No. 16-40948

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BERNHARD GUBSER,

Plaintiff - Appellant

v.

INTERNAL REVENUE SERVICE; JOHN KOSKINEN, in his official capacity as Commissioner of Internal Revenue Service; UNITED STATES OF AMERICA,

Defendants - Appellees

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF OF APPELLANT,
BERNHARD GUBSER

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CERTIFICATE OF INTERESTED PERSONS

No. 16-40948

BERNHARD GUBSER,

Plaintiff - Appellant,

v.

INTERNAL REVENUE SERVICE; JOHN KOSKINEN, in his official capacity as Commissioner of Internal Revenue Service; UNITED STATES OF AMERICA,

Defendants - Appellees.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Parties:

Plaintiff - Appellant:	Bernhard Gubser
Defendants - Appellees:	Internal Revenue Service; John Koskinen, Commissioner of Internal Revenue; and the United States of America

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STATEMENT REGARDING ORAL ARGUMENT

Appellant (hereinafter "Gubser") respectfully submits, pursuant to 5th Cir. R. 28.2.3, that oral argument in this case would be helpful to explain the district court's incorrect application of constitutional standing requirements to a declaratory judgment suit. Oral argument would also help to explain the civil penalties under 31 U.S.C. § 5321, the standard of proof for those penalties, the history and operation of the IRS Offshore Voluntary Disclosure Program, the role of the IRS Office of Appeals in resolving tax controversies, and the progression of Gubser's case through the administrative process.

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STATEMENT OF JURISDICTION

This is an appeal from a Memorandum and Order granting the Defendants-Appellees' Motion to Dismiss. ROA.81-86. The U.S. District Court for the Southern District of Texas had jurisdiction over this federal question pursuant to 28 U.S.C. § 1331. In addition, the Declaratory Judgment Act, 28 U.S.C. § 2201, authorized the district court to grant declaratory relief. Congress waived sovereign immunity over the underlying claims in 28 U.S.C. § 1355, which grants to the district courts exclusive jurisdiction over actions for the recovery or enforcement of any fines, penalties, or forfeitures incurred under any Act of Congress.

This Court has jurisdiction under 28 U.S.C. § 1291 because the district court's May 4, 2016 Memorandum and Order dismissing the underlying action constitutes a final judgment.

Appellant timely filed his Notice of Appeal on June 28, 2016.

STATEMENT OF THE ISSUE

A plaintiff has standing to seek declaratory relief if he will imminently suffer an injury due to the actions of the defendant and such injury is likely to be redressed by a favorable decision from the court. Gubser, who was born, raised, and educated in Switzerland, opened a Swiss bank account as a teenager and over time contributed his retirement savings to that account. The IRS alleged that Gubser willfully failed to report his Swiss bank account and proposed a penalty equal to half of Gubser's life savings. Gubser protested the penalty to IRS Appeals, which hears and settles tax controversies. The Appeals officer determined that the legal standard for proving willfulness was dispositive of the case but he did not know the proper standard. He asked Gubser to seek some sort of guidance on that standard. Gubser filed this declaratory judgment action to clarify that the proper standard is clear-and-convincing evidence. Did the district court err in holding that Gubser lacked standing to seek a declaration of the proper standard of proof?

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

United States citizens or residents who have a foreign bank account generally must keep records and file an annual Report of Foreign Bank and Financial Accounts ("FBAR"). 31 U.S.C. § 5314; 31 C.F.R. § 1010.350. If a person willfully fails to file an FBAR, 31 U.S.C. § 5321(a)(5)(C) imposes a penalty of as much as 50 percent of the balance of the foreign bank account.

The IRS alleged that Gubser willfully failed to report his Swiss bank account and proposed a penalty of about $1.3 million. ROA.154-155. To resolve this dispute, Gubser filed a protest with the IRS Office of Appeals, whose mission is to settle tax controversies on behalf of the government. Internal Revenue Manual ("I.R.M.") 8.1.1.1.1 (Feb. 10, 2012) ("The Appeals Mission is to resolve tax controversies . . . ."); ROA.16. The IRS has provided conflicting guidance regarding the standard for proving willfulness.[1] The IRS Appeals officer at Gubser's hearing did not know what the proper standard was: If the standard was a preponderance of the evidence, then he believed that the IRS could prove that Gubser acted willfully; but, if the standard was clear-and-convincing evidence, then he believed that the IRS could not. ROA.17. Because the proper standard

[1] *Compare* Marie Sapirie, *News Analysis: What the IRS OVDP Training Materials Tell Us*, 76 Tax Notes Int'l 743 (Dec. 1, 2014) (citing *FBAR Penalty Case Workshop, OVDI Opt-Out & Removal Part 1 or 2*, Tax Analysts Doc. No. 2014-27973 (May 30, 2013), which contended that the standard is a preponderance of the evidence) *with* IRS Chief Couns. Advice 200603026 (Jan. 20, 2006) (contending that the standard should be clear-and-convincing evidence).

was dispositive, the IRS Appeals officer asked Gubser's counsel to seek some sort of guidance regarding the proper standard of proof so that the parties could try to resolve the case. ROA.17, 114-115.

Gubser filed a complaint for declaratory judgment in the U.S. District Court for the Southern District of Texas. ROA.6-19. The complaint requested that the court declare that the Defendants must establish willful FBAR violations by clear-and-convincing evidence. ROA.18.

The United States moved to dismiss Gubser's suit, arguing that the court lacked subject matter jurisdiction because the United States had not waived sovereign immunity and because Gubser lacked standing. ROA.45-53.

Gubser responded to the Motion to Dismiss, establishing: (i) that the United States waived sovereign immunity in 28 U.S.C. § 1355; and (ii) that he had standing because the proposed penalty constituted imminent harm that could be resolved by the district court's declaration of the proper standard of proof. ROA.55-64. The United States then replied to Gubser's response. ROA.65-71.

The court heard oral argument (ROA.102-150) and dismissed the case on the basis that an order declaring the standard of proof would not "resolve the threat of a $1.36 million penalty." ROA.85-86. Gubser timely appealed. ROA.89-90.

B. Statement of Facts

Appellant Bernhard Gubser—a Swiss citizen—was born and raised in Switzerland. ROA.15. After secondary school, Gubser apprenticed with the Swiss railroad system and learned the transportation, freight, and import-export businesses. ROA.15. His trade brought him to Mexico and, later, the United States, where he worked as a transportation manager of an import-export company. ROA.15. In 1992, Gubser became a naturalized U.S. citizen. ROA.15.

Gubser always intended to retire in Switzerland. ROA.15. While still in Switzerland as a young man, long before he became a U.S. citizen, he opened a Swiss bank account at UBS AG and began to save for that retirement. ROA.15. Gubser left Switzerland to work abroad, but when he returned home, he used his Swiss account to pay his living expenses. ROA.15.

He married Heidi Gubser, who became a joint owner of the UBS accounts. ROA.15. Bernhard and Heidi divorced in 2008 and equally divided the funds, which were transferred to two newly opened accounts at Bank Julius Baer Co. Ltd. in Switzerland. ROA.15. Bernhard and Heidi separately owned each account; Bernhard's account is at issue here. He never concealed the Julius Baer account or his UBS account. ROA.15. He held his accounts directly and not through a foreign entity. ROA.15. The funds in the accounts consisted of after-tax compensation and inheritances. ROA.15.

Gubser did not know the details of U.S. tax law or the requirement to file an FBAR. Instead, he relied on his Certified Public Accountant, Ernesto Dominguez, to prepare his U.S. tax returns. ROA.15-16. As of 2008, the year in question, Dominguez had been preparing Gubser's returns for over 20 years. ROA.15. When he was preparing Gubser's 2008 U.S. tax returns, Dominguez did not ask Gubser about foreign bank accounts. ROA.16. Dominguez automatically checked "No" in Part III (Foreign Accounts and Trusts) of Schedule B of Form 1040, which asks whether the taxpayer had a financial interest in or signature authority over a foreign financial account. ROA.16. Dominguez therefore did not file an FBAR for Gubser. ROA.16. Gubser did not know of the requirement to file an FBAR as of the time the FBAR for 2008 was due. ROA.16. It was not until May 2010—nearly a year after the 2008 FBAR was due—that anyone from Dominguez's accounting firm asked Gubser about any interest he may have in a foreign financial account. ROA.16. In 2010, when Gubser first learned of the requirement to file an FBAR for his accounts at UBS and Julius Baer, he sought legal advice and timely filed his FBAR for 2009. ROA.16. He has timely filed an FBAR for all subsequent years. ROA.16.

On January 26, 2011, Gubser made a voluntary disclosure under the Offshore Voluntary Disclosure Program ("OVDP")[2] for tax years 2003 through 2010. ROA.16. Gubser was accepted into the OVDP on February 3, 2011, but he opted out of the OVDP penalty framework on January 24, 2014 (ROA.16), and therefore was subject to a full-scope IRS audit and the imposition of applicable civil penalties, including the penalty for failure to file an FBAR under 31 U.S.C. § 5321.

On March 30, 2015, the IRS sent Gubser a Letter 3709 (FBAR 30-Day Letter) notifying him that he had willfully failed to file an FBAR for 2008. ROA.16, 151-155.[3] In this letter, the IRS proposed a civil FBAR penalty for a willful violation of 31 U.S.C. § 5314 with respect to 2008. ROA.151-155. That penalty amounts to half of the balance in Gubser's account at the time of the violation. 31 U.S.C. § 5321(a)(5)(C) and (a)(5)(D); ROA.16. Because the maximum value of Gubser's account in 2008 was $2,726,672, a 50-percent willful FBAR penalty would confiscate $1,363,336 of Gubser's lifetime retirement

[2] Starting in 2009, the IRS announced a series of voluntary disclosure programs to encourage individuals who had not reported certain offshore income or who had not filed related information returns to resolve these issues with the IRS. The IRS National Taxpayer Advocate recently summarized the history of the OVDP as follows: "Between 2009 and 2014, the IRS generally required 'benign actors'—people who inadvertently failed to report foreign income and file one or more related information returns (*e.g.*, the *Report of Foreign Bank and Financial Accounts* (FBAR))—to enter an OVD program and either pay an 'offshore penalty' designed for 'bad actors' or 'opt out' and be audited . . . ." Fiscal Year 2017 Objectives Report to Congress, Taxpayer Advocate Service, at 164 (June 2016).

[3] The complaint, at ROA.16, mistakenly states that the FBAR 30-Day Letter was dated March 30, 2014. The letter was instead dated March 30, 2015, as shown at ROA.151-155.

savings. ROA.15. The FBAR 30-Day Letter informed Gubser that if he did not seek to resolve the penalty with the IRS Office of Appeals, then the IRS would "assess the penalty and begin collection procedures." ROA.153. Accordingly, Gubser protested the proposed penalty to the IRS Office of Appeals (ROA.16), which has the authority to resolve and settle tax controversies between taxpayers and the IRS based on the applicable law and the hazards of litigation. Treas. Reg. § 601.106(f)(1) and (2) (IRS Appeals officers must "hew to the law" and must seek to resolve "a tax controversy on a basis which fairly reflects the relative merits of the opposing views in light of the hazards which would exist if the case were litigated."). After the IRS Appeals officer asked for guidance regarding the proper standard of proof for establishing the willful failure to file an FBAR, Gubser filed this declaratory judgment action to seek such guidance. ROA.6-19.

SUMMARY OF THE ARGUMENT

Bernhard Gubser has established standing to sue for a declaration of the proper standard of proving a willful FBAR penalty. He pleaded sufficient facts to show (1) imminent harm (2) caused by the FBAR penalty proposed by the IRS (3) that the district court can redress with a declaratory judgment. Before filing suit, Gubser tried to settle the controversy with an IRS Appeals officer. ROA.17, 152-53, 156-57. The Appeals officer identified the standard of proof as dispositive and asked Gubser to seek guidance on this uncertain area. ROA.17, 109, 114-115. So Gubser sued for a declaration that the IRS must prove that he willfully violated the FBAR filing requirement by clear-and-convincing evidence (and not merely by a preponderance of the evidence).

The district court erroneously dismissed his suit for lack of standing, solely emphasizing the failure to establish redressability. ROA.85-86. The district court committed legal error when it mistakenly determined that declaratory judgment would be proper only if its order would legally bind the Appeals officer or would prevent the IRS from assessing the penalty. ROA.85-86. This Court reviews that legal error *de novo*. *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 635 (5th Cir. 2012) ("We review questions of standing *de novo*.").

Declaratory judgment, unlike injunctive relief or a writ of mandamus, is not a coercive remedy. Instead, it interprets the parties' rights and legal relations.

Declining relief because the court's order would not compel the Appeals officer to act undermines the purpose of the declaratory remedy and contradicts decades of case law.

Longstanding Supreme Court precedent establishes that a plaintiff's injury is redressable if it is substantially likely that the declaratory defendant will abide by the court's statement of the applicable law. The declaration need not compel the defendant to act, and the plaintiff's injury is redressable even if the defendant retains some discretion in the case. Moreover, declaratory judgment need not resolve the plaintiff's every injury; it is enough that it addresses and clarifies at least one aspect of the controversy.

Here, the court's declaration will resolve the current legal uncertainty about the proper standard of proof and will allow the Appeals officer to determine the proper penalty (*i.e.*, the willful or non-willful FBAR penalty). Because the Appeals officer specifically asked for guidance on this legal issue, it is substantially likely that he will follow that guidance when it is received, which will resolve the dispute over the proposed penalty. This is exactly the kind of case that declaratory judgment was made to resolve.

ARGUMENT AND AUTHORITIES

Gubser seeks clarity on one of the most fundamental elements of the adversarial system—the applicable standard of proof. The standard of proof is a basic component of due process. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington v. Texas*, 441 U.S. 418, 423 (1979) (citing *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). The standard of proof increases commensurately with the harm that results from an adjudication: the greater the harm, the higher the standard of proof. *Addington*, 441 U.S. at 423-24. Accordingly, the government must prove criminal cases beyond a reasonable doubt. *In re Winship*, 397 U.S. at 361-62. Likewise, civil cases with quasi-criminal consequences require greater scrutiny and a higher standard than a mere preponderance of the evidence. *Addington*, 441 U.S. at 423-24. For instance, clear-and-convincing evidence is necessary to prove civil fraud because the interests at stake are substantial. *Id.* at 424. The court must establish the standard of proof that the IRS should apply ***before*** the IRS actually applies it. Because "litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated

in advance." *Santosky v. Kramer*, 455 U.S. 745, 757 (1982). Advance notice of the standard of proof is necessary to "preserve fundamental fairness" and to avoid "proceedings . . . governed by a constitutionally defective evidentiary standard." *Id.*

The IRS has the burden of proving a willful violation of the FBAR requirements (*see United States v. McBride,* 908 F. Supp. 2d 1186, 1201-02 (D. Utah 2012); I.R.M. 4.26.16.6.5.1.3 (Nov. 6, 2015) ("The burden of establishing willfulness is on the Service.")), but the proper standard of proof is uncertain. The statute provides for a civil penalty of not more than $10,000 for the non-willful failure to file an FBAR (31 U.S.C. § 5321(a)(5)(B)), and a civil penalty of as much as half of the balance of the foreign bank account for the willful failure to file (31 U.S.C. § 5321(a)(5)(C)-(D)). But the statute does not expressly identify the standard of proof for the heightened willfulness penalty. The IRS, which administers[4] this non-tax penalty,[5] has issued conflicting guidance about the proper standard of proof.[6] Without certainty as to the standard ahead of time, Gubser cannot receive the process he is due before the IRS Appeals officer.

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[4] *See* 31 U.S.C. § 5314 (describing the duties and authority of the Secretary of the Treasury with respect to FBARs); 31 C.F.R. § 1010.306(c) (requiring FBARs to be filed with the Commissioner of Internal Revenue on or before June 30 of each calendar year); ROA.9-11 (describing the FBAR reporting and enforcement regime).

[5] *United States v. Simonelli*, 614 F. Supp. 2d 241, 247 (D. Conn. 2008) ("Because there is no tax underlying the FBAR penalty, the FBAR penalty cannot be considered a 'tax penalty.'").

[6] *See* IRS Chief Couns. Advice 200603026 (Jan. 20, 2006) ("We expect that a court will find the burden in civil FBAR cases to be that of providing 'clear and convincing evidence,' rather than

Accordingly, Gubser sought declaratory relief from the district court because his controversy with the IRS turned on a single, purely legal question: whether the IRS must prove that he willfully failed to file his 2008 FBAR by clear-and-convincing evidence or by a preponderance of the evidence. The court below decided that Gubser's dispute was not a proper "case or controversy" because he did not show that the court's order would compel IRS action: "Although Plaintiff alleges that an individual appeals officer represented the IRS could not meet this higher burden [of establishing willfulness by clear-and-convincing evidence], Plaintiff has not claimed that this representation was legally binding or would preclude the IRS from still assessing a penalty." ROA.86. Because the "appeals officer could still choose to assess or not assess the penalty regardless of any declarations," the district court concluded that "it is far from likely that a favorable declaration regarding the IRS's burden of proof would prevent the assessment of a penalty against Plaintiff." ROA.86.

The district court assumed that an order declaring the standard of proof must bind the IRS and compel it to act. That assumption is mistaken. Unlike mandamus, declaratory judgment does not compel action. Accordingly, a plaintiff need not

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merely a 'preponderance of the evidence.'"); Marie Sapirie, *News Analysis: What the IRS OVDP Training Materials Tell Us*, 76 Tax Notes Int'l 743 (Dec. 1, 2014) (citing *FBAR Penalty Case Workshop, OVDI Opt-Out & Removal Part 1 or 2*, Tax Analysts Doc. No. 2014-27973 (May 30, 2013); Caroline Ciraolo, *The FBAR Penalty: What Constitutes Willfulness?*, Maryland Bar Journal, at 43 (May 2013) ("It remains to be seen whether the Service still views its burden in establishing a willful FBAR violation as the same 'clear and convincing evidence' standard applied to a civil fraud penalty.").

show that the court's declaration would force the government to act. Such a requirement would significantly erode, if not entirely eliminate, the viability of declaratory relief for plaintiffs (like Gubser) who face government actors who retain some discretion in the dispute. Excessive barriers to declaratory relief make the remedy unworkable and eviscerate the Declaratory Judgment Act's valid and practical purpose. This Court should reverse the decision below and hold that Gubser has standing to sue.

I. Gubser has established that he will imminently suffer an injury-in-fact and that his injury is fairly traceable to the proposed penalty.

Constitutional standing requires a live case or controversy. U.S. Const., art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). A plaintiff establishes constitutional standing by showing (1) concrete and particularized harm (2) caused by the defendant's action that is (3) likely to be redressed by a favorable decision from the court. 504 U.S. at 560-61. The harm need not have already occurred and may be only imminent or threatened. *Id.*; *Bauer v. Texas*, 341 F.3d 352, 357-58 (5th Cir. 2003).

A. Standing under the Declaratory Judgment Act.

In a declaratory judgment suit, a plaintiff need not, and often does not, suffer an injury before seeking declaratory relief. *Bauer*, 341 F.3d at 357-58 ("A plaintiff can meet the standing requirements when suit is brought under the Declaratory Judgment Act . . . by establishing actual present harm or a significant possibility of

future harm . . . even though the injury-in-fact has not yet been completed.") (internal citations and quotations omitted). Indeed, Congress created the remedy of declaratory judgment in 1934 to allow the parties to determine their legal rights *before* the declaratory plaintiff suffered an injury or *before* the declaratory defendant filed a claim.[7] *Hardware Mut. Casualty Co. v. Schantz*, 178 F.2d 779 (5th Cir. 1949) (insurance company had standing to seek a declaratory judgment that the insured's policy did not require the company to defend him in a wrongful death suit and that the accident was not within the policy before actually having to defend the insured); *Scott-Burr Stores Corp. v. Wilcox*, 194 F.2d 989 (5th Cir. 1952) (landlord presented an actual controversy and did not have to wait until the end of the lease to request a declaratory judgment that the tenant did not properly notify the landlord of its intent to extend the lease).

[7] S. Rep. No. 73-1005, at 2-3 (1934) (declaratory judgment "has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. . . . In jurisdictions having the declaratory judgment procedure, it is not necessary to bring about such social and economic waste and destruction in order to obtain a determination of one's rights."); *see also* Edwin Borchard, *The Federal Declaratory Judgments Act,* 21 Virg. L. Rev. 35, 43 (1934) ("The issues are the same whether the plaintiff or prospective defendant initiates the action and so long as danger or penalty threaten and doubt, dilemma and uncertainty menace the parties' freedom of action and peace of mind, there is no reason why the law should not recognize these important interests as legal and give them judicial protection against impairment.").

B. Gubser will be injured by a penalty taking half of his life savings.

Though unaddressed in the opinion below, Gubser has satisfied his burden with respect to the first two elements of standing: *i.e.*, (1) imminent harm (2) caused by the defendant's action to propose a willful FBAR penalty.

Plaintiffs contesting the actions of government officials, such as the threat of enforcing a penalty, present a classic case or controversy under Article III of the Constitution. *Diamond v. Charles*, 476 U.S. 54, 64 (1986) ("The conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic 'case' or 'controversy' within the meaning of Art. III"). In *Roark & Hardee LP v. City of Austin*, 522 F.3d 533 (5th Cir. 2008), plaintiffs sought declaratory judgment that a city's ban on smoking in public places was unlawful. This Circuit held that bar and restaurant owners had standing—even though the City had not yet fined them for violating the smoking ban. *Id.* at 543. The Court held that the City's enforcement strategy, which targeted bars and restaurants and had an inspection process that resulted in criminal charges and suspension of the restaurant's operating license, created a sufficient threat of injury to the plaintiffs. *Id.* ("[E]ven if the City has resisted enforcing the $2,000 fine against Plaintiffs and revoking Plaintiff bar owners' licenses or permits at this stage, the City may seek to enforce these penalties later."). Because there was a

real possibility that the plaintiffs would be fined, the Fifth Circuit held that they had standing to challenge the ordinance. *Id.*

As with the plaintiffs in *Roark & Hardee*, Gubser faces a real threat that the IRS will assess a penalty against him. Gubser's controversy with the IRS crystallized when the IRS proposed a willful FBAR penalty against him. The IRS has audited Gubser's foreign-bank-account information for 4 years, applied the law to Gubser's facts, and determined that he was liable for a willful FBAR penalty. ROA.16, 151-155. IRS Counsel reviewed the IRS examiner's decision, agreed with it, prepared a written memorandum of review, and authorized the proposed penalty. I.R.M. 4.26.17.4.3.2 and 4.26.17.4.3.5.A (May 5, 2008). The IRS then issued a Letter 3709, which told Gubser that the penalty was imminent. In that letter, the IRS made an unqualified statement that it intended to assess and collect the penalty: "If you do not take any action by the response date noted above, we will assess the penalty and begin collection procedures." ROA.153. To avoid the penalty, his sole administrative recourse was pre-assessment dispute resolution before the IRS Office of Appeals, whose mission is to settle tax controversies. I.R.M. 8.1.1.1.1 (Feb. 10, 2012); I.R.M. 4.26.17.4.6.2 and 4.26.17.4.7 (Jan. 1, 2007). Otherwise, the IRS would assess the penalty, which would trigger collection action. I.R.M. 4.26.17.4.6.3 (Jan. 1, 2007). The mechanical IRS

enforcement process[8] makes the penalty inevitable—unless the parties can reach a resolution on their own accord.

The court below agreed. During the hearing on the government's motion to dismiss, the district court said: "[I]t seems to me that really an assessment is inevitable . . . it seems to me that this is going to happen one way or another." ROA.138.

The harm to Gubser is imminent and substantial. The IRS proposes to take half of Gubser's life savings through the proposed penalty. The IRS has fully audited and analyzed Gubser's foreign bank accounts and concluded that he is liable for the penalty. The IRS's position is neither speculative nor tentative. The controversy is live.

If the court does not declare the proper standard of proof, the IRS Appeals proceeding will be fruitless, the IRS will collect the penalty, and Gubser will have to file suit in this *same* court. 28 U.S.C. § 1355 (U.S. district courts have exclusive jurisdiction over "any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress . . . ."); 28 U.S.C. § 1391(b)(2) (venue proper in judicial district where "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated . . . ."); *see*

[8] The FBAR notice, assessment, and collection processes are set forth in the regulations (at 31 C.F.R. § 1010.810) and the Internal Revenue Manual (I.R.M. 4.26.16-17).

also I.R.M. 8.11.6.1.18 (Feb. 2, 2015) (plaintiff must either (1) pay the FBAR penalty and file a refund suit or (2) wait until the government files suit in district court to collect the penalty). This is because Gubser cannot meaningfully proceed to resolve the case at IRS Appeals in the face of an uncertainty regarding the most fundamental question in a fact-based controversy—the standard of proof.

Declaring the proper standard now will thus allow Gubser useful access to IRS Appeals. It will also bind the parties in all subsequent proceedings. *See Seaboard Coast Line R.R. Co. v. Gulf Oil Corp.*, 409 F.2d 879, 881-82 (5th Cir. 1969) (state court's declaration was res judicata of the matters at issue in federal litigation); *Mattis v. Schnarr*, 502 F.2d 588, 592-93 (8th Cir. 1974) (a declaratory judgment "is res judicata and the doctrine of collateral estoppel is applicable. The judgment is precedential as to the matters declared by it.") (internal citations omitted), *rev'd on other grounds sub nom. Ashcroft v. Mattis*, 431 U.S. 171 (1977). Accordingly, if the district court declares the standard of proof now, then that declaration will apply should the case be unresolved at IRS Appeals (which Gubser does not expect) in future proceedings between the parties. Because the harm to Gubser is imminent, and because the standard of proof is integral to resolving the dispute between Gubser and the IRS, the court should fulfill the purpose of the Declaratory Judgment Act and articulate the standard of proof now.

C. The IRS's proposal to impose a penalty caused the harm.

Gubser's imminent and threatened injury follows from the actions and intent of the government Defendants who proposed the penalty. A plaintiff need not establish proximate causation—only that the injury is "fairly traceable" to the defendant. *LULAC v. City of Boerne*, 659 F.3d 421, 431 (5th Cir. 2011) (citing *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997)); *Duarte v. City of Lewisville,* 759 F.3d 514, 520-21 (5th Cir. 2014) (plaintiff's inability to find housing was fairly traceable to sex-offender-registration requirements even though market forces also contributed to the injury).

Gubser's imminent, concrete, and particularized injury-in-fact is directly tied to the government's decision to pursue a willful FBAR violation penalty against him. As shown in the Letter 3709, the IRS proposed the penalty and stated that it "will assess the penalty and begin collection procedures." ROA.153. Thus, the harm to Gubser follows from the government's actions to propose, assess, and collect the penalty. The pertinent government defendants are before the court. Gubser has therefore satisfied the first two elements of the standing analysis.

II. Gubser established redressability by showing that the IRS Appeals officer is likely to apply the court's declaration of the standard for proving a willful FBAR violation.

The third element of standing is redressability: *i.e.*, that the plaintiff's injury likely will be redressed by a favorable decision from the court. *Lujan v. Defenders*

of Wildlife, 504 U.S. at 561. The redressability requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). To establish redressability in a declaratory judgment case, the plaintiff must show only that it is substantially likely that the parties will abide by the court's declaration of law. *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 75, n.20 (1978); *Hancock Cty. Bd. Of Supervisors v. Ruhr*, 487 Fed. Appx. 189, 195 (5th Cir. 2012).

Gubser and the IRS are adversaries in a concrete dispute over the imposition of a willful FBAR penalty. After examining his facts and proceeding through multiple levels of agency review—including review by an IRS attorney—the IRS proposed the penalty through a formal letter notifying Gubser that his last opportunity (before the IRS took collection action) to resolve the issue was to settle the case at IRS Appeals. The district court's declaration that clear-and-convincing evidence is the proper standard of proof is likely to redress Gubser's injury because the Appeals officer specifically asked for guidance on this point of law and because the IRS directs all of its Appeals officers to follow and apply the law in

resolving disputes. Accordingly, it is substantially likely that the Appeals officer will apply that standard in settling the proposed FBAR penalty. The district court erred because it did not consider redressability in the context of declaratory judgment and mistakenly focused on the Appeals officer's discretion in the matter.

A. The district court erroneously required a showing that a declaration would bind the IRS Appeals officer's ultimate decision.

Declaratory judgment is not a coercive remedy. *Powell v. McCormack*, 395 U.S. 486, 517 (1969). The plain text of the Declaratory Judgment Act shows that the court's order need not compel action or bind the parties—a declaration of the parties' rights is sufficient. The statute provides that any court of the United States "may declare the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought*." 28 U.S.C. § 2201 (emphasis added). Thus, a court may declare the law that applies to the parties regardless of whether the plaintiff seeks any other affirmative relief—such as an injunction, a restraining order, or an award of damages. *Powell v. McCormack*, 395 U.S. at 517-18 ("The availability of declaratory relief depends on whether there is a live dispute between the parties, and a request for a declaratory relief may be considered independently of whether other forms of relief are appropriate." (internal citations omitted)); *see also* S. Rep. No. 73-1005, at 2 (1934) ("The declaratory judgment differs in no essential respect from any other judgment

except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree. It declares conclusively and finally the rights of parties in litigation over a contested issue, a form of relief which often suffices to settle controversies and fully administer justice.").

Declaratory judgment was never intended to compel the parties to act. Yale professor Edwin Borchard, a principal proponent and author of the Declaratory Judgment Act, explained "that responsible defendants, like government officials or large corporations, do not need more than a declaration of the law to obey it and that a coercive procedure under such circumstances is an expensive and often unnecessary luxury." Edwin Borchard, *Declaratory Judgments, 1939*, 9 Brook. L. Rev. 1, 1 (1939); *see also* S. Rep. No. 73-1005, at 5 (1934) ("The declaratory judgment is a final, binding judgment between adversary parties and conclusively determines their rights.").

Case law bears this out and shows that declaratory judgment is a remedy without an award of execution. The Supreme Court has long held that "while ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of judicial function." *Fidelity Nat'l Bank & Trust Co. v. Swope*, 274 U.S. 123, 132 (1927). In a state-court action that involved a declaration of the parties' rights and the validity of the law at issue, the Court

explained that "[w]henever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status." *Id.* (internal quotations and citations omitted). Indeed, declaratory judgment is an available remedy even if the plaintiff could request a coercive remedy. *Wacker v. Bisson*, 348 F.2d 602, 607 (5th Cir. 1965) (holding that plaintiff may choose declaratory judgment over more directed habeas relief and that "the plaintiff may ask for a declaratory judgment even if he may also seek a coercive decree.").

Almost 80 years ago, the Supreme Court concluded that a party may seek declaratory judgment even though the court's order does not mandate action by the parties and does not resolve all issues in the case. In *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937), the Court considered an insurance company's suit for a declaration that four insurance policies were null and void because the insured had failed to pay his premiums. *Id.* at 239. The insured had claimed to be totally and permanently disabled and had contended that he was entitled to disability benefits from the insurance company. *Id.* at 237. But the insured had not filed suit, so the insurance company did not have the opportunity to establish the absence of the alleged disability in court. *Id.* at 242. The lower courts had dismissed the plaintiff's declaratory action on the basis that there was no case or

controversy: *i.e.*, because the plaintiff allegedly had not established constitutional standing to sue. *Id.* at 236.

Reversing the lower courts, the Supreme Court made clear that Congress acted within its authority to create the remedy of declaratory relief under the Declaratory Judgment Act and that Congress was "not confined to traditional forms or traditional remedies." *Id.* at 239-40. A plaintiff could seek declaratory relief as long as there was "a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged . . . ." *Id.* at 241. On the facts of that case, the parties disputed their "legal rights and obligations arising from the contracts of insurance." *Id.* at 242. The plaintiff did not request an "advisory opinion" but instead asked "for an adjudication of present right upon established facts." *Id.* Thus, even though the insurance company brought suit before the insured person sued to enforce his rights under the insurance contracts, and even though the suit involved only a declaration of rights under insurance contracts, the Court held that the plaintiff's complaint for declaratory judgment "presented a controversy to which the judicial power extend[ed] and that authority to hear and determine it [had] been conferred upon the District Court by the Declaratory Judgment Act." *Id.* at 244.

As with the insurance company in *Aetna*, Gubser anticipates that his adversary (the government) will seek to enforce its rights against him (by suing to

collect the penalty). The pertinent facts and circumstances are the same now as they will be when the IRS eventually enforces the penalty against him. The standard of proof will not change from the time when the penalty is proposed to the time when the government acts to collect it. By seeking clarity on the standard of proof at the administrative stage of the dispute, Gubser has followed the most efficient and expedient path for resolving the controversy. He does not need a coercive remedy (like mandamus to the Appeals officer or an injunction against the IRS) to resolve the dispute—a declaration of the standard of proof is likely to be sufficient.

By requiring that the declaration must bind the IRS Appeals officer's decision regarding the FBAR penalty, the district court analyzed Gubser's request as though he were seeking a coercive remedy rather than simple declaratory relief. Accordingly, the court did not recognize that declaratory judgment differs from coercive remedies and mistakenly assumed that declaratory judgment must bind the parties' subsequent actions. That mistake of law constitutes reversible error.

B. The Appeals officer's discretion on remand does not preclude redressability.

The district court's holding that Gubser lacked standing because the IRS Appeals officer retains discretion to decide against Gubser is also unsupported by case law and constitutes reversible error. ROA.86 ("Plaintiff conceded at oral argument that the appeals officer could choose to assess or not assess the penalty

regardless of any declarations by this Court regarding the burden of proof."); ROA.116 ("[I]f the Court were to issue an advisory [opinion] at this point they're certainly not bound to follow my advisory [opinion]."). The court need not resolve all of Gubser's injuries in order to grant declaratory relief. And the agency's discretion does not prohibit declaratory judgment or eliminate redressability.

The court below mistakenly assumed that a declaratory judgment is the same as an advisory opinion. During the hearing, the court said: "[I]t's the equivalent of an advisory opinion but just so that we're correct on the terminology as counsel pointed out it would be a declaratory judgment in their favor but it would have the effect of being an advisory opinion." ROA.121. As early as 1933, the Supreme Court recognized that a declaratory judgment is not an advisory opinion. Instead, a request for a declaratory judgment in an "adversary proceeding, involving a real, not a hypothetical, controversy" constitutes a justiciable "case or controversy." *Nashville, Chattanooga and St. Louis Ry. Co. v. Wallace*, 288 U.S. 249, 264 (1933); *see also* Edward Borchard, The Federal Declaratory Judgments Act, 21 Virg. L. Rev. 35, 37 (1934). More recently, the Supreme Court squarely held that a declaratory plaintiff has standing even if a federal agency retains some discretion in the dispute. In *FEC v. Akins*, 524 U.S. 11 (1998), the Supreme Court held that the plaintiffs had standing to seek declaratory judgment even though the defendants still had discretion in the case. There, the plaintiffs challenged the

Federal Election Commission's determination that the American Israel Public Affairs Committee ("AIPAC") was not a "political committee" under the Federal Election Campaign Act of 1971. *Id.* at 13. As a result of this determination, AIPAC was not required to make disclosures to the FEC regarding its membership, contributions, and expenditures. *Id.* Plaintiffs—a group of voters often opposing AIPAC's views—filed a complaint with the FEC concerning its AIPAC determination. *Id.* at 15-16. After the FEC dismissed their complaint, the plaintiffs sought judicial review. *Id.* at 18.

The government argued that the plaintiffs' claims were not redressable because the FEC retained discretion to decide the dispute against the plaintiffs: "[E]ven had the FEC agreed with respondents' view of the law, it would still have decided in the exercise of its discretion not to require AIPAC to produce the information." *Akins*, 524 U.S. at 25. The Court rejected this argument because it could not "know that the FEC would have exercised its prosecutorial discretion in this way." *Id.* The Court ultimately concluded that "[a]gencies often have discretion about whether or not to take a particular action. Yet those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground." *Id.*

The Supreme Court has also held that the presence of discretion does not negate redressability, especially if the party with discretion will likely consider and

comply with the court's order. In *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the commonwealth of Massachusetts challenged the Commerce Secretary's reapportionment based on census data, claiming that it lost a seat in the House of Representatives because census officials had used an improper method for counting the number of federal employees serving overseas. *Id.* at 790-91. The government argued that the plaintiffs' claims were not redressable. But the Court disagreed. Even though the district court's declaration would not compel the federal agency to act, the Court assumed that it was "substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, *even though they would not be directly bound by such a determination*."[9] *Id.* at 803 (emphasis added).

Gubser's dispute with the IRS is still a viable case or controversy even though the IRS Appeals officer retains some discretion regarding the applicability of the willful FBAR penalty. Supreme Court precedent firmly establishes that a court's declaratory judgment need not bind federal agencies. Instead, it is

[9] Other courts have applied this holding in different settings. *See, e.g.*, *Chamber of Commerce of the United States v. Edmondson*, 594 F.3d 742, 757 n.16 (10th Cir. 2010) (concluding that plaintiffs had standing to challenge state statute regulating illegal immigration and holding that plaintiffs established redressability even though certain public employers might not enter into contracts with employers who were not bound by the requested remedy); *Idaho Bldg. & Const. Trades Council v. Wasden*, 32 F. Supp. 3d 1143 (D. Idaho 2014) (trade associations had standing to challenge a statute banning project labor agreements in public works contracts even though the plaintiffs could not show that the administrator of the Division of Public Works would use his discretion to include project labor agreements).

sufficient if the declaration provides an "authoritative interpretation" of the law. Just as in *Akins* and *Franklin*, the court's construction of the statute would provide authoritative guidance regarding the applicable law. That is, the parties would know with certainty the proper standard for proving a willful FBAR penalty. The Declaratory Judgment Act allows Gubser to gain clarity on that issue without asking the court to enjoin collection of the penalty or to award damages due to the government's wrongful conduct. The presence of discretion in this process does not negate or undermine the utility of the district court's declaration of law in the dispute-resolution process.

Moreover, the Appeals officer will likely heed the court's guidance—after all, he asked for it. That request underscores the validity and viability of declaratory relief. In addition, the IRS's own guidance instructs Appeals officers to follow the applicable law. "Rule I" for practice before IRS Appeals includes the requirement that "an Appeals representative in his or her conclusions of fact or application of the law, *shall hew to the law* and the recognized standards of legal construction." Treas. Reg. § 601.106(f)(1) (emphasis added). Indeed, Appeals accomplishes its mission of resolving tax controversies by rendering decisions based on the law. I.R.M. 8.1.1.1.2.B (Feb. 10, 2012) ("A decision of high quality is required in each case and should represent judicious application of Service policy and *sound legal principles*.") (emphasis added). The IRS's direction to its

Appeals officers is clear: you must follow the law. In the face of such a mandate, it is highly unlikely that the Appeals officer will ignore a court's declaration of the applicable law. Just to the contrary, the court's declaration is highly likely to guide the Appeals officer's resolution of this dispute.

C. Declaring the proper standard of proof sufficiently remedies the harm to Gubser.

The court below suggested that a declaration of the standard of proof would be insufficient to redress Gubser's stated injury because Gubser has not claimed that it "would preclude the IRS from still assessing a penalty." ROA.86. Declaratory relief does not have to finally resolve every aspect of the controversy in order to sufficiently redress the claimed injury-in-fact. In *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983 (9th Cir. 2012), the plaintiff, a Malaysian citizen who was legally in the United States, alleged that she was mistakenly put on the "No-Fly List" and other terrorist watch lists. The government argued that she was stopped, searched, and detained at an airport because she did not have a visa. Because the decision to grant or deny a visa is immune from judicial review, the government contended that the court could not redress her injury. The court disagreed, pointing out that the system used to evaluate visa eligibility draws upon No-Fly Lists, so it was likely that the plaintiff's visa was revoked and not renewed due to her presence on the No-Fly List. Because removal from the No-Fly List

would make getting a visa more likely, the Ninth Circuit concluded that the plaintiff had standing.

In doing so, the court rejected the suggestion that the plaintiff had to show that the court's remedy would definitively redress her injuries. "[P]laintiffs need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision . . . [P]laintiffs must show only that a favorable decision is *likely* to redress [their injuries], not that a favorable decision *will inevitably redress* [their injuries]." *Id.* at 993. The court also held that plaintiffs need not establish that a judicial remedy would resolve all issues in the case. In essence, a plaintiff "is not required to solve all roadblocks simultaneously and is entitled to tackle one roadblock at a time." *Id.* *See also Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (to satisfy the redressability requirement, a plaintiff "need not show that a favorable decision will relieve his *every* injury.") (internal quotations omitted); *K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010) (physicians satisfied redressability element of standing in suit to enjoin Patient's Compensation Fund Oversight Board from using statute to prevent processing and payment of abortion-related claims even though litigants could bypass the Board and litigate directly in court.).

Case law demonstrates that the court's ability to remedy the first in a series of legal injuries is sufficient to establish redressability. In Gubser's case, declaring the proper standard for proving willfulness will resolve the legal uncertainty

regarding the proper standard of proof and allow the parties to analyze and potentially resolve their dispute according to a procedural rule that is fundamental to weighing the facts at the administrative stage, and, if necessary, in litigation. Because the resolution of that initial issue is a prerequisite to later determinations—even if those later determinations are based on discretion that is unaffected by the court's order—redress is still provided by a court determination of the standard of proof.

CONCLUSION

This Court should reverse the district court's order dismissing Gubser's complaint for declaratory judgment, hold that Gubser has standing to sue, and remand for consideration of the petition on the merits. The district court committed reversible error by misapplying the standing analysis to Gubser's request for declaratory relief. The constraint that the district court placed on declaratory judgment—namely, that a declaration must bind the government's ultimate decision on the assessment of the willful FBAR penalty against Gubser—is unsupported by case law and is contrary to the purpose of declaratory judgment. Upholding the district court's order would deprive Gubser of a fundamental procedural right and would establish an anomalous and unprecedented standing analysis. Gubser therefore requests that this Court reverse the district court's dismissal of his complaint for declaratory judgment and hold that he has standing to sue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellant has been mailed to Counsel for Appellee at the addresses listed below or provided to counsel for Appellee via email through this Court's electronic Notice of Docket Activity on this 24th day of August, 2016.

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I hereby certify that the official Record on Appeal in this case has been mailed to Counsel for Appellee at the address listed below on this 24 day of August, 2016.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,143 words, including the cover page but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), as modified by 5th Cir. R. 32.1, and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point in the body and Times New Roman 12 point in the footnotes.

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ECF CERTIFICATION

All required privacy redactions have been made.

The electronic submission is an exact copy of the paper document.

The document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/George M. Clarke, III
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ADDENDUM: STATUTES, REGULATIONS, AND RULES

28 U.S.C. § 2201. Creation of remedy.

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

31 U.S.C. § 5314. Records and reports on foreign financial agency transactions.

(a) Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:

> **(1)** the identity and address of participants in a transaction or relationship.
> **(2)** the legal capacity in which a participant is acting.
> **(3)** the identity of real parties in interest.
> **(4)** a description of the transaction.

(b) The Secretary may prescribe—

(1) a reasonable classification of persons subject to or exempt from a requirement under this section or a regulation under this section;
(2) a foreign country to which a requirement or a regulation under this section applies if the Secretary decides applying the requirement or regulation to all foreign countries is unnecessary or undesirable;
(3) the magnitude of transactions subject to a requirement or a regulation under this section;
(4) the kind of transaction subject to or exempt from a requirement or a regulation under this section; and
(5) other matters the Secretary considers necessary to carry out this section or a regulation under this section.

(c) A person shall be required to disclose a record required to be kept under this section or under a regulation under this section only as required by law.

31 U.S.C. § 5321. Civil penalties.

(a)

(1) A domestic financial institution or nonfinancial trade or business, and a partner, director, officer, or employee of a domestic financial institution or nonfinancial trade or business, willfully violating this subchapter or a regulation prescribed or order issued under this subchapter (except sections 5314 and 5315 of this title or a regulation prescribed under sections 5314 and 5315), or willfully violating a regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508, is liable to the United States Government for a civil penalty of not more than the greater of the amount (not to exceed $ 100,000) involved in the transaction (if any) or $ 25,000. For a violation of section 5318(a)(2) of this title or a regulation prescribed under section 5318(a)(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.
(2) The Secretary of the Treasury may impose an additional civil penalty on a person not filing a report, or filing a report containing a material omission or misstatement, under section 5316 of this title or a regulation prescribed under section 5316. A civil penalty under this paragraph may not be more than the amount of the monetary instrument for which the report was required. A civil penalty under this paragraph is reduced by an amount forfeited under section 5317(b) of this title.
(3) A person not filing a report under a regulation prescribed under section 5315 of this title or not complying with an injunction under section 5320 of

this title enjoining a violation of, or enforcing compliance with, section 5315 or a regulation prescribed under section 5315, is liable to the Government for a civil penalty of not more than $ 10,000.

(4) Structured transaction violation.

(A) Penalty authorized. The Secretary of the Treasury may impose a civil money penalty on any person who violates any provision of section 5324.

(B) Maximum amount limitation. The amount of any civil money penalty imposed under subparagraph (A) shall not exceed the amount of the coins and currency (or such other monetary instruments as the Secretary may prescribe) involved in the transaction with respect to which such penalty is imposed.

(C) Coordination with forfeiture provision. The amount of any civil money penalty imposed by the Secretary under subparagraph (A) shall be reduced by the amount of any forfeiture to the United States in connection with the transaction with respect to which such penalty is imposed.

(5) Foreign financial agency transaction violation.

(A) Penalty authorized. The Secretary of the Treasury may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314.

(B) Amount of penalty.

(i) In general. Except as provided in subparagraph (C), the amount of any civil penalty imposed under subparagraph (A) shall not exceed $ 10,000.

(ii) Reasonable cause exception. No penalty shall be imposed under subparagraph (A) with respect to any violation if—

(I) such violation was due to reasonable cause, and

(II) the amount of the transaction or the balance in the account at the time of the transaction was properly reported.

(C) Willful violations. In the case of any person willfully violating, or willfully causing any violation of, any provision of section 5314—

(i) the maximum penalty under subparagraph (B)(i) shall be increased to the greater of—

(I) $100,000, or

(II) 50 percent of the amount determined under subparagraph (D), and

(ii) subparagraph (B)(ii) shall not apply.

(D) Amount. The amount determined under this subparagraph is—

(i) in the case of a violation involving a transaction, the amount of the transaction, or
(ii) in the case of a violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to an account, the balance in the account at the time of the violation.

(6) Negligence.
(A) In general. The Secretary of the Treasury may impose a civil money penalty of not more than $ 500 on any financial institution or nonfinancial trade or business which negligently violates any provision of this subchapter or any regulation prescribed under this subchapter.
(B) Pattern of negligent activity. If any financial institution or nonfinancial trade or business engages in a pattern of negligent violations of any provision of this subchapter or any regulation prescribed under this subchapter, the Secretary of the Treasury may, in addition to any penalty imposed under subparagraph (A) with respect to any such violation, impose a civil money penalty of not more than $ 50,000 on the financial institution or nonfinancial trade or business.
(7) Penalties for international counter money laundering violations. The Secretary may impose a civil money penalty in an amount equal to not less than 2 times the amount of the transaction, but not more than $ 1,000,000, on any financial institution or nonfinancial trade or business or agency that violates any provision of subsection (i) or (j) of section 5318 or any special measures imposed under section 5318A.

(b) Time limitations for assessments and commencement of civil actions.
(1) Assessments. The Secretary of the Treasury may assess a civil penalty under subsection (a) at any time before the end of the 6-year period beginning on the date of the transaction with respect to which the penalty is assessed.
(2) Civil actions. The Secretary may commence a civil action to recover a civil penalty assessed under subsection (a) at any time before the end of the 2-year period beginning on the later of--
(A) the date the penalty was assessed; or
(B) the date any judgment becomes final in any criminal action under section 5322 in connection with the same transaction with respect to which the penalty is assessed.

(c) The Secretary may remit any part of a forfeiture under section subsection (c) or (d) of 5317 of this title or civil penalty under subsection (a)(2) of this section.

(d) Criminal penalty not exclusive of civil penalty. A civil money penalty may be imposed under subsection (a) with respect to any violation of this subchapter notwithstanding the fact that a criminal penalty is imposed with respect to the same violation.

(e) Delegation of assessment authority to banking agencies.

(1) In general. The Secretary of the Treasury shall delegate, in accordance with section 5318(a)(1) and subject to such terms and conditions as the Secretary may impose in accordance with paragraph (3), any authority of the Secretary to assess a civil money penalty under this section on depository institutions (as defined in section 3 of the Federal Deposit Insurance Act) to the appropriate Federal banking agencies (as defined in such section 3).

(2) Authority of agencies. Subject to any term or condition imposed by the Secretary of the Treasury under paragraph (3), the provisions of this section shall apply to an appropriate Federal banking agency to which is delegated any authority of the Secretary under this section in the same manner such provisions apply to the Secretary.

(3) Terms and conditions.

(A) In general. The Secretary of the Treasury shall prescribe by regulation the terms and conditions which shall apply to any delegation under paragraph (1).

(B) Maximum dollar amount. The terms and conditions authorized under subparagraph (A) may include, in the Secretary's sole discretion, a limitation on the amount of any civil penalty which may be assessed by an appropriate Federal banking agency pursuant to a delegation under paragraph (1).

Treas. Reg. § 601.106(f)(1) and (2). Appeals functions.

(f) Conference and practice requirements. Practice and conference procedure before Appeals is governed by Treasury Department Circular 230 as amended (31 CFR Part 10), and the requirements of Subpart E of this part. In addition to such rules but not in modification of them, the following rules are also applicable to practice before Appeals:

(1) Rule I. An exaction by the U.S. Government, which is not based upon law, statutory or otherwise, is a taking of property without due process of law, in violation of the Fifth Amendment to the U.S. Constitution. Accordingly, an Appeals representative in his or her conclusions of fact or application of the law, shall hew to the law and the recognized standards of legal construction. It shall be his or her duty to determine the correct amount

of the tax, with strict impartiality as between the taxpayer and the Government, and without favoritism or discrimination as between taxpayers. **(2) Rule II.** Appeals will ordinarily give serious consideration to an offer to settle a tax controversy on a basis which fairly reflects the relative merits of the opposing views in light of the hazards which would exist if the case were litigated. However, no settlement will be made based upon nuisance value of the case to either party. If the taxpayer makes an unacceptable proposal of settlement under circumstances indicating a good faith attempt to reach an agreed disposition of the case on a basis fair both to the Government and the taxpayer, the Appeals official generally should give an evaluation of the case in such a manner as to enable the taxpayer to ascertain the kind of settlement that would be recommended for acceptance. Appeals may defer action on or decline to settle some cases or issues (for example, issues on which action has been suspended nationwide) in order to achieve greater uniformity and enhance overall voluntary compliance with the tax laws.

31 C.F.R. § 1010.306. Filing of reports.

(a)

(1) A report required by § 1010.311 or § 1021.311, shall be filed by the financial institution within 15 days following the day on which the reportable transaction occurred.
(2) A copy of each report filed pursuant to §§ 1010.311, 1010.313, 1020.315, 1021.311 and 1021.313, shall be retained by the financial institution for a period of five years from the date of the report.
(3) All reports required to be filed by §§ 1010.311, 1010.313, 1020.315, 1021.311 and 1021.313, shall be filed with the Commissioner of Internal Revenue, unless otherwise specified.

(b)

(1) A report required by § 1010.340(a) shall be filed at the time of entry into the United States or at the time of departure, mailing or shipping from the United States, unless otherwise specified by the Commissioner of Customs and Border Protection.
(2) A report required by § 1010.340(b) shall be filed within 15 days after receipt of the currency or other monetary instruments.
(3) All reports required by § 1010.340 shall be filed with the Customs officer in charge at any port of entry or departure, or as otherwise specified by the Commissioner of Customs and Border Protection. Reports required by §

1010.340(a) for currency or other monetary instruments not physically accompanying a person entering or departing from the United States, may be filed by mail on or before the date of entry, departure, mailing or shipping. All reports required by § 1010.340(b) may also be filed by mail. Reports filed by mail shall be addressed to the Commissioner of Customs and Border Protection, Attention: Currency Transportation Reports, Washington, DC 20229.

(c) Reports required to be filed by § 1010.350 shall be filed with the Commissioner of Internal Revenue on or before June 30 of each calendar year with respect to foreign financial accounts exceeding $ 10,000 maintained during the previous calendar year.

(d) Reports required by § 1010.311, § 1010.313, § 1010.340, § 1010.350, § 1020.315, § 1021.311 or § 1021.313 of this chapter shall be filed on forms prescribed by the Secretary. All information called for in such forms shall be furnished.

(e) Forms to be used in making the reports required by § 1010.311, § 1010.313, § 1010.350, § 1020.315, § 1021.311 or § 1021.313 of this chapter may be obtained from the Internal Revenue Service. Forms to be used in making the reports required by § 1010.340 may be obtained from the U.S. Customs and Border Protection.

31 C.F.R. § 1010.350(a). Reports of foreign financial accounts.

(a) In general. Each United States person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country shall report such relationship to the Commissioner of Internal Revenue for each year in which such relationship exists and shall provide such information as shall be specified in a reporting form prescribed under 31 U.S.C. 5314 to be filed by such persons. The form prescribed under section 5314 is the Report of Foreign Bank and Financial Accounts (TD-F 90-22.1), or any successor form. See paragraphs (g)(1) and (g)(2) of this section for a special rule for persons with a financial interest in 25 or more accounts, or signature or other authority over 25 or more accounts.

31 C.F.R. § 1010.810. Enforcement.

(a) Overall authority for enforcement and compliance, including coordination and direction of procedures and activities of all other agencies exercising delegated authority under this chapter, is delegated to the Director, FinCEN.
(b) Authority to examine institutions to determine compliance with the requirements of this chapter is delegated as follows:

> **(1)** To the Comptroller of the Currency with respect to those financial institutions regularly examined for safety and soundness by national bank examiners;
> **(2)** To the Board of Governors of the Federal Reserve System with respect to those financial institutions regularly examined for safety and soundness by Federal Reserve bank examiners;
> **(3)** To the Federal Deposit Insurance Corporation with respect to those financial institutions regularly examined for safety and soundness by FDIC bank examiners;
> **(4)** To the Federal Home Loan Bank Board with respect to those financial institutions regularly examined for safety and soundness by FHLBB bank examiners;
> **(5)** To the Chairman of the Board of the National Credit Union Administration with respect to those financial institutions regularly examined for safety and soundness by NCUA examiners.
> **(6)** To the Securities and Exchange Commission with respect to brokers and dealers in securities and investment companies as that term is defined in the Investment Company Act of 1940 (15 U.S.C. 80-1 et seq.);
> **(7)** To the Commissioner of Customs and Border Protection with respect to §§ 1010.340 and 1010.830;
> **(8)** To the Commissioner of Internal Revenue with respect to all financial institutions, except brokers or dealers in securities, mutual funds, futures commission merchants, introducing brokers in commodities, and commodity trading advisors, not currently examined by Federal bank supervisory agencies for soundness and safety; and
> **(9)** To the Commodity Futures Trading Commission with respect to futures commission merchants, introducing brokers in commodities, and commodity trading advisors.
> **(10)** To the Federal Housing Finance Agency with respect to the housing government sponsored enterprises, as defined in § 1010.100(mmm) of this part.

(c) Authority for investigating criminal violations of this chapter is delegated as follows:

(1) To the Commissioner of Customs and Border Protection with respect to § 1010.340;
(2) To the Commissioner of Internal Revenue except with respect to § 1010.340.

(d) Authority for the imposition of civil penalties for violations of this chapter lies with the Director of FinCEN.
(e) Periodic reports shall be made to the Director, FinCEN by each agency to which compliance authority has been delegated under paragraph (b) of this section. These reports shall be in such a form and submitted at such intervals as the Director, FinCEN may direct. Evidence of specific violations of any of the requirements of this chapter may be submitted to the Director, FinCEN at any time.
(f) The Director, FinCEN or his delegate, and any agency to which compliance has been delegated under paragraph (b) of this section, may examine any books, papers, records, or other data of domestic financial institutions relevant to the recordkeeping or reporting requirements of this chapter.
(g) The authority to enforce the provisions of 31 U.S.C. 5314 and §§ 1010.350 and 1010.420 of this chapter has been redelegated from FinCEN to the Commissioner of Internal Revenue by means of a Memorandum of Agreement between FinCEN and IRS. Such authority includes, with respect to 31 U.S.C. 5314 and 1010.350 and 1010.420 of this chapter, the authority to: assess and collect civil penalties under 31 U.S.C. 5321 and 31 CFR 1010.820; investigate possible civil violations of these provisions (in addition to the authority already provided at paragraph (c)(2)) of this section); employ the summons power of subpart I of this part 1010; issue administrative rulings under subpart G of this part 1010; and take any other action reasonably necessary for the enforcement of these and related provisions, including pursuit of injunctions.

I.R.M. 4.26.16.6.5.1. Willful FBAR Violations – Defining Willfulness.

1. The test for willfulness is whether there was a voluntary, intentional violation of a known 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. Willfulness is shown by the person’s knowledge of the reporting requirements and the person’s conscious choice not to comply with the requirements. In the FBAR situation, the person only need know that a reporting requirement exists. If a person has that knowledge, the only intent needed to constitute a willful violation of the requirement is a conscious choice not to file the FBAR.

5. Under the concept of "willful blindness," willfulness is attributed to a person who made a conscious effort to avoid learning about the FBAR reporting and recordkeeping requirements.

Example:

Willful blindness may be present when a person admits knowledge of, and fails to answer questions concerning, his interest in or signature or other authority over financial accounts at foreign banks on Schedule B of his 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 filing and recordkeeping 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 filing 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. The mere fact that a person checked the wrong box, or no box, on a Schedule B is not sufficient, in itself, to establish that the FBAR violation was attributable to willful blindness.

6. 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 his tax return. The penalty for a willful violation should not apply absent other evidence that may indicate willfulness.

B. A person filed the FBAR in earlier years but failed to file the FBAR in subsequent years when required to do so. When asked, the person does not provide a reasonable explanation for failing to file the FBAR. In addition, the person may have failed to report income associated with foreign bank accounts for the years that FBARs were not filed. A determination that the violation was willful would likely be appropriate in this case.

C. A person received a warning letter informing him of the FBAR filing requirement, but the person continues to fail to file the FBAR in subsequent years. When asked, the person does not provide a reasonable explanation for failing to file the FBAR. In addition, the person may have failed to report income associated with the foreign bank accounts. A determination that the violation was willful would likely be appropriate in this case.

I.R.M. 4.26.17.4.3. Closing the FBAR Case with Penalties.

1. If the examiner, after discussion with the group manager, determines that it is appropriate to assert an FBAR penalty and that a referral to Criminal Investigation is not appropriate or has been declined, the examiner will assert penalties in accordance with the FBAR penalty guidelines. See IRM 4.26.16 for the FBAR penalty computation rules and penalty mitigation guidelines.
2. Once the penalties have been determined and just before the examiner is ready to issue Letter 3709, the FBAR 30 Day Letter, and Form 13449, FBAR Agreement to Assessment and Collection, the examiner will submit the FBAR case file to an SB/SE Counsel Area FBAR Coordinator.
3. Each of the eight SB/SE Division Counsel Areas has at least one Counsel FBAR Area Coordinator. A current listing of the Area Coordinators can be accessed on the SB/SE Counsel "Contacts" web page at: http://counsel.web.irs.gov/sbse/admin/ . The examiner may also call local counsel for the name of the appropriate FBAR coordinator or for other assistance with respect to FBAR cases.
4. Review by Counsel is not required:

   A. In special program agreement situations such as LCCI. This will allow the special rules of those programs to prevail. However special programs which do not require a special agreement, such as related offshore income tax cases, do require Counsel review of a related FBAR case.

B. When the examiner has determined that there is no FBAR issue or in cases where the examiner has determined that the issuance of Letter 3800, the FBAR Warning Letter, is appropriate.

5. Counsel will:

A. Render its legal advice within 45 days. If coordination with an Associate Chief Counsel is necessary and will cause a delay, Counsel will inform the FBAR examiner of the potential delay. Counsel will work with the examiner to establish a shorter time frame for review if expedited review is needed. b) Prepare a written memorandum of review of the FBAR case. If Counsel recommends issuance of Letter 3709, the FBAR 30-day letter, the review will be designed to assist Appeals in the event the case is appealed. If Counsel does not recommend issuance of Letter 3709, the review will state the reasons for the disagreement. If the disagreement is based upon inadequate factual development, the review should recommend areas for further examination.

6. After the Counsel review has been received and agreed that penalties are appropriate, the examiner will:

A. Issue Letter 3709, the FBAR 30 day letter, and

B. Transmit with Letter 3709 the Form 13449, FBAR Agreement to Assessment and Collection. Although Form 13449 is shown as an Agreement, it also functions as the examiner's report of FBAR violations. It is the basis for the FBAR penalty assessment(s).

C. Provide the customer Notice 1330, Information on Making FBAR Penalty Payment by Check, and retain a copy in the file. This notice advises that the payment will be recorded electronically and that the person submitting payment will not receive a copy of the cancelled check.

D. Discuss payment. Payment on the FBAR penalty must be evidenced by a separate check or money order made out to the United States Treasury showing the FBAR account number and year. Separate checks or money orders should be written for FBAR and tax payments. When a receipt is desired, payment should be made by money order or cashiers check. The examiner should not issue a tax receipt form, such as Form 809.

E. No interest accrues on FBAR penalties prior to assessment, therefore only the penalty amount would be owed if full payment is made in a pre-assessment case or if payment is made within 30 days after the date a notice of the penalty amount due is first mailed to the filer. Under 31 U.S.C. § 3717(b), interest begins to accrue on the date the

FBAR notice of penalty assessment is mailed but no interest is owed on payments received within thirty days from the date a notice of the penalty amount due is first mailed to the filer. In addition to interest, a six percent delinquency penalty applies to amounts remaining unpaid ninety days from the date a notice of the penalty amount due is first mailed to the filer. The applicable interest rate is found at http://fms.treas.gov/cvfr/index.html. This rate is updated at least annually but may be updated quarterly if certain criteria, identified in § 3717(a) (2), are met.

I.R.M. 4.26.17.4.6. Closing the FBAR Case Unagreed.

1. If an FBAR penalty is proposed but not agreed to, the examiner waits 45 days to see if the person will appeal as provided in Letter 3709.
2. In order to appeal:
   - **A.** The person against whom an FBAR penalty is proposed must mail a written protest in duplicate to the examiner that is postmarked before the designated response date, which is listed in the Letter 3709.
   - **B.** The protest must contain all the information required in Letter 3709.
   - **C.** An appeal requires 180 days remaining on the assessment statute of limitations. The statute of limitations on assessment of a failure to file penalty is six years from the date when the FBAR should have been filed (which is June 30th of the year following the year for which the foreign financial account is being reported).
3. If there is no response from the person against whom an FBAR penalty is proposed, the penalty is assessed and the collection process begins.
4. The examiner will:
   - **A.** Complete a summary memorandum and FBAR Monitoring Document.
   - **B.** Forward the FBAR case for closure to the group manager.
5. The group manager will:
   - **A.** Review the FBAR case file for both technical and procedural issues and note this on the activity record.
   - **B.** Indicate the date the case is closed from the group.
   - **C.** Forward the FBAR file on a 3210 to Internal Revenue Service, P.O. Box 33113, Detroit, MI 48232-0113.
6. Detroit Computing Center will:
   - **A.** Enter the information from the FMD to the FBAR database.
   - **B.** Note on the FBAR database that a follow-up FBAR civil examination is needed.

- **C.** Forward the penalty assessment information to the Field Director, Compliance Services, Cincinnati, Small Business/Self-Employed.
- **D.** This designated official completes the assessment using Form 13448, Penalty Assessments Certification Summary. Form 13448 is for internal use only. It validates the assessment, i.e., it documents the Service's determination that the penalty assessed is legally due and payable. It functions in the same way as Form 23C in the Campuses. A copy of Form 13448 is placed in the case file.
- **E.** If the penalty has been paid in full, the case file can now be placed in the FBAR historic files.
- **F.** If the penalty has not been paid in full, DCC will issue the Letter 3708, Notice and Demand for Payment. The letter 3708 should be sent by certified mail, return receipt requested. A copy should be placed in the case file. DCC enters the interest rate on Letter 3708 according to the interest rate currently published by the Financial Management Service (FMS) at http://fms.treas.gov/cvfr/index.html. DCC then places the case file in the FBAR historic files and forwards the collection information to the FMS.

I.R.M. 4.26.17.4.7. Closing the FBAR Case Appealed.

1. If the person apparently violating the FBAR requirements appeals and there is no related Title 26 case or the related Title 26 case is agreed, the following procedures apply.
2. The examiner will:
   - **A.** Ensure that any documents needed in any related cases or in the FBAR case are copied so that there is a fully documented case file for each.
   - **B.** Note on the Transmittal Letter that the case is an FBAR category case, UIL 9999.99-01, in the Appeals Coordinated Issue (ACI) Program. The Appeals Officer must contact the Appeals FBAR Coordinator prior to scheduling the initial conference. The coordinator can be reached at (818) 242-8143 x3014.
   - **C.** Forward, through the group manager, an FMD to DCC so that the appeal can be entered on the FBAR database.
3. The group manager will:
   - **A.** Review the FBAR case file for both technical and procedural issues and note this on the activity record.
   - **B.** Indicate the date the case is closed from group.

   C. Complete and forward the FMD to the DCC, at Internal Revenue Service, P.O. Box 33113, Detroit, MI 48232-0113.
   D. Forward the case to Appeals following regular case processing procedures.
4. DCC will record the appeal on the FBAR database and continue to monitor the statute of limitations. DCC will contact Appeals when the statute of limitations has less than a year to expire and thereafter on a regular basis.
5. Appeals Officers will follow procedures outlined in " Foreign Bank and Financial Accounts Requirements Guidance for Appeal Officers " available on the Appeals web site. Appeals will close the FBAR case through DCC following the closing procedures for examiners found in this section.
6. In addition to the above procedures which are to be used in all appealed cases, where there is a related Title 26 case, the examiner, the group manager, and Appeals will discuss whether the examiner should hold the FBAR case until the Title 26 case is closed or forwarded to Appeals. The different statutes of limitation are important in this discussion.

I.R.M. 8.1.1.1. Accomplishing the Appeals Mission.

1. The Appeals Mission is to resolve tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service.
2. Appeals accomplishes this mission by considering protested cases, holding conferences, and negotiating settlements in a manner which ensures the following:
   A. **A prompt conference and a prompt decision in each case.** A prompt conference and decision enable the taxpayer to know with the least amount of delay, the final decision of the Service as to the amount of tax liability, or other issue in contention, and results in getting into the Treasury additional revenue involved at the earliest practicable date.
   B. **A high-quality decision in each case.** A decision of high quality is required in each case and should represent judicious application of Service policy and sound legal principles.
   C. **A satisfactory number of agreed settlements.** It is a fundamental purpose of the Appeals function to effect settlement of contested cases - on a basis fair to both the Government and the taxpayer - to the end that the greatest possible number of nondocketed cases are closed in

that status and the greatest possible number of docketed cases are closed without trial.

3. Appeals often conducts conferences by telephone or correspondence. However, if the taxpayer and/or representative prefer a face-to-face conference, Appeals will schedule such conferences on dates and/or at locations that are reasonably convenient to taxpayers, representatives and Appeals in accordance with the Appeals conference techniques and guidelines for specific workstreams as outlined in their related IRM sections.
4. Appeals provides multilingual services to taxpayers who speak limited English, especially Spanish, to resolve tax controversies in an effective and informative manner, in accordance with IRM 22.31.1, *Multilingual Initiative*. Generally, bilingual employees provide the services, either those on a bilingual position description or those who volunteer.
5. Generally, definitions of terms used in the Manual are with the material where the term is discussed. See *Exhibit 8.1.1-1.* for a list and the definitions of common terms used in Appeals.
6. In furtherance of the Appeals Mission, it is expected that Appeals personnel provide a unified Appeals position to taxpayers and/or practitioners in the settlement of an issue. This extends to all members of Appeals involved in the case. While there may be differing positions and/or opinions during the discussion of an issue, the ultimate resolution of the issue should be based upon the conclusions reached by the Appeals employee with ultimate responsibility for the case.

I.R.M. 8.11.6.1. FBAR Overview.

1. The Financial Crimes Enforcement Network (FinCEN) delegated its enforcement authority to the IRS for penalties imposed under Title 31, Sections 5314 - 5321 for the failure to file FinCEN Form 114 , *Report Of Foreign Bank And Financial Accounts (FBAR)*. This delegation was effective April 8, 2003, by memorandum of agreement between FinCEN and IRS.
2. A United States person must file an FBAR (FinCEN Form 114, *Report of Foreign Bank and Financial Accounts,*) if that person has a financial interest in or signature authority over any financial account(s) outside of the United States and the aggregate maximum value of the account(s) exceeds $10,000 at any time during the calendar year. Failure to file this form may result in civil and/or criminal penalties. The civil penalties may be appealed.

Note:

Form TD F 90-22.1 is now obsolete as it was replaced with FinCEN Form 114.

3. FinCEN has introduced new FinCEN Form 114a, *Record of Authorization to Electronically File FBARs*, for filers who submit Reports of Foreign Bank and Financial Accounts (FBARs) jointly with spouses, or wish to submit them via third-party preparers.
4. Effective July 1, 2013, filers must electronically file the FBAR through the FinCEN's BSA E-Filing System.
5. Filings can be researched on the FinCEN Query System (FCQ) or on Integrated Data Retrieval System (IDRS) using command code (cc): IRPTRO. Penalty cases, assessments and payments are recorded on a separate FBAR database maintained by the Enterprise Computing Center in Detroit (ECC).
6. Post-assessed FBAR cases in excess of $100,000 cannot be compromised by Appeals without approval of Department of Justice (DOJ). See 31 USC § 3711(a)(2) and 31 CFR § 902.1(a) and (b). Once assessed, the penalty becomes a claim of the U.S. Government.
7. Pre-assessed FBAR penalties are eligible for Fast Track Settlement only if the FBAR 30-day Letter 3709, has not been issued to the taxpayer. Refer to IRM 8.26.2, *Fast Track Settlement for Small Business/Self Employed (SB/SE) Taxpayers*.
8. Once FBAR penalties have been assessed, Alternative Dispute Resolution (ADR) is not available.
9. Post Appeals Mediation (PAM) is not available in any FBAR penalty case.
10. Refer to IRM 4.26.16.4.6, *Mitigation*, for mitigation threshold conditions for FBAR penalties.
11. There is no joint and severable liability with FBAR penalty cases.
12. Interest on FBAR penalties does not accrue until the penalty is assessed, and is payable only if full payment of the FBAR penalties is not made within 30 days of assessment.
13. Unagreed FBAR cases are closed immediately to ECC for assessment. A statutory notice of deficiency is not issued.
14. Title 11 Bankruptcy does not provide relief for FBAR penalty debt.
15. FBAR penalties may come to Appeals as stand-alone cases or together with a related income tax or international penalty.
16. FBAR penalties are an Appeals Coordinated Issue and require a referral to International Operations prior to holding the first conference.

17. The FBAR penalty case will usually be received in Appeals pre-assessment. However, upon request, Appeals will also conduct post-assessment hearings as provided in Title 31 CFR § 5.4 and § 900 to consider FBAR penalty liability and collection.

Note:

Post-assessment FBAR penalty cases are priority cases and must be worked expeditiously. Appeals requires these cases be completed and approved within **120 days** of assignment. This is calculated from the Appeals Officer assigned date (ASGNDATE) to the date the Appeals Team Manager (ATM) approves the case for closing (ACAP date).

18. The venue for challenging FBAR penalties is the United States District Court and the Federal Court of Claims, not the United States Tax Court.

Note:

Taxpayers seeking to challenge a FBAR penalty after it has been assessed may either (1) pay the penalty and file a refund suit, or (2) wait until the government files suit in district court to collect the penalty and challenge the assessment.

19. Refer to additional FBAR Resource materials available:

- IRM 4.26.16, *Report of Foreign Bank and Financial Accounts (FBAR)*. It should be used as a reference for background and statute information.
- IRM 4.26.17, *Report of Foreign Bank and Financial Accounts (FBAR) Procedures*.
- LB&I website http://lmsb.irs.gov/hq/pqa/Post-filing/pfa_FBAR_Home.asp
- SB/SE website http://mysbse.web.irs.gov/examination/tip/FBAR/default.aspx
- IRS.gov http://www.irs.gov
- FinCEN website http://bsaefiling.fincen.treas.gov

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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August 25, 2016

Mr. George Millington Clarke III
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Washington, DC 20006-4078

No. 16-40948 Bernhard Gubser v. IRS, et al
USDC No. 5:15-CV-298

Dear Mr. Clarke,

The following pertains to your brief electronically filed on 8/24/2016.

Please make the following correction to your brief within 14 days from the date on this notice:

- Caption on the brief does not agree with the caption of the case in compliance with FED R. APP. P. 32(a)(2)(C). **(See attachment)**

Once you have prepared your sufficient brief, you must select from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary.

Sincerely,

LYLE W. CAYCE, Clerk

James deMontluzin /ddl
By: ___________________________
James deMontluzin, Deputy Clerk
504-310-7679

cc: Mr. Jon E. Fisher
Mr. Randolph Lyons Hutter

Mr. Joseph Judkins
Ms. Kathleen Eileen Lyon
Ms. Kathryn E. Rimpfel

Case No. 16-40948

BERNHARD GUBSER,

Plaintiff - Appellant

v.

INTERNAL REVENUE SERVICE; JOHN KOSKINEN, in his official capacity as Commissioner of Internal Revenue Service; UNITED STATES OF AMERICA,

Defendants - Appellees

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

August 29, 2016

Mr. George Millington Clarke III
Baker & McKenzie, L.L.P.
815 Connecticut Avenue, N.W.
Suite 1200
Washington, DC 20006-4078

No. 16-40948 Bernhard Gubser v. IRS, et al
USDC No. 5:15-CV-298

Dear Mr. Clarke,

We have reviewed your electronically filed appellant's brief correction and it is sufficient.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5TH CIR. R. 42.3.

The paper copies of your brief must **not** contain a header noting "RESTRICTED". Therefore, please be sure that you print your paper copies **from this notice of docket activity** and not the proposed sufficient brief filed event so that it will contain the proper filing header. Alternatively, you may print the sufficient brief directly from your original file without any header.

Sincerely,

LYLE W. CAYCE, Clerk

By: _________________________
James deMontluzin, Deputy Clerk
504-310-7679

cc: Mr. Jon E. Fisher
Mr. Randolph Lyons Hutter
Mr. Joseph Judkins
Ms. Kathleen Eileen Lyon
Ms. Kathryn E. Rimpfel