National Foreign Trade Council
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November 4, 2011

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

Re: Request for FBAR Relief For Multinational Corporate Employees

Dear Director Freis:

We write to request that FinCEN adopt more rational, less burdensome rules for FBAR filings required by employees of US companies involved in global finance operations. Multinational companies are increasingly frustrated by changing rules that unnecessarily expand the FBAR filing requirements for their employees, create traps for innocent violations and potentially impose costly penalties.

We understand that your office may have previously considered some of these issues. Nevertheless, we respectfully submit that further consideration is warranted and clearly would be consistent with this Administration's announced commitment to the "least burdensome tools for achieving regulatory ends." Executive Order 13563 (Jan. 18, 2011). In this regard, we recognize that FinCEN's main mission is the enforcement of bank secrecy laws – but we believe the current reporting requirements exceed what is reasonable and necessary at the individual employee level in most circumstances.

Based on the factual and legal considerations presented below, we ask that FinCEN issue guidelines that when SEC-reporting companies file FBAR for all "foreign financial accounts" – whether owned by domestic parents or at least 50%-owned subsidiaries and foreign affiliates – all of their worldwide employees are exempt from any individual FBAR filing requirements related to those accounts.

Factual Background

Multinational companies maintain numerous financial accounts in the names of the US parent company, its domestic subsidiaries and its foreign affiliates. Typically these accounts are established under guidelines developed by the corporate treasurer or similar high-level financial staff. Day-to-day investment responsibilities are then often delegated to staff employed by the parent and various domestic subsidiaries.

In addition, in our global economy, most major US companies today also have operations in a host of foreign countries. Often, these operations are conducted by wholly owned foreign subsidiaries

with locally-based finance staff responsible for managing cash and other investments on behalf of the global enterprise.

Each multinational company has its own guidelines and staffing for managing cash and other investments, but it is not unusual for dozens of employees – employed by different entities in the corporate group – to have "signature authority" over the financial accounts of the enterprise. These accounts may be maintained in the names of numerous corporate entities to facilitate day-to-day operations, prudent cash management and for other valid business reasons.

Legal Background/Status of Corporate Employees and Officers

Current rules require SEC-reporting domestic companies to file FBAR covering foreign financial accounts (1) for which they are the owner of record, or (2) have an "other financial interest," i.e., where the owner of record or holder of legal title is a corporation, partnership or other entity in which the US company directly or indirectly owns more than 50% of the voting power or total value of the shares or interests. 31 CFR § 1010.350(e)(1), (2)(ii). Such entities may file limited information on such accounts, but also may be required to provide "detailed information" when requested by FinCEN. 31 CFR § 1010.350(g)(1).

The 2011 regulatory guidance imposes substantial FBAR reporting burdens on individuals who have "signature authority" over the accounts of SEC-reporting enterprises. Under the current FBAR guidance, an exemption from the FBAR filing requirement is available only for US corporate staff responsible for investing the foreign accounts of a US parent company whose stock is publicly traded – or for accounts in the name of a US subsidiary that directly employs the person with such responsibility (as long as all the accounts are reported by the US parent on a consolidated FBAR filing). 31 CFR § 1010.350(f)(2)(iv), (v).

However, it appears FBAR filings are required for an employee with "signature authority" in all of the following cases:

(1) An employee of a publicly traded US parent company is responsible for investing the foreign financial accounts of any of its US or foreign subsidiaries.

(2) An employee of a US subsidiary of a publicly traded US parent is responsible for investing the foreign financial accounts of the US parent, other US subsidiaries, or foreign subsidiaries.

(3) An employee of a foreign subsidiary is responsible for investing the subsidiary's own foreign accounts or the foreign accounts of its domestic parent, domestic subsidiary or foreign affiliates.

Recommendation: Individual Employees Should be Exempt From FBAR Filings

The current rules are burdensome and complex and create the potential for inadvertent errors by corporate finance employees. Indeed, the latest FBAR rules arguably are more burdensome than the prior guidance – with no apparent justification.[1] Because this issue affects most multinational

[1] This is particularly true as to pre-2010 years where, as the AICPA points out in its letter dated June 27, 2011, prior FinCEN guidance reasonably indicated that no individual filings were required.

companies, it likely impacts thousands of corporate employees in the US and abroad and potentially requires hundreds of thousands of unnecessary FBAR filings.

There is no valid reason why individual employees should have to file FBAR for accounts over which they only have signature authority where the US parent files a report for all of the company's foreign financial accounts, whether held in the names of domestic or foreign entities. Companies do not want to subject their employees to tax penalties for inadvertent failures to follow the confusing FBAR rules. Even inadvertent omissions will often require the employee to incur legal costs to resolve the matter. In addition, employers are legitimately concerned that affected staff may resign their positions – or ask to be reassigned to different positions – rather than face stiff penalties for non-filing of FBAR reports. In many cases, the employees working abroad are expatriates and reassigning them can be particularly costly and disruptive.

When these concerns were previously raised by commentators, no relief (other than a one-year filing extension in certain situations) was provided. In this regard, FinCEN's comment (in the Preamble, 76 Fed. Reg. at 10242) that other changes in the revised regulations make further "relaxations" unnecessary misses the point. The affected employees generally <u>do</u> have "signature authority" (as defined under both the prior and the current guidance) – we nevertheless believe FinCEN should not burden them with duplicative FBAR filing obligations or expose them to potentially substantial penalties for not doing so.

We respectfully submit that FinCEN has access to all of the information it needs concerning the foreign accounts of SEC-reporting entities – from the consolidated FBARs filed by these entities and any specific requests FinCEN staff may wish to make of them. There is no need to burden thousands of individual employees with obligations to make duplicative filings for accounts maintained for the sole benefit of their employers.

Sincerely,

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cc: The Honorable Douglas Shulman, Commissioner, Internal Revenue Service
Emily S. McMahon, Acting Assistant Secretary (Tax Policy), Department of the Treasury