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September 10, 2009

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U.S. House of Representatives
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Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Report On Qualified Intermediary And Related Withholding And
Information Reporting Legislation Proposed By The
Administration

Dear Sirs:

We write to comment on provisions of the Administration's Fiscal Year 2010 Revenue Proposals relating to offshore tax evasion, released in May of this year. This report comments on proposals relating to (a) reporting and withholding rules applicable to payments made to qualified intermediaries and non-qualified intermediaries, (b) reporting requirements relating to transfers of money and property to foreign accounts and the establishment of new foreign accounts, and (c) several proposals relating to the obligation of a taxpayer with a foreign bank or

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other financial account to file a Report of Foreign Bank and Financial Accounts, known as an “FBAR.” We also comment on one FBAR-related provision in a bill drafted by Senator Baucus.

Payments to QIs and NQIs

We generally support the Administration’s proposal to expand the obligations of qualified intermediaries (“QIs”) to report on payments made to U.S. account holders, in particular to require reporting of foreign source income. However, we recommend simplifying assumptions that will allow QIs to report such income based on information readily available to them; generous transition rules; and a more limited set of reporting obligations with respect to customers that have only small amounts of assets or income subject to reporting, in order to minimize the additional costs to QIs while preserving the government’s ability to obtain information most likely to identify taxpayers who are evading their tax obligations with respect to foreign accounts. We agree that Treasury should be given authority to expand the QI rules to affiliates, provided that those affiliates have customer relationships, and we urge that such authority be applied in a flexible manner that takes into account the characteristics of the particular financial institution.

We have more significant concerns with the three other proposals under this rubric, namely the proposal to require automatic withholding on payments of fixed or determinable annual or periodical amounts (“FDAP”) to non-qualified intermediaries (“NQIs”), the proposal to require automatic withholding on payments of gross proceeds to NQIs, and the proposal for a negative presumption regarding payments of FDAP to certain foreign entities. As a general matter, we recommend that these proposals be recast so that they require enhanced reporting, with withholding tax imposed solely to enforce compliance with the new reporting requirements. In that regard, we are particularly concerned with the gross proceeds proposal, since it would impose withholding tax on amounts not subject to tax in the hands of any foreign person. We also recommend that any withholding tax obligations be modified so that they do not impose new substantive requirements upon foreign persons fully eligible for the benefits of income tax treaties that the United States has entered into, in order to avoid overriding the United States’ commitments under those treaties. The general theme of these comments is that while we support new rules intended to ensure that U.S. taxpayers who hold assets or earn income abroad pay the U.S. taxes that they owe, those new rules should be structured in such a manner that they do not disrupt the international capital markets by imposing withholding tax on foreign investors who are fully compliant with their current U.S. tax obligations.

We also recommend that new rules be reshaped to distinguish between intermediaries that are banks or other financial institutions with customers that are subject to regulatory “know your customer” rules, on the one hand, and other types of intermediaries such as investment funds structured as partnerships, who are not subject to those rules. Only intermediaries of the first kind are eligible to be QIs, and we believe that new reporting and withholding obligations should take that into account. As a general matter, we agree that all such intermediaries should be subject to enhanced obligations to ensure the accuracy of the information that they provide about U.S. customers or investors to withholding agents, and that they should be required to provide additional information about significant indirect U.S. investors. However, the details of those requirements should take the differences between these different classes of intermediaries into account. In the case of foreign corporations, we support a more limited version of the

proposed negative presumption proposal that would require such entities to provide information only about significant U.S. investors therein, subject to our comments above about recasting the rules as information reporting rules and not overriding treaty commitments.

Transfers to Foreign Accounts and Related Proposals

We generally concur with the proposals to require (a) U.S. individuals and their controlled entities to report transfers to or from foreign accounts, (b) U.S. financial intermediaries and QIs that open an account on behalf of a U.S. person or U.S.-controlled entity to file an information return regarding that account, and (c) U.S. persons or QIs that form a foreign entity on behalf of U.S. individuals or their controlled entities to file a similar information return. Specific recommendations are noted.

We do not support the proposal to require U.S. financial intermediaries and QIs to report transfers of more than \$10,000 to or from a foreign account on behalf of a U.S. person. This proposal would impose very substantial obligations on reporting entities, given the number and size of normal cross-border commercial cash flows, and is not likely to provide a correspondingly substantial benefit to tax enforcement.

FBAR-Related Proposals

As a general matter, we believe that compliance with FBAR filing requirements would be substantially enhanced, and the burden on taxpayers required to file FBARs would be reduced, if the rules and procedures governing FBAR filing requirements were conformed to the extent consistent with the purposes of those requirements to tax rules and procedures. We also recommend that the imposition of any new FBAR obligations or penalties be postponed for a period sufficient to allow the IRS to issue guidance clarifying a number of very significant questions about who is required to file FBARs, given the severe penalties associated with noncompliance.

We support a modified version of proposals made by the Administration and Senator Baucus to require taxpayers to file a shadow FBAR with their tax return, under which the taxpayer would file the FBAR itself, or a duplicate copy, with its tax return, rather than a separate form with the same information. We recommend that the taxpayer be required to make only a single filing, with its tax return. If duplicate filings are required, we recommend that they be filed at the same time rather than having wholly separate filing schedules for the FBAR and shadow FBAR. The shadow FBAR filing obligation should be limited to taxpayers that have a financial interest in a foreign account.

We support the proposal to double penalties if a taxpayer required to file a shadow FBAR fails to do so and there is an understatement that arises from a transaction involving the undisclosed foreign account. We do not support the proposal to make the penalty a strict liability penalty if the understatement arose from a reportable transaction.


We support the proposal to adopt a rebuttable evidentiary presumption in civil proceedings that a foreign financial account held at an NQI has an account balance of at least \$10,000, thus triggering an FBAR filing requirement, provided that it is made clear that the taxpayer can rebut the presumption by providing bank account statements or similar documents

showing the actual balance in the account. We do not support the proposal to adopt a rebuttable presumption that any failure to file an FBAR as willful if the account balance is at any time during the year greater than \$200,000.

* * *

We appreciate your consideration of our comments. Please let us know if you would like to discuss these matters or if we can assist you in any other way.

Respectfully submitted,


Erika W. Nijenhuis
Chair

Enclosure

cc: Thomas Barthold
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