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Re: Report on the Rules Governing Reports on
Transactions with Foreign Financial Agencies (FBARs)

Dear Sirs:

We write to submit a report commenting on the Report of Foreign Bank and Financial Accounts (TD F 90-22.1, referred to as the "FBAR"). The FBAR, which is authorized by the "Currency and Foreign Transactions Reporting Act" (the "Bank Secrecy Act" or "BSA"), must be filed by a United States person for any year in which the person owned, had an interest in or had signature or similar authority over one or more foreign financial accounts with an aggregate balance in excess of $10,000, with certain exceptions.

The Bank Secrecy Act was enacted in 1970 in part to address the use by United States persons of bank accounts in secrecy jurisdictions to commit financial crimes, including tax evasion. To aid the investigation and prosecution of these offenses, the BSA authorizes the Secretary of the Treasury to require recordkeeping and information reporting in certain circumstances. The BSA directs the Secretary, in promulgating these requirements, to consider "the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency . . . ."

On July 17, 2009, in light of significant uncertainty and confusion surrounding recent amendments to the FBAR rules and statements made by government personnel, the Tax Section submitted a letter requesting among other things a one-year moratorium on the application of the FBAR rules to "non-traditional accounts" (*i.e.,* accounts other than traditional bank and securities accounts). The July 17 letter also commented on a number of specific issues, though without making specific recommendations as to many of them.

On August 6, 2009, Treasury and the IRS issued Notice 2009-62, which extends the filing date for certain filers to June 30, 2010 and requests comments on a number of issues relating to the FBAR requirements, principally regarding signature authority and the status of equity interests in commingled funds. We commend Treasury and the IRS for issuing the Notice, both because of its acknowledgment of the legitimacy of some of the substantive concerns addressed by the Tax Section and many others, and also because of its status in itself as a first step in the effort to bring to the FBAR the more traditional notice-and-comment rulemaking process that it sorely needs.

The purposes of the attached report are to respond to the requests for comments in Notice 2009-62 and to recommend other changes to the FBAR regime, addressing the issues raised in our July 17 letter as well as a number of other issues. The report makes a large number of recommendations and proposals, based on our reasoning from first principles as to the "optimal" way to structure the FBAR regime, including a number of "principal" recommendations, described briefly below.

Avoid duplication. We believe that while it is extremely useful to have many people ***potentially*** required to file FBARs as to any single foreign financial account, the ideal regime would ***actually*** require only a single FBAR for that account (in addition, to reports or returns filed by the beneficial owner(s) of the account). We make several recommendations designed to approach this goal, including establishment of "qualified" and "designated filer" regimes under which one entity, by virtue of either meeting certain criteria or entering into an agreement with the government, might undertake to file FBARs on behalf of others, as well as very significant expansion of the employee and consolidation exceptions to FBAR reporting.

Exclude jurisdictions. We recommend, consistent with the language and legislative history of the BSA, that Treasury study whether it would be feasible to narrow the focus of the foreign financial account reporting regime to jurisdictions that permit bank secrecy and/or that do not adequately supervise banking and other financial activities.

Raise dollar threshold. We also recommend that Treasury and the IRS consider raising the minimum aggregate dollar threshold for FBAR reporting from the current $10,000, and perhaps indexing that threshold for inflation.

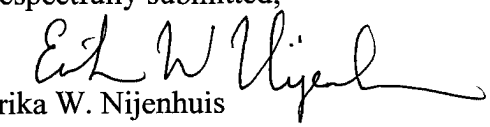
Improve procedure. We strongly recommend that going forward, Treasury and the IRS take what steps are necessary to ensure that "traditional" notice-and-comment rulemaking procedures are followed in providing rules and guidance under the FBAR regime and to allow electronic filing for all filers.

Avoid questionable retroactive interpretations. We strongly encourage Treasury and the IRS not to require FBAR filings (i) with respect to equity interests in illiquid offshore investment vehicles or (ii) by foreign persons, in each case for years prior to 2009.

Summary of other recommendations. The report makes a large number of other recommendations, many of which are "alternatives" to those described above. Among others, we recommend that (i) going forward, interests in illiquid offshore investment vehicles such as most hedge funds and private equity funds should be exempt from FBAR reporting, (ii) going forward, serious consideration should be given to whether it is appropriate to require FBAR reporting by foreign persons, (iii) certain types of entities should be exempted from FBAR reporting, including certain types of well regulated entities, trusts, estates, most pension plans and electing tax-exempt entities, and (iv) it should be made clear that certain types of accounts are not subject to FBAR reporting, including accounts with foreign clearinghouses and regulated exchanges.

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

Respectfully submitted,



Erika W. Nijenhuis
Chair

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