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## **Internal Revenue Manual (IRM) 4.26.16.5.5.1 (06-24-2021)**

### **Willful FBAR Violations - Defining Willfulness**

1. The civil test for willfulness is whether a person either: (1) knowingly violated a legal duty; (2) recklessly violated a legal duty; or (3) acted with "willful blindness" by making a conscious effort to avoid learning about a legal duty.
2. A finding of willfulness under the BSA must be supported by evidence of willfulness.
3. The burden of establishing willfulness is on the Service.
4. **Knowing violation.** Willfulness is shown when a person knew of the FBAR reporting and recordkeeping requirements and made a voluntary, intentional, or conscious choice not to accurately report an account on a timely filed FBAR or keep required records.
5. **Reckless violation.** Willfulness is also shown when a person recklessly disregarded the FBAR reporting and recordkeeping requirements. Recklessness is evaluated using an objective standard, not by looking at whether a person subjectively believed that he or she was not required to accurately report the account on a timely filed FBAR or keep required records. The objective standard looks at whether conduct entailed an unjustifiably high risk of harm that is either known or so obvious that it should be known. The harm in the FBAR context is that the reporting or recordkeeping requirements are not being met. A person recklessly violates the FBAR reporting or recordkeeping requirements when the person clearly ought to have known that there was a grave risk that the requirements were not being met and the person was in a position to very easily find out for certain whether or not the requirements were being met.
6. **Willful Blindness.** Willfulness is also shown when a person acted with willful blindness by making a conscious effort to avoid learning about the FBAR reporting or recordkeeping requirements.

#### **Example:**

Willful blindness may be present when a person admits knowledge of, and fails to answer questions concerning, their interest in or signature or other authority over financial accounts at foreign banks on Schedule B of their Federal income tax return. This section of the income tax return refers taxpayers to the instructions for Schedule B, which provides guidance on their responsibilities for reporting foreign bank accounts and discusses the duty to file the FBAR. These resources indicate that the person could have learned of the reporting requirements quite easily. It is reasonable to assume that a person who has foreign bank accounts should read the information specified by the government in tax forms. The failure to

act on this information and learn of the further reporting requirement, as suggested on Schedule B, may provide evidence of willful blindness on the part of the person.

**Note:**

The failure to learn of the reporting requirements coupled with other factors, such as the efforts taken to conceal the existence of the accounts and the amounts involved, may lead to a conclusion that the violation was due to willful blindness. A person checking the wrong box, or no box, on a Schedule B is a significant fact to consider when establishing whether the FBAR violation was attributable to willful blindness. That fact should be coupled with other facts and circumstances to prove willful blindness. A person checking the wrong box, or no box, on a Schedule B is also a significant fact to consider when determining whether the FBAR violation was the result of reckless disregard.

7. The following examples illustrate situations in which willfulness may be present:
  - a. A person files the FBAR but omits one of three foreign bank accounts. The person had previously closed the omitted account at the time of filing the FBAR. The person explains that the omission was due to unintentional oversight. During the examination, the person provides all information requested with respect to the omitted account. The information provided does not disclose anything suspicious about the account, and the person reported all income associated with the account on their tax return. The penalty for a willful violation should not apply absent other evidence that may indicate willfulness.
  - b. A person reported one or more foreign accounts on a timely FBAR in earlier years but failed to report a foreign account on timely-filed FBARs in subsequent years when required to do so. In addition, the person may have failed to report income associated with the unreported foreign bank account for the year that the FBAR was not filed. If the person's explanation for the failure to report the account and other available evidence do not outweigh the facts supporting a determination that the failure was intentional or the result of reckless disregard or willful blindness, the penalty for a willful violation should apply.
  - c. A person received a warning letter informing him of the foreign account reporting and recordkeeping requirements, but the person fails to file an FBAR in a subsequent year. In addition, the person may have failed to report income associated with the foreign bank accounts for the year that the FBAR was not filed. If the person's explanation for the failure to file an FBAR and other available evidence do not outweigh the facts supporting a determination that the failure was intentional or the result of reckless disregard or willful blindness, the penalty for a willful violation should apply.