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James H. Freis, Jr.
Director
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

RE: Suggestions to Improve Foreign Bank Account Reporting and Form TD F 90-22.1 in Response to RIN 1506-AB08

Dear Director Freis:

The Institute of International Bankers ("Institute") appreciates the opportunity offered in the Notice of Proposed Rulemaking, RIN 1506-AB08, to provide the Financial Crimes Enforcement Network ("FinCEN") with comments regarding revisions to regulations under the Bank Secrecy Act and to the instructions to Form TD F 90-22.1, "Report of Foreign Bank and Financial Accounts" ("FBAR").

The Institute would like to thank FinCEN for incorporating several of the suggestions contained in our letter of July 30, 2009, into the proposed regulations. We offer below further suggestions that we hope that FinCEN will find equally helpful as it finalizes the proposed regulations.

The Institute offers these comments on behalf of its membership. Founded in 1966, the Institute is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Its membership is comprised of internationally headquartered banking/financial institutions from 39 countries around the world. Collectively, the U.S. branches, agencies, banking subsidiaries, securities affiliates and other operations of the Institute's member banks have approximately $4.58 trillion in assets, of which approximately $2.35 trillion are banking assets, representing approximately 21% of the U.S. banking market. In addition, the Institute's most recent study on the subject showed that the combined U.S. operations of internationally headquartered banks employ over 250,000 Americans

In summary, we believe that FinCEN must do more to eliminate duplicative filings and protect employees who have signature or other authority over, but no financial interest in, the accounts of their employers and their employers' customers. As we explain below, employees may not be in a position to provide information concerning their employer's accounts, and are unlikely to be able to maintain the records dictated by the Bank Secrecy Act regulations. Moreover, employers are genuinely concerned that the burden of actually preparing multiple FBARs for the same foreign accounts will fall on them. We support FinCEN's goals of enforcing U.S. tax and money laundering laws, but it is difficult to see how those goals are served by requiring more than one person to provide identical information regarding a single account. Indeed, duplicate filings are likely to consume scarce enforcement resources with little, if any, benefit to the government. As we explain below, the general rule should be that if the employer reports the account, the employee is excused from reporting, and if the employer is not otherwise obligated to file an FBAR (for example, because it is a foreign corporation) it can voluntarily file in order to spare its employees, and possibly itself, the burden of preparing a multitude of FBARs.

We also offer suggestions regarding the scope of the FBAR filing exceptions, the need to make changes to the FBAR recordkeeping rules commensurate with the other changes to the FBAR program, and the retroactivity of the final regulations.

Clarification of the Bank Officer/Employee Exception as Applied to U.S. Branches of Foreign Banks

We believe that the proposed regulations appropriately exclude officers and employees of U.S. branches of foreign banks from the requirement to file FBARs in many circumstances. We understand the proposed regulations to provide that such persons would qualify for the bank officer/employee exception under proposed section 103.24(f)(2)(i) for accounts "owned or maintained by" their employers over which they have signature or other authority, but in which they have no financial interest. U.S. branches are considered "banks" under 31 CFR § 103.11(c)(8) and those branches are examined by the regulators listed in proposed section 103.24(f)(2)(i), which should be sufficient to allow U.S. branch officers and employees to take advantage of the bank officer/employee exception. On the other hand, the regulations seem to assume that if an officer or employee qualifies for an exception to FBAR filing, any account over which that individual has signature authority would in any event be reported by the employer, who typically is a U.S. person. However, under the regulations as proposed, U.S. branches of foreign banks would not be required to file their own FBARs because they are not United States persons under proposed section

103.24(b). We understand from informal conversations that we have had with Treasury personnel that the final regulations will address this issue.

We suggest that the final regulation should provide that a U.S. branch of a foreign bank may voluntarily file an FBAR in order to permit its employees to qualify for the bank officer/employee exception. The only accounts that should be included on such an FBAR should be any accounts over which a U.S. person has signature or other authority. Officers and employees should not be required to make their own FBAR filings. Such a rule would give the government all of the information that it would receive from employee FBARs if there were no exception.[1]

In addition, it would be helpful if FinCEN explained what it means by a foreign account "maintained by" a bank or other employer. The proposed regulations use the phrase "owned or maintained" throughout the exceptions contained in section 103.24(f)(2) to describe the accounts covered by those exceptions. We believe this phrase covers both accounts that are beneficially owned by the employer and accounts that the employer opens or transacts through on behalf of the employer's customers. Examples illustrating accounts that are not owned, but simply maintained, would be helpful.

One reason that we believe it is important to clarify the scope of the accounts covered is to provide an unambiguous result when a bank employee has signature authority over a customer's account at a non-U.S. bank or branch. As we stated in our July 2009 letter, it is not unusual for a client of a financial institution to request that the institution conduct the client's transactions using the client's foreign financial accounts. For example, such a situation might arise where a foreign client of a foreign bank travels to the U.S. for an extended stay. Such a client may have personal bills for expenses in his or her home country (e.g., electric bills, phone bills) temporarily re-directed to the U.S. branch of the bank, with instructions to pay these bills as they come due. Because the bills typically must be paid in the client's home-country currency, an employee of the U.S. branch would cause the payment to be made from the client's account in the home country. Under the proposed rules, it is not clear whether the employee who authorizes the payment from the foreign account is required to file an FBAR.

We think the better view, and the more administrable rule, is that the account be considered "maintained" by the institution, and therefore is covered

[1] We strongly recommend retaining the definition of United States person in the proposed regulations. The definition is clear and enforceable, and generally conforms to the well-developed concept of a United States person under Title 26. On the other hand, the definition in the October 2008 version of the FBAR, which covered all persons "in and doing business in the United States" had neither precedent nor a clear analogy and was too vague, inviting disputes over its precise scope.

by the bank officer/employee exception. We continue to believe that it is unfair to burden rank-and-file employees with FBAR filings and record-keeping requirements when FinCEN obtains the account details from other filers. Employees of a large institution with many clients may have many accounts to report, and even if the employee has signatory authority over 25 or more accounts and therefore qualifies for abbreviated filing under section 103.24(g)(2), the employee would still be required (under current rules) to maintain records for five years. Moreover, to the extent the clients are U.S. citizens or resident aliens, the accounts already would be reported on FBARs by those clients.

Another alternative would be to modify the rules so that the employer, not the employee, is considered to have "signature or other authority" over a client's foreign financial accounts, provided that the employer files an FBAR. An employer not otherwise obligated to file an FBAR should be permitted to do so in order to allow officers or employees to avoid that obligation.

Relief for Employees of State-Examined Institutions

FinCEN has proposed that the bank officer/employee exception apply only when the bank is examined by one of the following federal agencies: Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, or the National Credit Union Administration. We believe it is appropriate to extend the exception to include financial institutions (such as limited purpose trust companies) that are examined by state bank regulatory agencies. We believe that such state oversight serves the same purpose as that of federal regulators. We note that the Bank Secrecy Act regulations seem to equate federal and state bank supervision in several places. *See* 31 CFR § 103.11(c)(1), (c)(6), (n)(7).

Clarification and Expansion of the Public Company Exception

The public company employee exception in proposed section 103.24(f)(2)(iv) has several technical issues that FinCEN should address. The first sentence of that paragraph currently provides:

> An officer or employee of an entity with a class of equity securities listed on any United States national securities exchange need not report that he has signature or other authority over a foreign financial account of such entity if the officer or employee has no financial interest in the account.

The preamble makes clear that this exception is available "regardless of whether the entity is domestic or foreign." We assume, therefore, that the phrase "a class of equity securities" is intended to include American Depositary Receipts ("ADRs") and similar investments traded on a national exchange.[2] Accordingly, officers and employees of a foreign parent company with ADRs that are traded on the New York Stock Exchange would be entitled to relief, even though the parent company is not a United States person and therefore is not required to file an FBAR. Accounts over which those employees have signature authority would, therefore, not be reported under the proposed regulation. We do not believe FinCEN intended this result and suggest a revision below to address this issue.

The second sentence of proposed section 103.24(f)(2)(iv) provides:

> An officer or employee of a United States subsidiary of such entity need not file a report concerning signature or other authority over a foreign financial account of the subsidiary if he has no financial interest in the account and the United States subsidiary is included in a consolidated report of the parent filed under this section.

This language presents what we believe is an unintentional problem for foreign groups with a class of stock or ADRs traded on a U.S. national securities exchange. The foreign parent is not a U.S. person, and therefore cannot file a consolidated report under proposed section 103.24(g)(3); only an "entity that is a United States person" can do so. Accordingly, while the foreign parent's direct U.S. employees (including, we presume, employees of U.S. branches of the parent) would qualify for the (f)(2)(iv) exception, employees of the group's U.S. subsidiaries would not, because no consolidated report can be filed.

We would propose exempting employees of U.S. subsidiaries and branches of a foreign group with a class of stock or ADRs traded on a U.S. national securities exchange if the group's U.S. holding company files a consolidated report including itself, its 50%-owned subsidiaries, and any U.S. branches of the group. If such a foreign group operates in the U.S. exclusively through branches, the largest branch should be allowed to file the consolidated report for all of the branches. The U.S. group also should be permitted to include in the consolidated FBAR any foreign accounts of foreign affiliates over which employees in the U.S. have signature or other authority.

[2] FinCEN should consider clarifying that ADRs are "a class of equity securities" in the final regulations or the preamble.

We also propose that the public company exception be broadened to include entities that trade on an established foreign securities market, as well as the U.S. subsidiaries of those entities. We continue to believe that U.S. employees of a foreign group with equity traded on a recognized foreign stock exchange should be entitled to the same filing relief as employees of groups with equities that trade in the U.S. market. Treasury could publish a list of qualifying exchanges or rely on U.S. tax treaties, which generally delineate which exchanges will be recognized for "limitation on benefits" and other purposes. Listed companies in such markets are subject to material financial controls and audits by outside accountants and are overseen by foreign agencies that play the same role as the Securities and Exchange Commission. Accounts held by these groups pose as low a risk of violating U.S. money laundering or tax law as do accounts held by U.S. publicly traded companies.

Modified Filing for U.S. Employees Abroad

The preamble to the proposed regulations notes that U.S. persons employed outside the United States who have signature or other authority over the accounts of their employers will be subject to a modified filing obligation. While the proposed regulations themselves do not address modified filing, the draft instructions to the FBAR indicate that the U.S. person should provide his or her own name and other identifying information, the name and other identifying information of the employer, and the U.S. person's title with that employer.[3]

Modified filing for U.S. workers abroad is a welcome change to the FBAR, but we would encourage FinCEN to incorporate this procedure into the regulations rather than making this option a part of the form instructions. Regulations are subject to formal notice-and-comment rulemaking, while forms can be modified without any comment by the public. As we said in our letter of July 30, 2009:

> The Institute strongly recommends that the IRS and Treasury use the formal guidance tools at their disposal – including regulations and revenue procedures – to provide guidance on how to appropriately file the FBAR. Without such guidance, many affected filers will remain either unaware or confused as to their obligations and the government's compliance objectives will correspondingly suffer.

[3] The instructions also seem to indicate that the U.S. person should state whether he or she owns 25 or more foreign financial accounts.

We also note that the draft instructions use imprecise language to describe the modified filing requirement that may create needless disputes. First, the draft instructions allow modified filing when the U.S. person has signature authority over "a" foreign financial account, which could be interpreted to mean a single account. We believe that FinCEN intended this exception to cover all employer-owned accounts, no matter how numerous, because the instructions state that the employer's identifying information needs to be stated only once. Simply changing the word "a" to "any" would alleviate any ambiguity on this point.

The proposed instructions also refer to a person "employed" outside the United States, and refer to the owner of the account as the "employer." On the other hand, in the various filing exceptions in proposed section 103.24(f)(2), FinCEN uses the phrase "officer or employee" to describe a person who qualifies. We believe FinCEN intended modified filing to be available to officers because the example in the proposed instructions refers to "treasurer" as a valid title to put on Item 43 of the FBAR form. FinCEN should use the phrase "officer or employee."

Finally, the modified filing rule should provide guidance regarding how to report accounts other than the employer's accounts. For instance, the U.S. person may have a financial interest a foreign bank account, or have signature or other authority over a spouse's account.

We propose that section 103.24(f)(2) be amended to add:

> (vi) A United States person who, in a foreign country, acts as an officer or employee of an entity need not report that he or she has signature or other authority over any foreign financial accounts owned or maintained by such entity or an affiliate if he or she has no financial interest in the account(s). Such a United States person shall nevertheless file a Report of Foreign Bank and Financial Accounts (TD-F 90-22.1), or any successor form, but such form is required to include only information sufficient to identify the United States person and the entity or entities, and shall state the United States person's title with respect to the entity or entities. If the United States person is required to report other foreign financial accounts under this section, those accounts shall be reported on the same form.

Proposal to Broaden the Modified Filing Requirement

The modified filing requirement appears to be based on the premise that a U.S. person working abroad, whether for a domestic or a foreign firm, is unlikely

to have access to banking and financial records of his or her employer. FBAR filers are generally required to maintain records of the accounts reported for five years under 31 CFR § 103.32, and U.S. persons working abroad are in no position to do so – particularly if they change jobs.

There appears to be an even stronger basis supporting a modified filing requirement for U.S. persons who work in the United States and who have signature or other authority over a foreign account solely by reason of their employment. Like those who work outside the United States, employees in the U.S. (and former employees, for that matter) are not in a position to demand or maintain copies of their employers' financial records. But unlike the accounts over which employees who work abroad have signature authority, there is a high likelihood that a U.S. employer's foreign financial account will be reported on the employer's FBAR, making the officer's or employee's filing redundant.

The regulations should provide that if an employer has filed an FBAR with respect to an account, an officer or employee who merely has signature authority should not have an obligation to identify the same account on his or her own FBAR. Similar to what we suggest above for the U.S. branch of a foreign bank, we believe that an employer who otherwise would not be required to file an FBAR should have the option of filing the form for the purpose of allowing employees to qualify for modified filing. Such an employer filing should be limited to accounts for which U.S. persons have signature or other authority. Under this approach, FinCEN would obtain all of the account information that it otherwise would receive, while substantially lessening the reporting burden on individuals. The filing and recordkeeping burden would squarely rest on the owner of the account, who is clearly the one most capable of maintaining the proper records.

Recordkeeping Rules Should be Re-examined In Light of the Exceptions.

FinCEN proposes to substantially modify section 103.24, which deals with FBAR filing, but it made no proposals with respect to the recordkeeping requirements, which are found in 31 CFR § 103.32:

> Records of accounts required by § 103.24 to be reported to the Commissioner of Internal Revenue shall be retained by each person having a financial interest in or signature or other authority over any such account. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such

> account during the reporting period. Such records shall be retained for a period of 5 years and shall be kept at all times available for inspection as authorized by law. In the computation of the period of 5 years, there shall be disregarded any period beginning with a date on which the taxpayer is indicted or information instituted on account of the filing of a false or fraudulent Federal income tax return or failing to file a Federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding.

The persons who qualify for the exceptions to filing in proposed section 103.24(f)(2) should not have a recordkeeping burden. That would largely obviate the benefit of the filing exception. Accordingly, we recommend changing the first sentence of section 103.32 to read: "Every person who files, or is required to file, a Report of Foreign Bank and Financial Accounts (TD-F 90-22.1), or any successor form, shall retain records of any foreign financial account required to be reported on such form." In addition, FinCEN should add a sentence to the end of section 103.32 that reads: "Notwithstanding the foregoing, a person who has signature or other authority over, but no financial interest in, a foreign financial account, and who qualifies for one or more of the exceptions in section 103.24(f)(2), has no obligation to maintain records of such account." This change puts the burden for recordkeeping where it belongs – on those who are required to file (or who file voluntarily), and not on those who are sensibly excepted by the regulations.

In the event that FinCEN does not accept our suggestion that officers and employees should generally be exempt from reporting the accounts of their employers (provided the employer reports those accounts), at the very least the recordkeeping requirement should carve out such filers. FinCEN should be able to obtain the required records from the employer, and it would be the rare employer who allowed an employee (or former employee) to keep a personal copy of the employer's bank records.

Retroactivity

Notice 2010-23 extends until June 30, 2011, the deadline to file an FBAR for 2010 and earlier years for any person who has signature authority over, but no financial interest in, a foreign financial account. Notice 2010-23 states, "When completing an FBAR that is subject to the extension provided in this paragraph, persons must adhere to FBAR guidance in effect at the time the FBAR is filed."

We note that the proposed regulations themselves do not include an effective date, and therefore presumably would be effective upon publication in the Federal Register. Assuming final regulations are published before June 30, 2011, it is our understanding that anyone entitled to rely on the extension in Notice 2010-23 will also be entitled to rely on the final regulations, including any filer-favorable changes in those regulations. It would be helpful if the final regulations or an IRS notice issued concurrently with the publication of the final regulations made that understanding explicit. Moreover, because the regulations will provide authoritative guidance on issues that have existed for years, FinCEN should consider permitting filers who are unable to take advantage of the extension in Notice 2010-23 (e.g., those who have a financial interest in an account) to apply the regulations retroactively.

CONCLUSION

We hope that FinCEN finds the above suggestions helpful in improving the administration of the FBAR requirements while substantially lowering the burden on those who might otherwise be required to file the form. We would be happy to meet with you to discuss our comments. In the meantime, if you have any questions, please contact the undersigned (212-421-1611; luhlick@iib.org) or John Staples (202-783-1500; jstaples@bsmlegal.com) or Jonathan Jackel (202-783-1500; jjackel@bsmlegal.com) of Burt, Staples, & Maner, LLP, who assisted the Institute in the preparation of this submission.

Very truly yours,

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