

7/19/2018 RIA Fed. Tax Update

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RIA Federal Tax Update

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Articles

IRS clarifies willfulness under FBAR rules

Summary: In Program Manager Technical Advice, IRS has set out the definition of willfulness, and the standard of proof for establishing willfulness, for purposes of the penalty for willful violation of the requirements of the Report of Foreign Bank and Financial Accounts (FBAR). (Program Manager Technical Advice 2018-013)

Program Manager Technical Advice 2018-013



Image 1 within document in PDF format.

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In Program Manager Technical Advice, IRS has set out the definition of willfulness, and the standard of proof for establishing willfulness, for purposes of the penalty for willful violation of the requirements of the Report of Foreign Bank and Financial Accounts (FBAR).

Background. Under [31 USC 5314\(a\)](#) and [31 C.F.R. 1010.350](#), every U.S. person that has a financial interest in, or signature or other authority over, a financial account in a foreign country must report the account to IRS annually on an FBAR. The penalty for violating the FBAR requirement is set forth in [31 USC 5321\(a\)\(5\)](#). The maximum amount of the penalty depends on whether the violation was non-willful or willful. The maximum penalty amount for a nonwillful violation of the FBAR requirements is \$10,000. ([31 USC 5321\(a\)\(5\)\(B\)\(i\)](#)) The maximum penalty amount for a willful violation is the greater of \$100,000 or 50% of the balance in the account at the time of the violation. ([31 USC 5321\(a\)\(5\)\(C\)](#), [31 USC 5321\(a\)\(5\)\(D\)](#))

The statute and the regs do not define willfulness.

IRS defines willfulness under FBAR. IRS has concluded that the standard for willfulness under [31 USC 5321\(a\)\(5\)\(C\)](#) is the civil willfulness standard and that it includes not only knowing violations of the FBAR requirements, but willful blindness to, as well as reckless violations of, the FBAR requirements.

IRS noted that the Supreme Court has made a delineation between the term willful for criminal purposes versus willful for civil purposes. It noted that in [Safeco Ins. Co. of America. v. Burr](#), (S Ct 2007) 551 U.S. 47, a criminal case, the Supreme Court interpreted the term willful or willfully narrowly, limiting liability to knowing violations. The *Safeco* court also noted that where willfulness is a statutory condition of civil liability, the Supreme Court has generally interpreted willfulness to not only include knowing violations of a standard, but reckless ones as well. And the district court in [Bedrosian](#), (DC PA 2017) 120 AFTR 2d 2017-5832, noted that every federal court to have considered the willfulness standard for civil FBAR violations has concluded that the civil standard applies and that the standard includes willful blindness and recklessness.

IRS said that willful blindness is established when an individual takes deliberate actions to avoid confirming a high probability of wrongdoing and when he can almost be said to have actually known the critical facts. The government can show willful blindness by evidence that the taxpayer made a conscious effort to avoid learning about reporting requirements.

And, it said, citing [Vespe](#), (CA 3 1989) 63 AFTR 2d 89-837, that the recklessness standard is met if the taxpayer (1) clearly ought to have known that (2) there was a grave risk that withholding taxes were not being paid and if (3) he was in a position to find out for certain very easily.

Standard of proof. IRS said that the courts are uniform with regard to the standard of proof for civil FBAR penalties; the government bears the burden of proving liability for the civil FBAR penalty by a preponderance of the evidence.

As the court in [Bohanec](#), (DC CA 2016) 118 AFTR 2d 2016-6757, noted, the Supreme Court has held that a heightened, clear and convincing burden of proof applies in civil matters where particularly important individual interests or rights are at stake. Important individual interests or rights include parental rights, involuntary commitment, and deportation. However, the preponderance of the evidence standard applies where even severe civil sanctions that do not implicate such interests are contemplated. The court in *Bohanec* held that civil FBAR penalties do not rise to the level of particularly important individual interests or rights, and accordingly, the preponderance of the evidence standard applies.

IRS noted that [Chief Counsel Advice 200603026](#) suggested that the clear and convincing standard should apply, but subsequent cases have not sustained that position.

References: For foreign financial accounts reporting requirements, see FTC 2d/FIN S-3650; United States Tax Reporter 60,114.06.

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