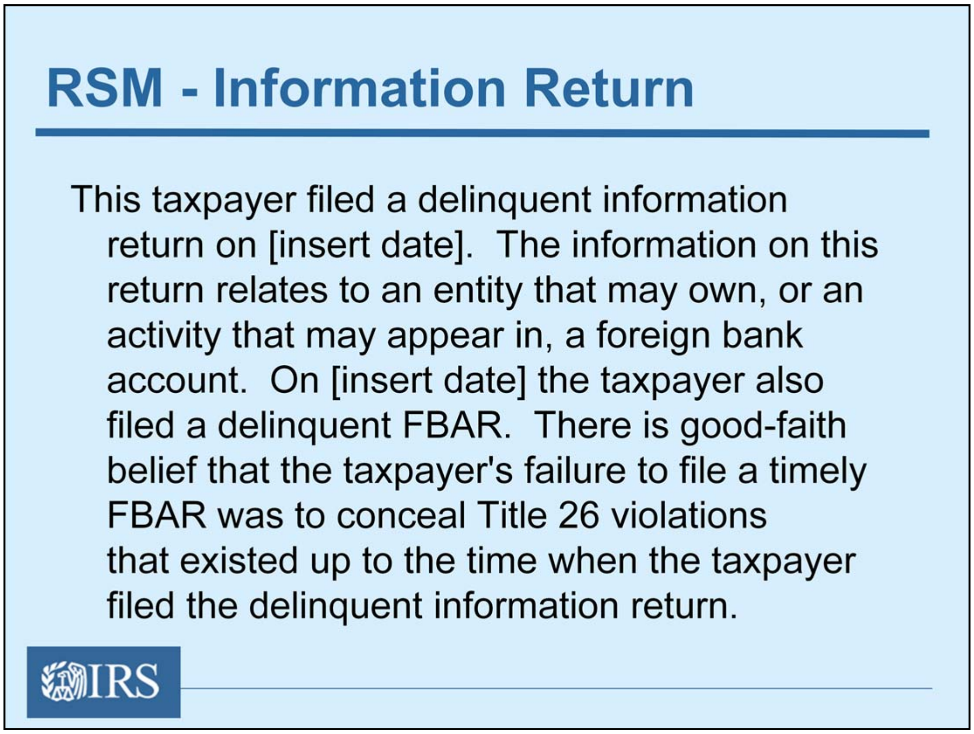
If you have problems securing a related statute memorandum, please contact one of the member of the quiet disclosure team. To minimize such problems, the next few slides contain language that you can use on the RSM.



This slide is the RSM explanation where the taxpayer filed an amended income tax return for the year covered by the RSM. This language is in the quiet disclosure guide. Please read it with me. You may need to scroll your computer screen to read the entire slide. This is an unfortunate limitation of using Centra.

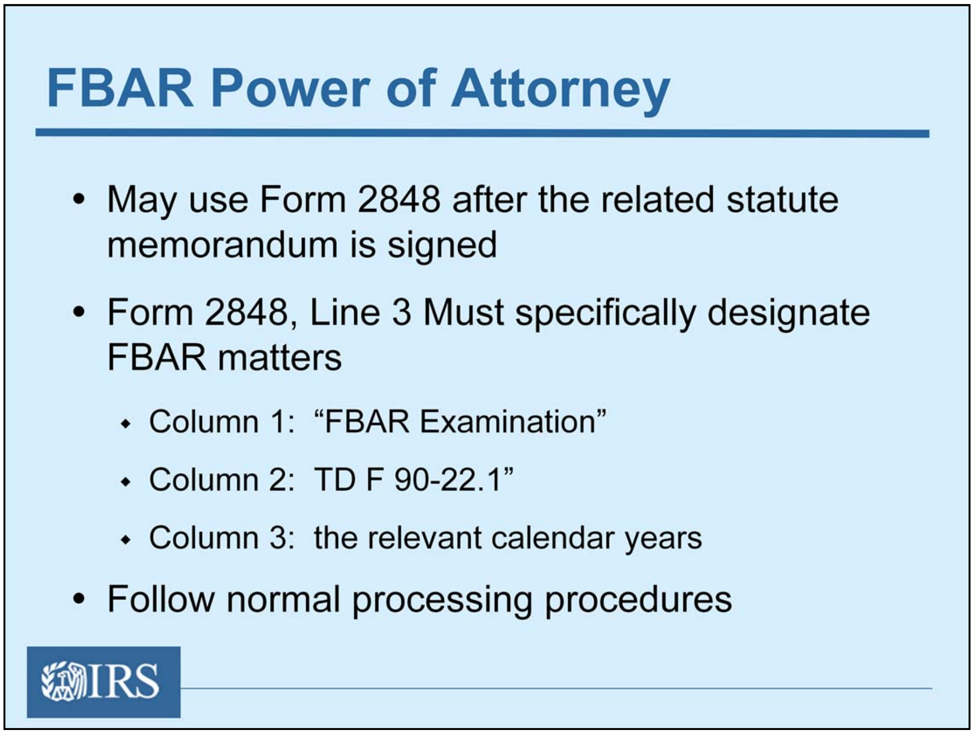


This slide shows the RSM explanation where the taxpayer filed a delinquent income tax return for the year covered by the RSM. This language is in the quiet disclosure guide. As you can see, it is very similar to the language with respect to an amended tax return. Please take a minute to read it with me.



Finally, this slide shows the RSM explanation where the taxpayer filed only a delinquent information return for the year covered by the RSM. This language is in the quiet disclosure guide. Once again, let's play read-along-with Chris and read the slide together.

If the taxpayer filed both a delinquent information return and a delinquent or amended income tax return for a year, then it is only necessary to include on the RSM the language for the amended or delinquent income tax return.



After the designated official signs the related statute memorandum, the taxpayer may use, and you may accept, Form 2848 to designate a person to represent the taxpayer in matters related to the FBAR penalty.

To designate a representative for FBAR-related matters, the taxpayer must place the following entries on Form 2848, line 3:

Column 1: "FBAR Examination"

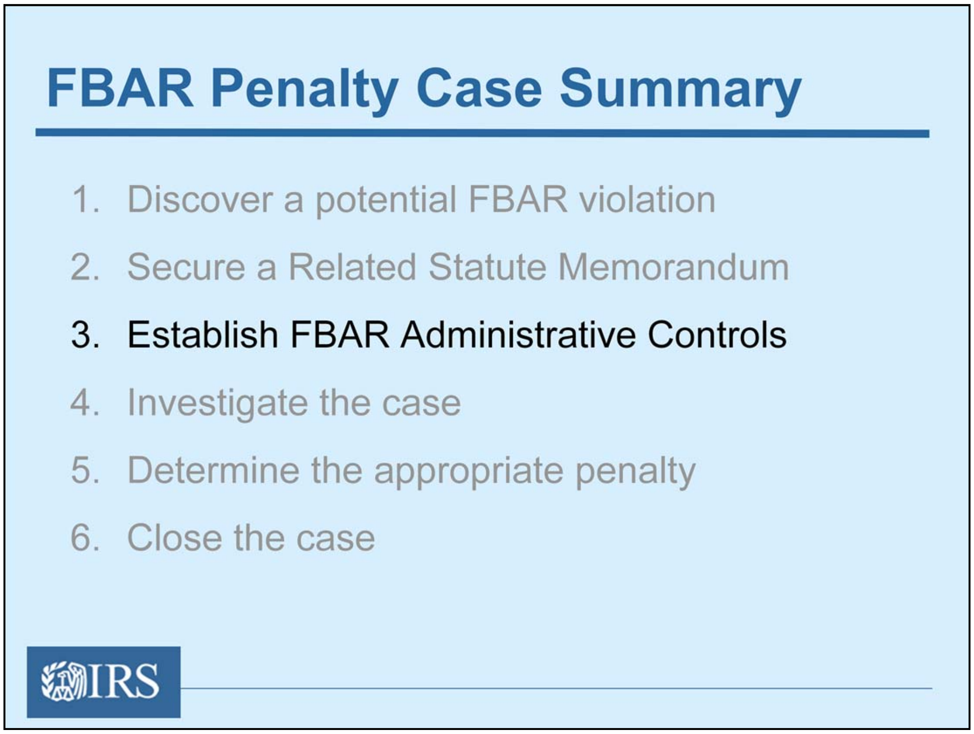
Column 2: "TD F 90-22.1"

Column 3: the relevant calendar years

To refresh your memory, line 3 on Form 2848 is the area where the taxpayer identifies the tax periods and types of tax covered by the power of attorney.

The taxpayer may use a single Form 2848 to designate a representative for both income tax matters and FBAR-related matters.

Follow the regular procedures to process an FBAR-related Form 2848.



We just covered steps one and two. Now we will move onto Step 3, Establish the FBAR administrative controls.

3. FBAR Administrative Controls

- Two separate administrative controls
  - Exam controls on ERCS
  - Title 31 database maintained by DCC
- Establish each year where there is an RSM
- See the ERCS guide for details
  - Establish each FBAR case year on ERCS
  - Input the FBAR penalty statute date
  - Charge time directly to the case

IRS

There are two separate, administrative controls for FBAR cases: Examination controls on ERCS, and a Title 31 database maintained by the Detroit Computing Center. Unfortunately, ERCS and the DCC database do not talk to each other, so you will need to update both databases separately.

For each taxpayer and each year you have a signed related-statute memorandum you must have a corresponding penalty case on ERCS. It is important that the DCC database and the ERCS database match.

The ERCS process is in the ERCS FBAR guide; therefore, I am not going to cover those procedures. For now, just remember that you need to establish each FBAR year on ERCS, to input the correct FBAR penalty assessment statute into ERCS, and to charge the time you work on the FBAR penalties directly to the FBAR penalty case.

Please remember that there is an error in the workshop book you currently have. C6 is the ERCS MFT for FBAR penalty cases.

DCC Database Controls

- IRM 4.26.17.3
- FAX or email the RSM to DCC to establish the case on the DCC database
- FBAR Monitoring Document, Form 13536 (FMD) provides information to Detroit:
  - Case name
  - Owner of the foreign account
  - Representative
  - Examination information, including contact information
  - Case Disposition
- Send FMD to Detroit as necessary to update database

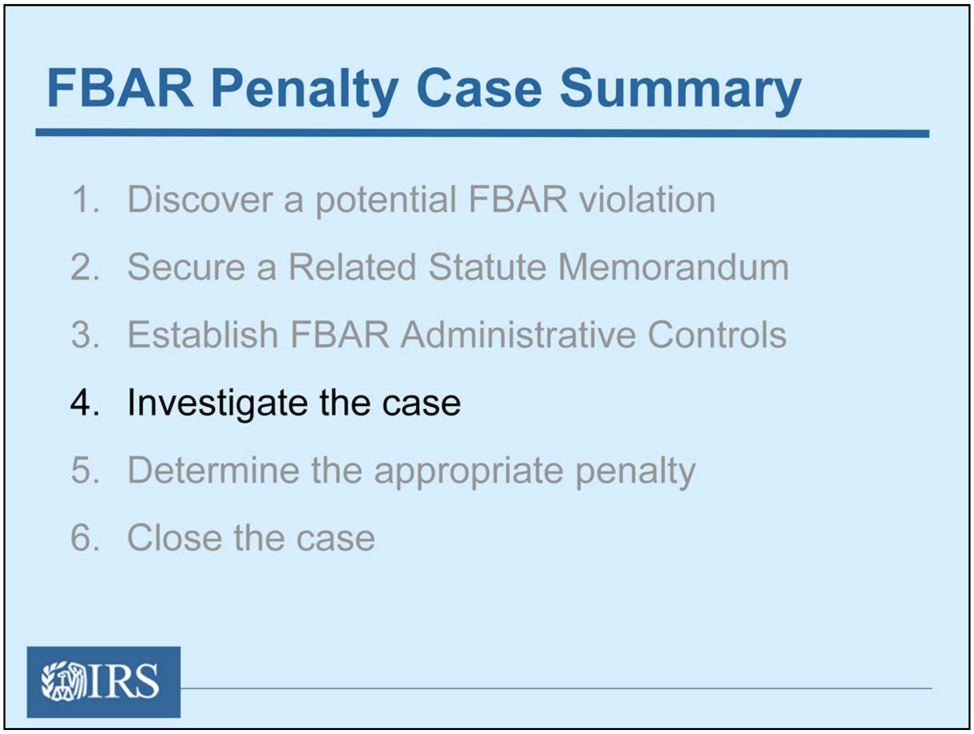
IRS

IRM 4.26.17.3 covers the administrative procedures for FBAR penalty cases; however the IRM has not been updated to reflect new FBAR procedures. Generally, where there is conflict between the IRM and these FBAR PowerPoint presentations, please follow the PowerPoint presentation. If you have questions about whether a particular IRM section is out of date, please contact a member of the quiet disclosure team.

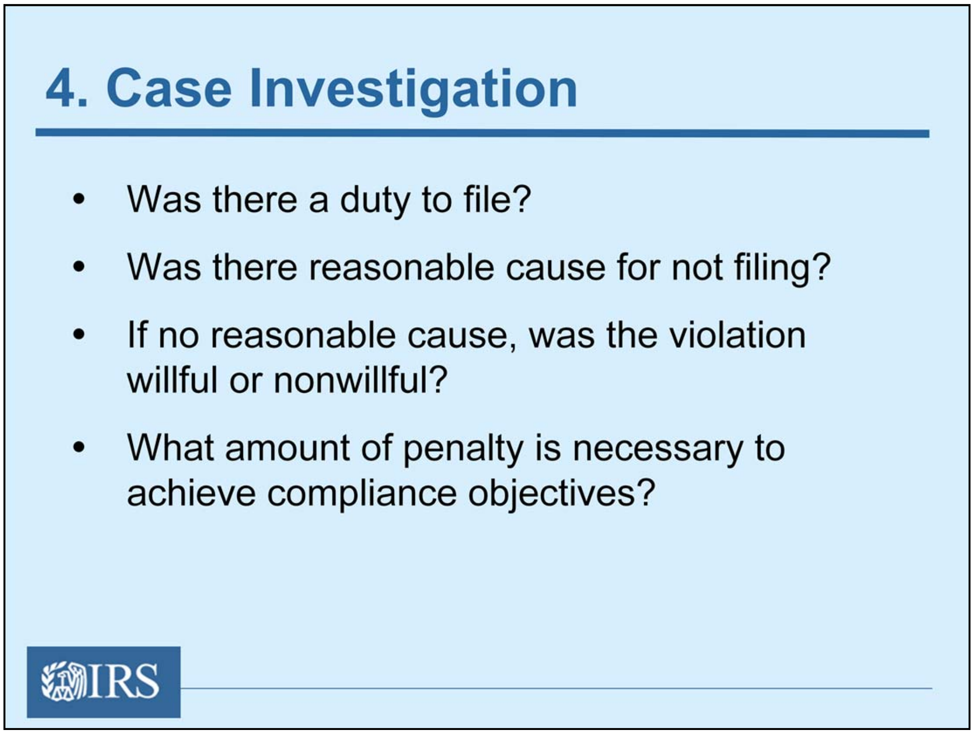
We already covered the Related Statute Memorandum. In addition to allowing you to use Title 26 information in the FBAR penalty case, the RSM is the source document that DCC uses to establish the penalty case on their database. After you secure the RSM, it needs to be faxed (or scanned and emailed) to the DCC. There is also another document, the FBAR Monitoring Document, Form 13536, better known by the abbreviation F-M-D, that you complete and FAX or email to Detroit. The FBAR Monitoring Document provides Detroit with details about the FBAR penalty investigation. At the time you send the RSM to Detroit you also should send an FBAR Monitoring Document. The fax and email address for the DCC are in the FBAR section of the quiet disclosure workshop guide.

The FBAR Monitoring Document has five sections: the case name, which is the name of the person under investigation for the FBAR violation; the owner of the foreign account, if the owner is not the person under investigation; the representative, if any; information about the examination, including the name of the examiner and the group manager; and finally information about the disposition of the case.

For the most part the FBAR Monitoring Document is self-explanatory, so I am not going to cover it in detail. The one important point I need to mention is that if any information on the document changes, such as your group manager changes, or the representative changes, you should send another FBAR Monitoring Document to Detroit with the new information so the DCC database has the most current information. The FBAR Monitoring Document has a space for time charged to the case; however, only provide the time charged on the final document sent to Detroit when you close the case. In other words, do not send an new FBAR monitoring document to Detroit every time you charge time to the FBAR case.



Alright, we are rolling right along. We just covered step three. Now we will move onto Step 4, Investigate the case. This is where the fun begins.



So far we covered the administrative steps necessary to begin an FBAR penalty case. Now we will discuss the FBAR penalty investigation itself. The FBAR penalty investigation needs to answer four basic questions:

Was there a duty to file an FBAR?

Was there reasonable cause for the violation?

In the absence of reasonable cause, does the evidence show the violation was willful?

What is the appropriate penalty, if any, to achieve compliance?

Investigating FBAR Violations

- The goal of the FBAR penalty investigation is to gathering 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
  - For clarity, insist on a written statement
- Many investigations will result in non-willful penalties only because the IRS cannot prove willfulness

IRS

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

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Many FBAR penalty investigations will result in non-willful penalties, not because the person did not act willfully, but because we cannot meet our burden to prove that the person acted willfully. Do not be discourages by this; if, despite your best efforts the evidence is not there, accept that fact and move on.

Quiet Disclosure FBAR Cases

- Not about taxes
- Likely filed quiet disclosure to avoid penalties
- Penalties are necessary to be fair to those taxpayers who filed voluntary disclosures
- Penalties encourage voluntary compliance
- Representatives likely will argue that compliance already has been achieved
- Situational compliance is not acceptable

Quiet disclosure cases are not about taxes; the taxpayer already swallowed that medicine because he filed amended or delinquent tax returns. The likely reason for the quiet disclosure is the taxpayer's desire to avoid the real nasty medicine: civil penalties. We must assert all appropriate civil penalties to be fair to all of the taxpayers who filed voluntary disclosures. Civil penalties are strong statutory tools to achieve voluntary compliance, and the FBAR penalty is perhaps the best tool we have to achieve that goal.

The representatives will argue that the taxpayers are already in compliance and that penalties will not increase their compliance. While that sounds like a compelling argument, do not accept it. You are investigating the facts and circumstances surrounding the failure of the taxpayer to comply with the law. The mindset of many of these taxpayers is that they never believed the IRS would discover their offshore activities. Situational compliance, which is compliance commensurate with the taxpayer's belief he will get caught, is not acceptable. Civil penalties, particularly the FBAR penalty, will be an important reminder to taxpayers to comply with the law if they again find themselves in a situation where they think they will not be caught.

Let's return to the first of the four basic questions that the FBAR penalty investigation needs to answer. You will need to show that the person had a legal duty to file an FBAR and that the person failed to meet his legal duty. To prove that a person failed to comply with the law, you must prove that the person had a reporting requirement under the statute and that the person failed to comply with the statute.

To prove that the person had filing requirement, you must:

Prove the person is a U.S. Person

Prove the person had a financial interest in, or signature or other authority over one or more accounts

Prove that each account was a foreign financial account

Prove the aggregate balance of the foreign financial accounts exceeded $10,000 at any time during the calendar year

FBAR Reasonable Cause

- Determination of reasonable cause is made based upon the facts and circumstances
- Did the person act in good faith considering experience, knowledge, and education
- See Treasury Regulation §1.6664-4 and IRS Fact Sheet 2011-13 (12-2011)

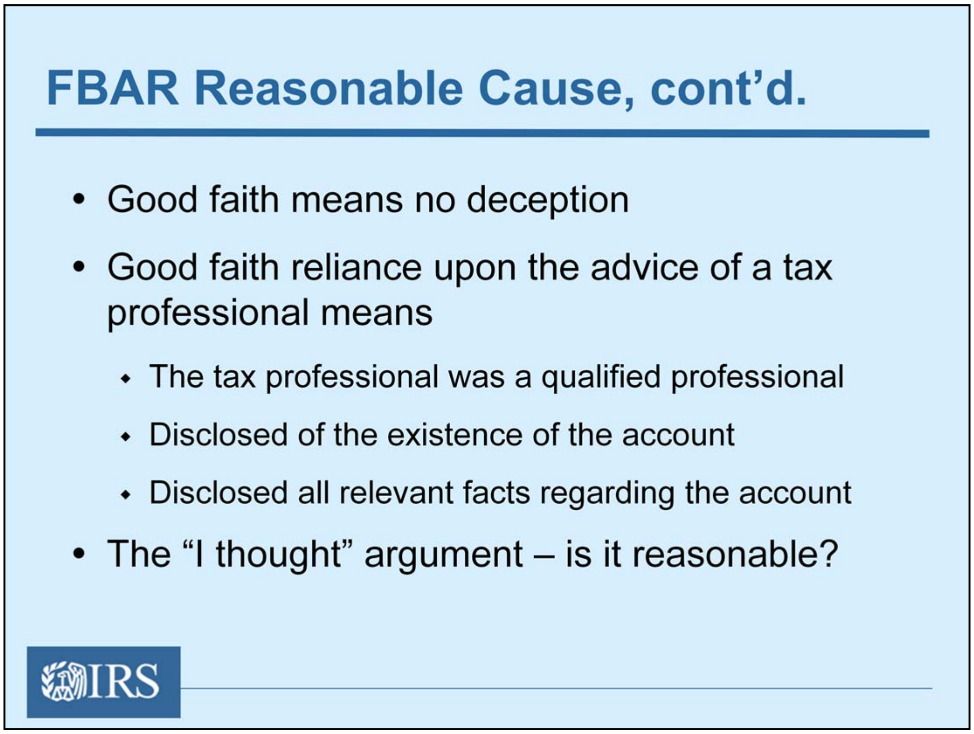
IRS

We already suggested you ask for a statement of reasonable cause; now let's briefly discuss reasonable cause as it applies to FBAR violations.

Whether a person has reasonable cause for failing to file an FBAR must be determined based upon the specific facts and circumstances of each case.

Normally the most important factor to consider is whether the person acted in good faith, taking into account the experience, knowledge, and education of the person.

Although not dealing with FBARs, Treasury Regulation section 1.6664-4 contains a good discussion of reasonable cause that may help you determine whether reasonable cause exists with respect to for FBAR violations. Also, IRS Fact Sheet 2011-12, dated December 2011, has a discussion of reasonable cause for FBAR violations.



So, what is good faith? That is a good question. In general, good faith means no deception.

In many cases a good faith reliance of the advice of a tax professional is the basis of a reasonable cause argument. Whenever there is a reliance defense it is important to verify that the tax professional was a qualified tax professional. Foreign bankers, investment advisors, or other similar persons normally are not qualified to give advice on U.S. tax matters.

To have good faith reliance on a tax professional means that the taxpayer disclosed not only the existence of the account, but also all of the relevant facts regarding the account. Taxpayer's and their representative often blame the return preparer for the violation because the return preparer failed to ask the taxpayer about a foreign bank account. The burden is on the taxpayer to disclose the information and not on the return preparer to cross-examine his own client and pull information from him.

Many taxpayers try to explain their failure to disclose the foreign account to the return preparer using an "I thought" statement:

I thought only income earned in the United States is taxable;

I thought since I did not earn the income in the United States it is not taxable;

I thought since the bank account was a gift I did not have to pay taxes on it.

I thought this;

I thought that;

And so on.

You need to explore the basis for the taxpayer's statement. Is it reasonable? Where did he get the information? How did he draw such a conclusion? In most cases the taxpayer cannot provide a reasonable basis for his "I thought" statement and is simply using the statement explain why he failed to disclose the account, specifically the earnings in the foreign bank account, to his return preparer.

Reasonable Cause and Willfulness

- A person that **chose** not to file an FBAR based upon the good faith reliance on the advice of a competent tax professional could have reasonable cause
- Good faith reliance on bad advice from a competent tax professional could be reasonable cause
- Deception = Bad Faith and no reasonable cause

IRS

Just because a person acted willfully does not mean the person lacks reasonable cause. A person that chose not to file an FBAR and, in good faith, relied upon the advice of a qualified and competent tax professional could have reasonable cause for not filing the FBAR.

Even a person that received bad advice from a competent and qualified tax professional and, in good faith, followed that advice could have reasonable cause.

As we have already stated, deception equals bad faith, and where there is bad faith there is no reasonable cause.

Willful versus Non-Willful Penalty

- The primary difference between willful and non-willful FBAR penalties is the degree of fault by the person
- Willful penalty – voluntary, intentional violation of a known legal duty
- Non-willfull penalty – an involuntary, unintentional violation of a legal duty

IRS

As we discussed previously, there are two FBAR penalties: one for willful violations and one for non-willful violations, or, more importantly, where we cannot prove willful conduct.

The primary difference between the willful penalty and the non-willful penalty is the degree of fault of the person who failed to comply with the FBAR reporting requirements.

A willful FBAR penalty is appropriate where there was a voluntary, intentional violation or disregard of a known legal duty. Notice that the two important concepts here are knowledge and intent. As we just discussed, a willful penalty is not appropriate where the person had knowledge of his FBAR filing requirement but lacked intent to violate the law because in good-faith he relied upon the advice of a tax professional.

A non-willful penalty is appropriate where there was an involuntary, unintentional violation or disregard of a legal duty. In other words, the person lacked an intent to violate the law, but nonetheless did violate the law and did not have a reasonable cause for doing so.

A non-willful penalty is also appropriate where there are indications of willfulness, but there is not sufficient evidence to prove willfulness.

Voluntary and Intentional

- No reasonable cause
- Deliberate choices
- A motive to hide the account 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

IRS

What is voluntary and intentional in the context of a willful FBAR penalty?

The violation must be the result of deliberate choices made by the person.

A motive to conceal the foreign account tends to show that the violation was deliberate and not accidental; however, the absence of motive does not negate willfulness where there is other evidence that shows the violation was anything but accidental or unintentional.

You do not have to show a bad motive to prove a willful violation; however, it is nice to have a bad motive, for example tax avoidance or tax evasion.

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

IRS

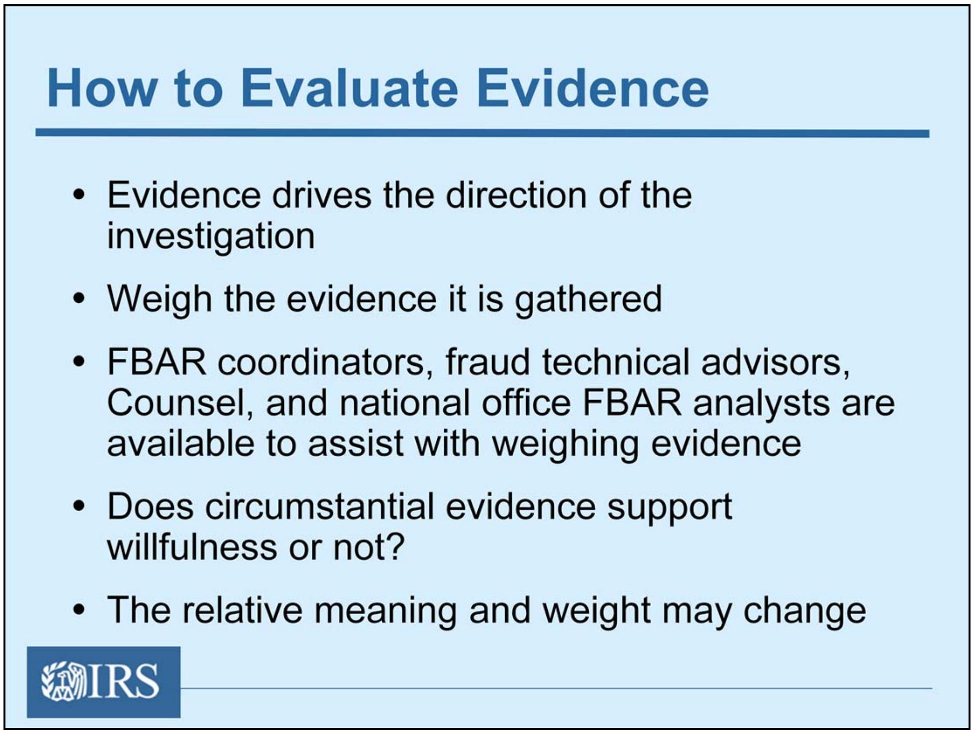
Recall that the definition of willfulness is a voluntary, intentional violation or disregard of a known legal duty. We just discussed voluntary and intentional. Now we will briefly discuss the concept of known legal duty.

Based upon our prior experience with FBAR penalty cases, developing the known legal duty aspect of a willful FBAR penalty case normally will be the primary focus of the investigation. During this presentation we cover only the general concept; additional details of how to develop this issue are found in the FBAR investigative techniques guide.

The easiest method to prove the person knew of the FBAR filing requirement is by direct evidence. Direct evidence that the person knew of the requirement to file and FBAR includes either a statement by the taxpayer that he knew of the requirement to file an FBAR, a correct FBAR filed for a previous year, an incomplete FBAR filed for the year under investigation, or prior compliance action against the person, for example in the past the person received an FBAR warning letter.

In many cases you will not have direct evidence; therefore, you must build the willful FBAR penalty case based upon circumstantial evidence. In the context of FBAR violations, circumstantial evidence shows that the cumulative effect of the person's conduct, either by action or inaction, tends to show the person intended to conceal the foreign bank account, and that the failure to file the FBAR was one more necessary step to conceal the account.

Examples of circumstantial evidence include lying to the return preparer about the existence of account, failing to disclose the account or earnings from the account for many years, and using extraordinary means to conceal the account, for example by using a nominee foreign entity to own the account.



The evidence will drive the direction of the investigation. As you develop the case you will be evaluating the cumulative effect of the evidence not only to determine the outcome of the case, but also to determine whether there is additional evidence that will support or not support that outcome. The FBAR coordinators, fraud technical advisors, Counsel, and the national office FBAR analysts are available to assist with evaluating the evidence.

Remember that willfulness requires both knowledge and intent. In many cases you will use circumstantial evidence to show knowledge and intent. Often it is helpful to consider the evidence on a sliding scale where on one side the evidence tends to show willfulness and on the other side the evidence tends not to show willfulness. During the investigation the meaning of a piece of evidence and the relative weight of that evidence may change as the evidence accumulates in one direction, either favoring willfulness or not favoring willfulness.

On the next few slides we will discuss some of the typical evidence in FBAR cases and how to evaluate such evidence in terms of willfulness and non-willfulness.

Willful or Not?

Factors tending to support a willful penalty

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

Factors tending not to support a willful penalty

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

IRS

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Willful or Not?, cont'd.

Factors tending to support a willful penalty

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

Factors tending not to support a willful penalty

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

IRS

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Willful or Not?, cont'd.

Factors tending to support a willful penalty

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

Factors tending not to support a willful penalty

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

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Willful or Not?, cont'd.

Factors tending to show willfulness

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

Factors tending not to support a willful penalty

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Break, Please!

Break Time

Definition of Willful – Review

Willfulness is the voluntary, intentional violation of a known legal duty

IRS

Before the break we defined willfulness as a voluntary, intentional violation of a known legal duty, and we just discussed how to evaluate the weight and relevance of some typical facts you may encounter during your FBAR penalty investigations.

Now, you may have asked yourself how do those facts we just discussed prove that the taxpayer knew of his duty to file an FBAR, and then intentionally decided not to file the FBAR? Good question, if you asked yourself that question, give yourself a gold star.

Our previous discussion focused on why the taxpayer would do something or did not do, in other words what motivated the taxpayer. Well, the simply fact is that the discussion did not really prove the taxpayer knew about the FBAR filing requirements. Fortunately, though, there is another definition of willfulness that does not require us to prove the taxpayer actually knew of his FBAR filing requirement.

The other definition of willfulness is willful blindness.

Willful Blindness

- Willful blindness is a voluntary, intentional, reckless failure to discover a legal duty (willful ignorance, intentional avoidance, blatant ignorance)
  - Prove by circumstantial evidence
  - Evidence subject to different interpretations
- Show the person was in a position to acquire knowledge
- Weakness: Person argues he did not know or even had reason to know that he had to report the account

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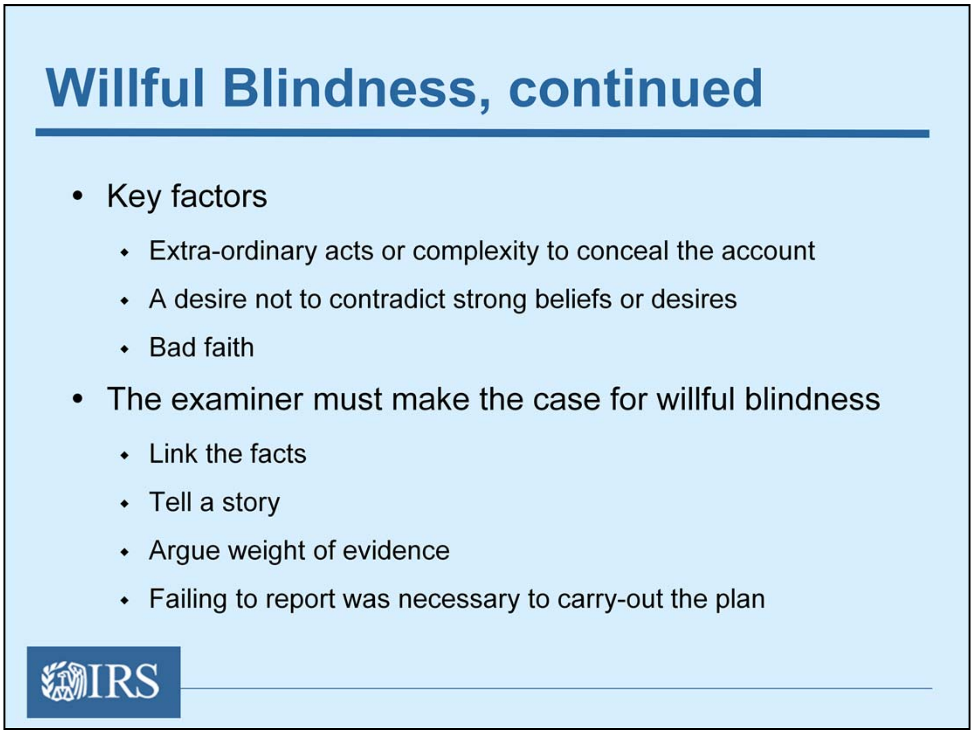

The success of a willful blindness case will depend upon three basic factors: first, did the person take extra-ordinary or complex actions to conceal his ownership of the foreign account; second, would disclosing the existence of the account either violate the person's stated reasons for having the account or conflict with strongly-held beliefs; third, taking into account all of the actions of the person, did the person act in bad faith with respect to the foreign account. We are going to discuss these factors in the next few slides. Keep in mind that not all these factors apply in every case.

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Willful Blindness – Extraordinary Acts

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

IRS

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Willful Blindness – Contradict Beliefs

- If the person is not a natural-born U.S. citizen
  - Consider tax system in the country of origin
  - Steps to become familiar with U.S. laws
- Business in foreign countries
- Compliance with state or local laws
- Other indications that show the person objects to disclosing information to the government

IRS

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Willful Blindness – Bad Faith

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

IRS

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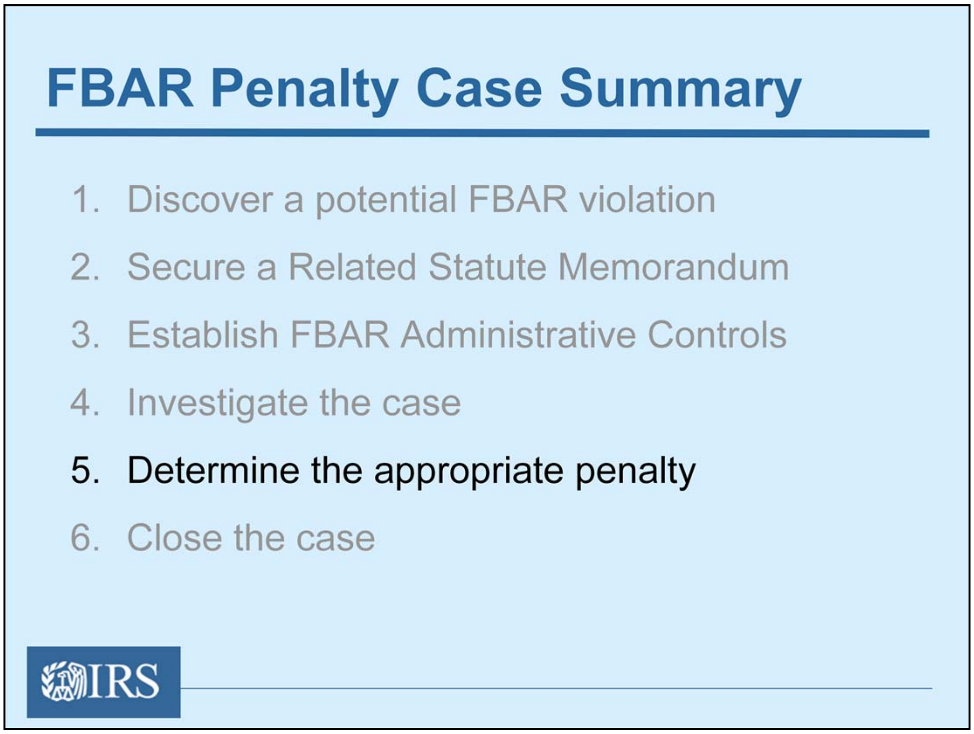
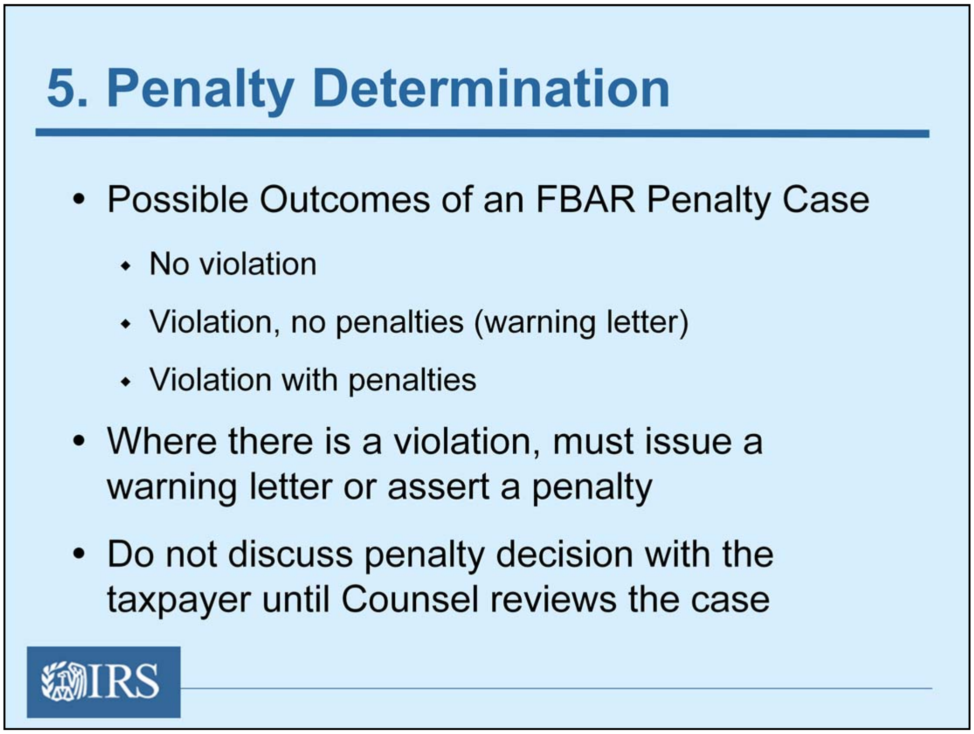


That concludes the investigative techniques portion of the presentation. To be honest, we could have spent an entire day on investigative techniques, but then we would have time to cover the other fun-filled FBAR-related subjects. When you get a chance please review the FBAR investigative techniques guide; the guide contains some good information. Remember too that your FBAR coordinator and Counsel are available to assist you with these interviews and other information-gathering issues.

Here again is the slide that shows the six steps in the FBAR penalty investigation process. We are now up to number 5, determining the appropriate penalty to assert.



At the conclusion of the FBAR penalty investigation you and your group manager must determine the appropriate FBAR penalty to assert, if any. The possible outcomes of the investigation are:

There was no violation.

There was a violation, but no penalties are warranted.

There was a violation and penalties are warranted.

It is important to remember that when you discover a violation, you must either issue the FBAR warning letter or assert a penalty.

It is also important that you do not propose specific penalties until Counsel reviews the FBAR penalty case. We will discuss the role of Counsel shortly.

FBAR Civil Penalties

- For willful violations the civil penalty cannot exceed the greater of
  - $100,000
  - 50% of the balance in the account at the time of the violation (June 30 of the following year)
- For non-willful violations, the penalty cannot exceed $10,000
- no penalty is imposed if
  - there is reasonable cause, and
  - Taxpayer files correct FBARs

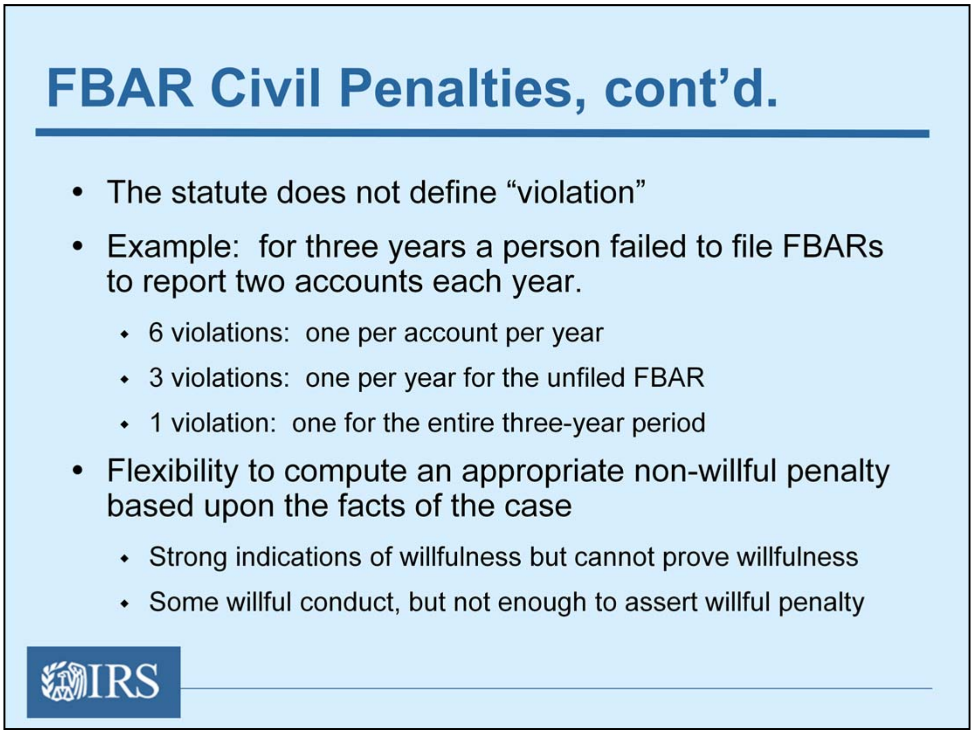
IRS

Let’s review the FBAR penalties.

The penalty for willful violations cannot exceed the greater of $100,00 or 50 percent of the balance in the account at the time of the violation. Since the FBAR is due by June 30 of the following calendar year, the willful FBAR penalty is computed using the balance on the due date of the FBAR.

The penalty for non-willful violations cannot exceed $10,000.

Where there is reasonable cause for the violation, and the person files correct FBARs, then there is no penalty.



The FBAR penalty statute does not define what is a violation. And that fact provides you with some flexibility in determining the appropriate penalty bases upon the facts and circumstances of the case.

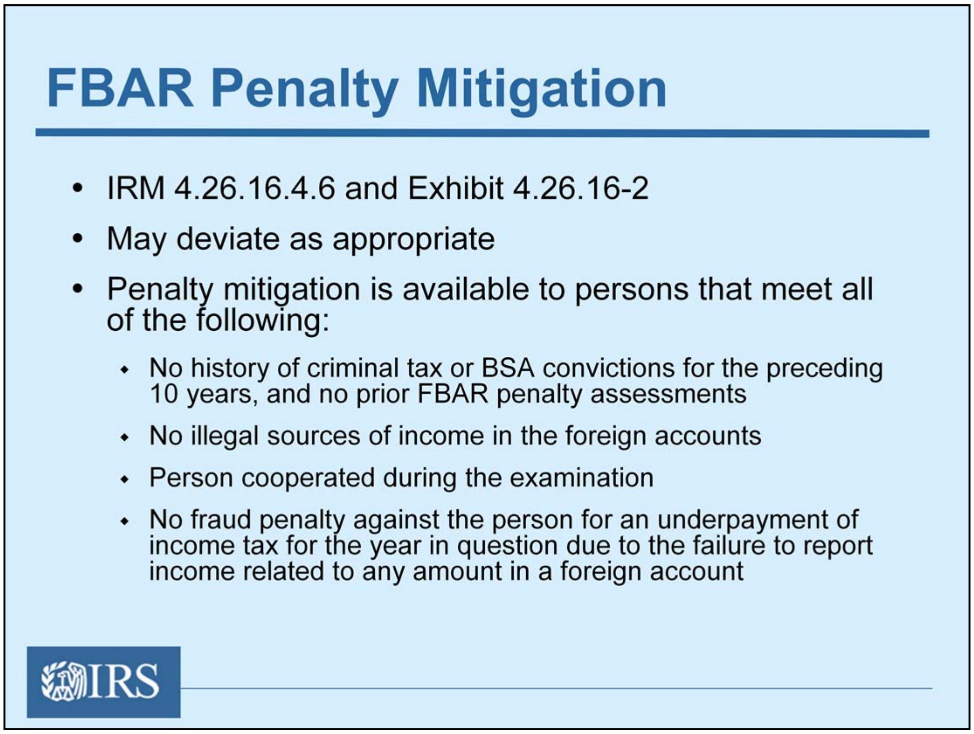
For example, an FBARA investigation reveals that for three years a person fails to file FBARs to report two accounts each year.

There could be six violations, one violation per account per year.

There could be three violations, one violation for failing to file an FBAR for each year.

There could be one violation to cover the entire period of non-compliance.

Examiners and group managers should use this flexibility to compute an appropriate aggregate penalty in cases where a single non-willful penalty is not appropriate based upon the facts of the case. Examples of cases where the examiner and group manager may consider identifying the maximum number of violations are cases there are indications of willfulness but the evidence is not strong enough to support a willful penalty assessment.



As we just discussed, there is considerable flexibility in determining the amount of FBAR penalties to assert. To ensure a degree of consistency of FBAR penalty determinations, the IRM contains FBAR mitigation guidelines. These are guidelines only, and examiners and group managers may deviate from the guidelines where the facts of the case warrant.

The mitigation guidelines are contained in IRM section 4.26.16.4.6 and IRM Exhibit 4.26.16-2.

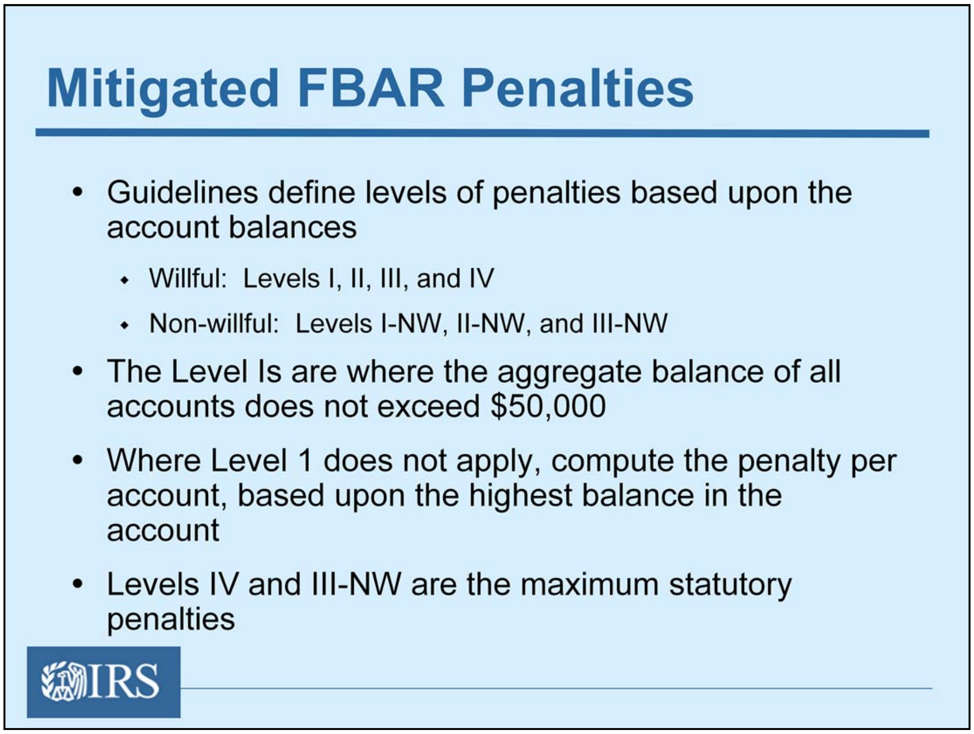
FBAR penalty mitigation is available to any person that meets all of the following requirements:

•There is no history of past criminal tax or BSA convictions for the preceding ten years, and no prior FBAR penalty assessments.

•No illegal sources of income are in, or passed through, any of the person's foreign accounts.

•The person cooperated during the examination.

•The IRS did not sustain a civil fraud penalty against the person for an underpayment of tax for the year in question due to the failure to report income related to any amount that was in the foreign account.



We are not going to discuss the mitigation guidelines in any detail. The FBAR case procedures guide provides examples of how to compute mitigated penalties; however, I want to highlight a few things.

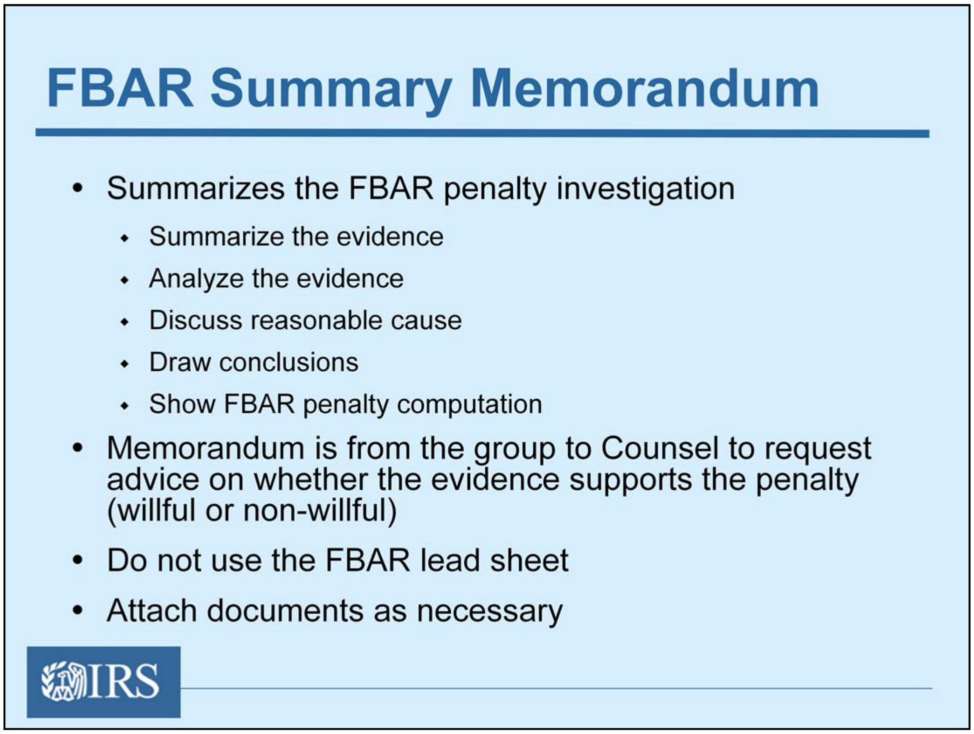
The mitigation guidelines compute an FBAR penalty based upon the **maximum** balance of each undisclosed account during the year. For those of you who worked voluntary disclosure cases, we also computed the miscellaneous offshore penalty based upon the highest aggregate balance of the foreign bank account. You must be careful that when you compute the statutory willful FBAR penalty that you use the appropriate base for the penalty, which is the balance in the account on the date of the violation.

The guidelines define mitigated computations by level, and use Roman numerals to identify the level: for willful penalties Level I, Level II, Level III, and Level IV; for non-willful penalties, Level I-NW, Level II-NW, and Level II-NW.

Level I mitigation for both willful and non-willful penalties is where the aggregate balance of all undisclosed accounts does not exceed $50,000.

Where Level 1l mitigation does not apply because the balances exceed $50,000, you compute the mitigated penalties per account using the maximum balance of that account to determine the appropriate mitigation level.

Level IV and Level III-NW are the statutory-maximum penalties, so there is no mitigation at those levels.



Remember that the FBAR coordinators are available to assist you with all matters FBAR, including the determination of the appropriate FBAR penalty to assert.

After you and your group manager determine the appropriate penalty to assert, the next step is to prepare a summary memorandum. This memorandum summarizes the FBAR penalty investigation. The memorandum should summarize the evidence contained in the FBAR case file, analyze the evidence, interpret the evidence, discuss whether the taxpayer had reasonable cause for violations, and compute the penalties.

I want to take a moment to emphasize that in the memorandum you must make a determination whether you believe the taxpayer had reasonable cause for any of the FBAR violations. If the taxpayer provided you with any indication that he had reasonable cause, definitely reference the taxpayer's statement and address any points raised by the taxpayer. If the taxpayer did not provide a statement of reasonable cause, either try to anticipate what his position could be, or point to specific evidence that you gathered that supports your position that the taxpayer did not have reasonable cause for the FBAR violation.

The memorandum is from the examination group to Counsel to request advice on whether the evidence supports the proposed FBAR penalty, either willful or non-willful. This document must be a formal memorandum to Counsel because Counsel will provide a written reply. Do not use the FBAR lead sheet as a substitute for this memorandum.

As necessary, attach copies of the evidence to this memorandum.

Memorandum Review

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

IRS

Before the memorandum goes to Counsel the FBAR coordinator and fraud technical advisor need to review it. The fraud technical advisor only reviews the memorandum if you proposed the willful FBAR penalty.

The FBAR coordinator must review all memoranda. The FBAR coordinator will review the evidence to make sure the memorandum contains all of the relevant information. The FBAR coordinator also will make sure that you considered reasonable cause, and review your penalty computation to verify that is it correct.

Counsel Advice

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

IRS

The role of Counsel is to provide advice on the FBAR penalties determined by you and your group manager.

Counsel only reviews the proposed penalty. Counsel will correct an incorrect penalty computation, and they may recommend an alternative penalty computation, but Counsel will not compute the penalty for you.

Counsel may advise to assert a lesser or greater penalty, or a fewer or a greater number of penalties, where they believe the proposed penalties are not appropriate given the facts of the case.

Counsel also may advise that the current evidence is not sufficient to sustain the proposed penalty and may identify specific evidence that might be available to support the proposed penalty.

Counsel may advise not to assert a penalty.

The final decision regarding the FBAR penalty assessment is with the group manager. Where the group manager and Counsel do not agree on the FBAR penalty, the FBAR coordinator, fraud technical advisor, and a national office FBAR analyst are available to assist with the resolution of the case.

FBAR Penalty Case Summary

1. Discover a potential FBAR violation
2. Secure a Related Statute Memorandum
3. Establish FBAR Administrative Controls
4. Investigate the case
5. Determine the appropriate penalty
6. Close the case

Alright, we are in the home stretch. So far you discovered the FBAR violation, you wrestled with the administrative FBAR case controls, you gathered evidence, determined a penalty, and asked Counsel to review your conclusions. Now it is time to close the case.

6. Close the Case

- Send correspondence to the taxpayer
  - FBAR warning letter (no penalties)
  - FBAR 30-day letter package (penalties)
- Wait for taxpayer to respond (30-day letter only)
- Close the case from the group
  - To Detroit (warning letter, agreed cases, and no-response cases)
  - To Appeals (unagreed appeal cases)

IRS

You have to inform the taxpayer of your decision. To do so, you send the appropriate correspondence to the taxpayer. Where you do not propose any penalties, send the FBAR warning letter; where you propose penalties, send the FBAR 30-day letter package.

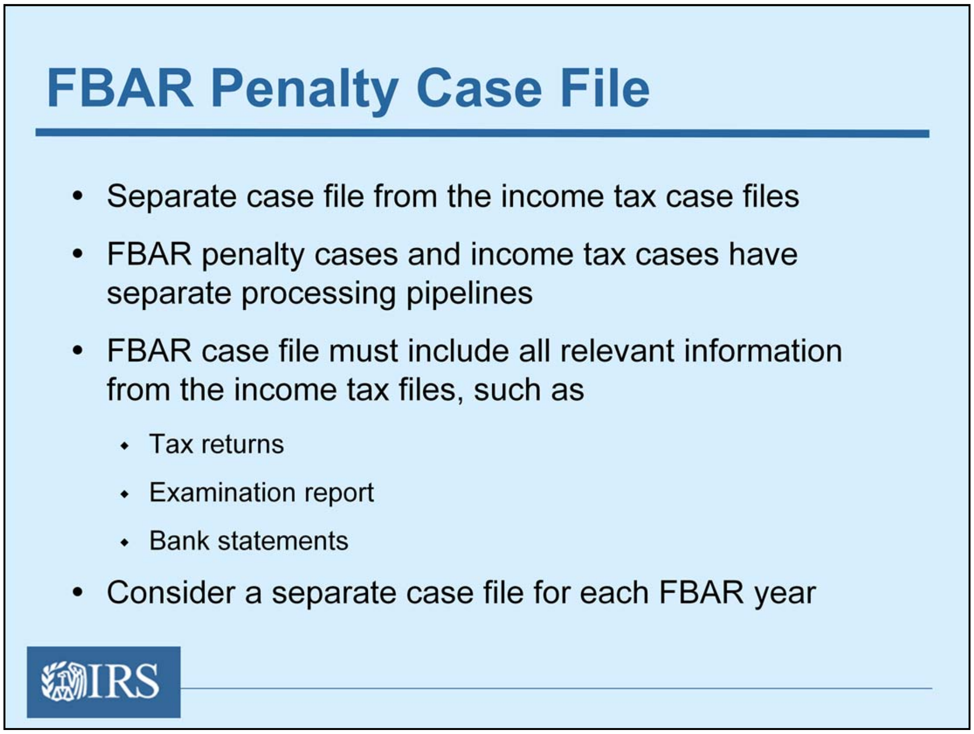
Next, if you proposed penalties you wait for the taxpayer to respond to the 30-day letter.

Lastly, you close the case either to Detroit or to Appeals.

You send warning letter cases and agreed cases to Detroit. You also send to Detroit no-response cases for Detroit to assess the penalties.

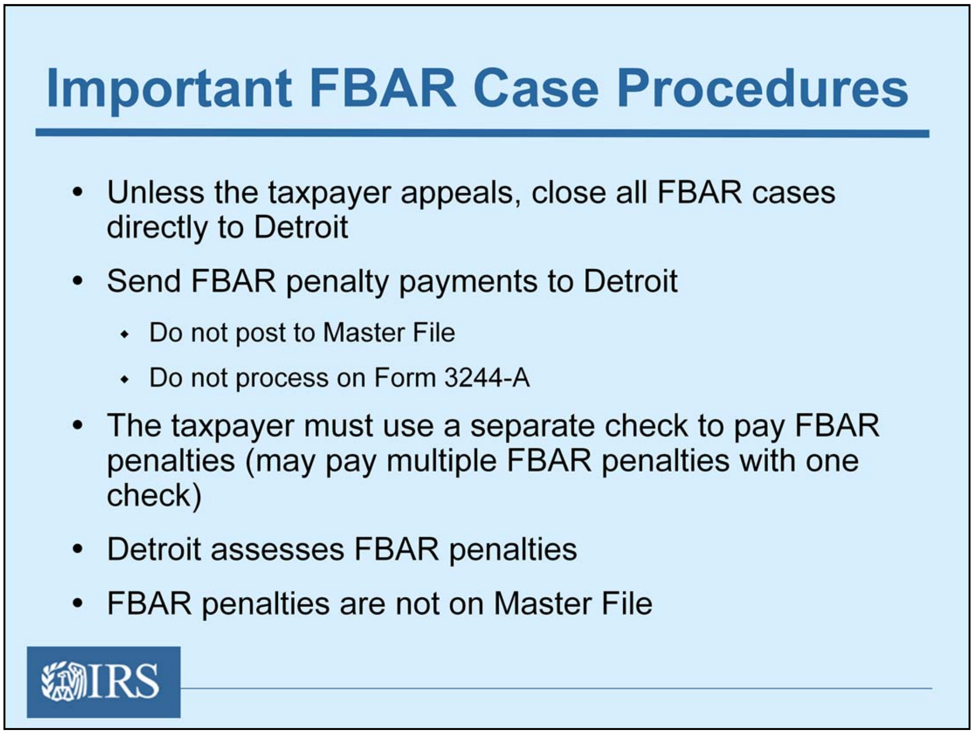
You send unagreed, appealed cases to Appeals.

The FBAR case procedures guide contains the case closing procedures so I am not going to spend too much time on them; however, there are a few things that I want to highlight.



There must be separate case file just for the FBAR penalty case because the FBAR penalty cases and the income tax cases have different processing pipelines. Therefore, it is very important that the FBAR case file include copies of all the relevant documents from the income tax file. Relevant documents include, but are not limited to, a copy of the tax returns, a copy of the examination report, and copies of the bank statements.

It is probably better to have a separate case file for each FBAR year, and place all of the FBAR workpapers in one of the FBAR case files.



Here are some of the procedures that are unique to FBAR cases. The FBAR case procedures guide contains more information on these procedures. I mention them here just to highlight their importance.

Other than appealed cases, all FBAR cases are closed directly to Detroit. Do not send them to Technical Services, unless required by local procedures.

Send all FBAR penalty payments to Detroit. Do not post the payments to Master File and do not use Form 3244-A.

The taxpayer must use a separate check to pay the FBAR penalties. The taxpayer may pay multiple FBAR penalties with a single check, but the taxpayer cannot use a single check to pay both Title 26 taxes or penalties and Title 31 FBAR penalties.

Detroit assesses all FBAR penalties.

FBAR penalties are not on Master File.

FBAR Penalty Appeals

- Pre-assessment appeal rights
  - Timely response to FBAR 30-day letter
  - At least 180 days on the assessment statute
- Post-assessment, pre-payment appeal rights
  - Timely response to the FBAR 30-day letter with less than 180 days on the assessment statute
  - requested appeal rights after Detroit assessed the penalty
- Only one conference with Appeals
- May appeal collection actions to a U.S. District Court

IRS

Taxpayers may appeal FBAR penalty assessments to Appeals. The appeals procedures for FBAR cases are in the FBAR penalty case procedures guide. I just mention them here for your awareness.

To have pre-assessment appeal rights, the taxpayer must timely respond to the FBAR 30-day letter and there must be at least 180 days on the FBAR assessment statute when the case arrives in Appeals. Practically speaking, you should allow 30 days for the FBAR case to get to Appeals, which means there should be at least 210 days remaining on the penalty assessment statute at the time you close the case from the group. In pre-assessment cases, the appeals officer will prepare the paperwork to assess the sustained FBAR penalties.

If the taxpayer timely responds to the FBAR 30-day letter and requests to go to Appeals, but refuses to sign the FBAR statute extension, the group directs Detroit to assess the penalty, and then the group forwards the case to Appeals after receiving proof of the penalty assessment from Detroit.

The taxpayer also has post-assessment, pre-payment appeal rights if the taxpayer appeals the penalty after Detroit assesses the penalty. For these appeals, Detroit will send the FBAR administrative file directly to Appeals.

Taxpayers only get one Appeals conference.

Taxpayers also may appeal FBAR penalty collection actions to a U.S. District Court.

Ok. That is the end of the FBAR presentation. Are there any questions?