Reference: RIN 1506-AB08
Comments on FinCEN proposed revisions to the regulations implementing the Bank Secrecy Act regarding foreign financial accounts.

Dear Sirs:

American Citizens Abroad would like to comment on the expected impact of the proposed Amendment to the Bank Secrecy Act regulations published on 26 February 2010. ACA, the voice of Americans overseas, is a non-partisan, non-profit association representing the interests of American citizens residing abroad.

As a general comment, ACA is not surprised but nonetheless disappointed that the proposed changes do little or nothing to address the fundamental problems with the FBAR filing requirement. ACA and other organizations representing the interests of the 6 million plus Americans resident overseas have repeatedly and consistently pointed out a whole spectrum of ethical, operational, economic, and practical problems with the FBAR filing requirement; these include:

- **The impossibility of fairly enforcing this law:** the overwhelming majority of U.S. citizens resident outside the United States are completely unaware of this requirement (indeed, a significant number of them are not even aware of their citizenship), and it is fundamentally impossible for the Treasury Department to enforce it evenly. The only options, therefore, are either to enforce it selectively, which is grossly unfair, or not to enforce it all, which renders it pointless. In practice, it is difficult to imagine the Treasury Department using this law in any manner other than to pile on an additional legal threat against a company or individual that it is attempting to pressure into co-operation on some unrelated issue. Either one of these two options are unethical and morally indefensible.

- **Gross disproportionality of the mandated penalties versus the nature of the violation:** the penalty for failure to comply with this obscure regulation could under many easily imaginable circumstances grossly exceed the penalties for serious crimes that result in substantial consequences to its victims. A worker approaching retirement age with a couple of million in a pension account that fails to file this form could be penalized to the tune of US$1 million – significantly more, for example, than Exxon was fined for the Valdez disaster.

- **Provisions that do little to advance the purported purpose of the law but create onerous record-keeping, record retention, and reporting requirements:** there is no conceivable reason why the supposed objectives of this law could not be met, for example, by including a tick-box on the 1040 that would allow filers to assert that their bank balance is below US$1million. The complex requirements for calculating and reporting account values are extremely burdensome and contribute nothing to financial crime-fighting that a simple blanket declaration would not achieve; more robust reporting requirements for higher value accounts could remain in place. There is also no good reason why FBAR records need to be retained for five years when

tax records can be discarded after three, and given that people increasingly do their banking on-line, the "records retention" requirement is impractical to comply with.

- **Provisions that hinder the ability of Americans to compete on an even playing field with nationals of other countries, and which directly undermine American national interests:** thanks to FBAR, increasing numbers of multinational companies, trusts, governments, non-profits and NGOs are explicitly or implicitly barring U.S. citizens from serving in posts that involve signature authority over their accounts. We would challenge the Treasury Department to provide a single rational, justifiable reason why, as a hypothetical example, if an American bishop were the next to be elected to the Papacy, the Vatican should be expected to start providing financial information to the U.S. Treasury.

- **Fundamental disrespect for the sovereign right of other nations to establish their own requirements, and for the right of all people to make free choices about the sort of regulatory regime they choose to live under:** on balance, the United States is one of the least co-operative nations with respect to sharing financial information with foreign regulators, yet it attempts through FBAR and other means to demand the information it is itself unwilling to provide. At best, this is careless ignorance. At worst, it is conscious discrimination. An American living in Sweden, for example, must accept that his financial information is widely shared and widely available. If he doesn't like that, he doesn't have to live there, but Sweden does not attempt to force American regulators to require U.S. residents to comply with a similar level of openness. Nonetheless, if that same American moves to a country with strict banking privacy laws such as Switzerland, FBAR requirements attempt to impose an extra-territorial negation of Swiss data protection laws on that citizen.

We further note that the economic incentive behind most of these regulations is U.S. insistence on being the only country other than Eritrea and North Korea that attempts to tax individuals on the basis of citizenship, rather than residency. Few, if any, of the supposed "problems" that the FBAR filing requirement and regulations purport to be a "solution" for would exist if the U.S. abandoned its curious tradition of demanding taxes from those to whom it provides few services. Rather than address this problem, the FBAR requirements represent an implicit admission by Treasury that this approach is unworkable even while it insists on attempting to maintain an illusion of reasonableness.

With respect to the specific provisions of the proposed rulemaking, we would like to note the following:

- The definition of "owner of record or holder of legal title" includes "an agent, nominee, attorney, or a person authorized to act on behalf of the person with respect to the account." This requires reporting accounts of clients by an attorney, which eliminates the usual confidential professional relationship between an attorney and his client. For example, an attorney/notary pubic who has authority over an escrow account or who is executor of a person's estate would have to report that account information to the Department of Treasury, even if the client is a foreigner. The attorney would have to obtain the permission of his foreign clients before reporting

the account on the FBAR. It is evident that U.S. citizens working in the legal profession abroad will be severely handicapped in their professional ability, as indeed the majority of their clients are likely to be foreigners.

- Similarly, the requirement to report on accounts over which one has signatory authority, but no financial interest, will deny American citizens access to the profession of financial advisor abroad. According to general practice, a client authorizes the advisor to execute investment decisions on the account following their mutual agreement and for the convenience of the client, but the manager has no right to make withdrawals or transfer funds outside of the account. The signatory authority involves only the right to manage the funds. If the American advisor is required to report information on client accounts to the U.S. Department of Treasury, foreigners will be very hesitant to engage an American citizen as manager.

- Requiring American citizens to file reports on bank accounts over which they have signatory authority, but no personal financial interest, puts American citizens who reside and work abroad for a foreign corporation or association in a serious situation of conflict of interest – the privacy of his/her foreign employer versus the obligations to follow FBAR regulations. In fact, the employee, who for instance, may be responsible for paying certain bills for the company (and thus have signatory power over the account), may be prohibited by his employer to provide company bank account information to the U.S. Department of Treasury. If the person does so, he/she may lose his/her job. It is already clear that with all of the recent publicity concerning the FBAR and other extensions of U.S. regulations into foreign countries, foreign businesses will not hire an American citizen in any position of responsibility involving signatory authority over the company's bank accounts.

- Additionally, American entrepreneurs will find themselves unable to develop partnerships with foreigners as the foreigners will not want their partnership bank accounts to be reported to the U.S. Treasury Department. At a time when American industry is finding it increasingly challenging to compete with foreign firms, and when Americans employed in export industries at home find their jobs more insecure than they ever have been in living memory, it is difficult to believe that Treasury would work to reduce U.S. tax receipts by actively undermining American's ability to compete through these regulations.

The impact on employment of American citizens working abroad is significant. The State Department recently provided the National Taxpayers Advocate with the estimate of 7 million Americans residing overseas. If one assumes that two-thirds are adults of working age, the number would exceed 4.2 million. If one further assumes that half of those of working age are, in fact, active professionally, the group of American citizens residing abroad potentially affected by this FBAR regulation would number about two million individuals. The great majority of American citizens who are engaged overseas work for foreign corporations, partnerships or associations, which remain outside the scope of those organizations considered as "exceptions" that exempt the U.S. citizen from the obligation to report. It should be noted that the Department of Commerce reported that in 1999, the number of American citizens employed by foreign affiliates of non-

financial U.S. subsidiaries amounted to only 20,000 (down from 40,000 in 1981). The chances of an American working abroad for an American affiliated company registered with the U.S. authorities are minimal.

Hence, the overwhelming majority of American citizens employed abroad by foreign corporations would, according to the FBAR rules, be required to report the bank account's name, number, financial institution and maximum amount in the account during the year. It is quite possible that many employees may not even have access to full information on the bank account and may simply not be in a position to provide all of the information required, in particular the maximum amount in the account during the year. It is most probable that the foreign employer would prohibit its employees from providing such proprietary information to the U.S. Treasury, and hence these reporting requirements are turning American citizens into pariahs in the employment market abroad.

We are disappointed that these proposed revisions do not reflect any indication of change of attitude or increase in understanding by the Treasury Department; in fact, they display only a stubborn insistence on retaining policies that have been proven failures and which have already significantly damaged American competitiveness. While we remain optimistic that the fundamental changes we have been advocating will ultimately be implemented, these proposals assure us only that in the short term we can expect to see more casualties of these misguided and short-sighted policies.

We thank you for your consideration of the above.

Sincerely yours,

Jacqueline Bugnion	Marylouise Serrato
Director	Executive Director