American Institute of CPAs
1455 Pennsylvania Avenue, NW
Washington, DC 20004

November 19, 2010

The Honorable Michael F. Mundaca
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Mr. William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Mr. Steven Musher
Associate Chief Counsel (International)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Mr. Bill S. Bradley
Chief Counsel
Financial Crimes Enforcement Network
Department of Treasury
P.O. Box 39
Vienna, VA 22183

Mr. Jamal El-Hindi
Associate Director, Regulatory Policy and Programs Division
Financial Crimes Enforcement Network
Department of Treasury
P.O. Box 39
Vienna, VA 22183

Mr. Kevin McCarthy
Acting Director, Fraud/Bank Secrecy Act
Small Business/Self Employed Division
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

RE: Additional Comments on Notice of Proposed Rulemaking (RIN-1506-AB08) regarding Amendment to the Bank Secrecy Act Regulations – Pertaining to Foreign Trusts

Dear Messrs. Mundaca, Shulman, Wilkins, Musher, Bradley, El-Hindi, and McCarthy:

The American Institute of Certified Public Accountants (AICPA) offers the following comments in response to a Notice of Proposed Rulemaking (RIN-1506-AB08), published in the Federal Register on February 26, 2010, requesting comments regarding proposed amendments to regulations under Title 31 of the U.S. Code (the Bank Secrecy Act, or BSA) concerning reports of foreign financial accounts. These comments were developed jointly by the Foreign Bank and Financial Account Reporting Task Force (FBAR Task Force) of the AICPA's International Taxation Technical Resource Panel, and by the Foreign Trusts Task Force of the AICPA's Trust, Estate and Gift Tax Technical Resource Panel, and approved by the Tax Executive Committee.

The AICPA is the national professional organization of certified public accountants comprised of approximately 360,000 members. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

These comments supplement our prior comments on these proposed regulations and on IRS Notice 2009-62, submitted on April 30, 2010, and November 16, 2009, and focus on our concerns specifically regarding the application of FBAR in the foreign trust area.

Executive Summary

1. The proposed regulations' exception from FBAR reporting for trust beneficiaries if trustees or agents of the trust who are U.S. persons file an FBAR (31 C.F.R. § 103.24(g)(5)) should be expanded to also include a U.S. grantor who files an FBAR.

2. Non-U.S. trustees should be permitted to file an FBAR for a foreign account held by a trust, and if a schedule of the U.S. beneficiaries is attached to the FBAR filed by the trustee, the U.S. beneficiaries of such trust should not be required to file an FBAR for the trust's accounts.

3. Trust beneficiaries should only be required to file an FBAR if none of the exceptions noted above or in the regulations applies, and a distribution is made from the trust causing a Form 3520 filing requirement for a U.S. beneficiary.

4. A beneficiary of a discretionary trust should not be considered to have a financial interest in a foreign account merely because of the beneficiary's status as a discretionary beneficiary.

5. "Beneficial interest" should not include a remainder interest.

6. Trust income should be defined as fiduciary accounting income.

7. The regulatory text should contain the same terms as discussed in the preamble to the regulations.

8. The FBAR instructions should be changed to mirror the language in the proposed regulations so that an FBAR is required only if the trust protector is subject to the U.S. person's direct or indirect instruction. The presence of a protector should not automatically create an FBAR filing requirement.

Specific Comments

1. **The proposed regulations' exception from FBAR reporting for trust beneficiaries if trustees or agents of the trust who are U.S. persons file an FBAR (31 C.F.R. § 103.24(g)(5)) should be expanded to also include a U.S. grantor who files an FBAR.**

The proposed regulations provide a reporting exception for U.S. beneficiaries if the trust, trustees, or agents of the trust are U.S. persons that file an FBAR to report trust accounts. We support such an exception as this will eliminate many unnecessarily duplicative FBARs. We further recommend that this FBAR filing exception be expanded to also include situations where a U.S. grantor or settlor of a trust files an FBAR to report trust accounts. If the grantor files the FBAR with all the required trust account information, the U.S. beneficiary should not also be required to file an FBAR to report duplicative trust information.

Specifically, the proposed regulations should be modified to insert the **bolded text** below.

A beneficiary of a trust (described in paragraph (e)(2)(iv) of this section (having a beneficial interest of more than 50 percent in the trust's corpus or income)) is not required to report the trust's foreign financial accounts if the trust, trustee of the trust, agent of the trust**, or grantor of the trust** is a United States person that files a report under this section disclosing the trust's foreign financial accounts.

2. **Non-U.S. trustees should be permitted to file an FBAR for a foreign account held by a trust, and if a schedule of the U.S. beneficiaries is attached to the FBAR filed by the trustee, the U.S. beneficiaries of such trust should not be required to file an FBAR for the trust's accounts.**

We note that the above discussed exception in the regulations does not currently cover foreign trusts with only non-U.S. trustees. With respect to these trusts, the non-U.S. trustee should be permitted (but not required) to file an FBAR to report foreign accounts held by the trust. If the non-U.S. trustee files and certifies to the U.S. beneficiaries that an FBAR containing the required information regarding the trust's foreign account has been filed by the trustee, the U.S. beneficiaries should not be required to file a separate FBAR to report trust accounts. If a non-U.S. trustee is permitted to file an FBAR to report foreign financial accounts held by the trust, it would eliminate the need for U.S. beneficiaries to make duplicative disclosures of the same information, and would be similar to combined or consolidated reporting. To ensure that all relevant information is disclosed, we recommend that if the non-U.S. trustee files an FBAR, that it be required to attach to the FBAR a schedule of the U.S. beneficiaries included in the combined or consolidated report. This would clarify which entities or persons are participating in a joint filing and would alleviate the current concerns that undisclosed participants have with respect to the statute of limitations.

3. Trust beneficiaries should only be required to file an FBAR if none of the exceptions noted above or in the regulations applies, and a distribution is made from the trust causing a Form 3520 filing requirement for a U.S. beneficiary.

The AICPA is pleased to see that the proposed regulations adopted an approach similar to what we recommended in item 5 of our November 16, 2009 comments to IRS and FinCEN - that any U.S. person who is considered to have control of the trust as a grantor under IRC section 679 be required to file an FBAR if the trust has a foreign account. As discussed in our November 2009 comments, we agree that a U.S. settlor or transferor to a trust is more likely than a beneficiary to have access to and knowledge of the trust's assets. The ABA section of Real Property Trust & Estate Law made the same recommendation. We note, however, that the IRS expanded the definition of control by citing IRC sections 671-679.

As discussed in our November 16, 2009 comments, we continue to recommend that if none of the exceptions noted above or in the regulations apply and a distribution is made from the trust, only a trust beneficiary who receives a distribution (and is required to file a Form 3520 for the distribution) should be required to file an FBAR form. Furthermore, the October 2008 version of the FBAR instructions would limit such filing requirement to beneficiaries receiving more than 50 percent of the foreign trust's income in a particular year. Our recommendation would cause a filing requirement only under circumstances where it is evident that the U.S. beneficiary has knowledge of the trust's existence and, given the size of the beneficial interest, likely will be given access to the information necessary to complete the FBAR. If there is no distribution from the trust, an FBAR should not be required by a U.S. beneficiary of a foreign non-grantor trust.

4. A beneficiary of a discretionary trust should not be considered to have a financial interest in a foreign account merely because of the beneficiary's status as a discretionary beneficiary.

The proposed regulations require FBAR reporting by a person who has more than a 50-percent beneficial interest in the assets or income of the trust for the calendar year, as determined under all of the facts and circumstances, including the terms of the trust and any accompanying documents. To simplify the rules, Treasury should consider the recommendation in proposal 3, above, as this would eliminate the uncertainty in the proposed regulations.

We note that the proposed regulations do not define whether or under what circumstances the reporting applies to a discretionary or contingent interest holder. The proposed regulations also do not define how to measure beneficial interest and whether it needs to be measured each calendar year. These points should be clarified in the final regulations so that a beneficiary of a discretionary trust should not be considered to have a financial interest in a foreign account simply because of his or her status as a discretionary beneficiary. A beneficiary of a discretionary trust does not have a fixed right to income or principal and may never receive distributions. Thus, the final regulations should clarify that "a person who has more than a 50-percent beneficial interest in the assets for the calendar year" includes a discretionary or contingent beneficiary of a discretionary trust only in a year in which they receive more than 50 percent of the foreign trust income (or principal).

5. "Beneficial interest" should not include a remainder interest.

We recommend that the IRS not include a remainder interest in the term "beneficial interest." Some believe that the proposed regulations would require that if a U.S. beneficiary has a remainder interest in a trust for the calendar year, such beneficiary has a filing obligation with respect to the trust's foreign accounts. We do not agree with this interpretation and recommend the regulations be clarified to exclude a remainder interest from the definition of "beneficial interest."

A remainderman of a trust is not entitled to receive trust assets until after an event specified in the trust document, such as the death of the life interest holder, occurs. A remainderman is often not aware that they are named as such under the trust document and in most cases would not have access to the trust information required to complete the FBAR. A remainderman's interest in a trust is even more remote than that of a current discretionary beneficiary. For these reasons, we recommend that remainder beneficiaries not be required to file FBARs with respect to their remainder interests in trust accounts.

6. Trust income should be defined as fiduciary accounting income.

We note that the proposed regulations do not clarify whether trust income is defined as fiduciary accounting income, which is based on the terms of the trust agreement and/or local law, or, alternatively, "distributable net income," which is an income tax concept that differs with respect to a domestic or foreign trust. This should be clarified in the final regulations. We suggest that the regulations be based on trust accounting income.

7. The regulatory text should contain the same terms as discussed in the preamble to the regulations.

We note that the text of the proposed regulatory language does not contain several terms discussed in the preamble, including: "for the calendar year" and "as determined under all of the facts and circumstances, including the terms of the trust and accompanying documents." We suggest the same words be added to the regulatory text if they are described in the preamble.

8. The FBAR instructions should be changed to mirror the language in the proposed regulations so that an FBAR is required only if the trust protector is subject to the U.S. person's direct or indirect instruction. The presence of a protector should not automatically create an FBAR filing requirement.

The proposed regulations provide that a U.S. person will be considered to have a financial interest in a trust that was established by the U.S. person and for which the U.S. person has appointed a trust protector that is subject to such person's direct or indirect instruction.

The FBAR instructions that were revised in 2008 provide that if a U.S. person established a trust, and the trust had a protector, the U.S. person is required to report trust accounts for FBAR purposes. We note this filing requirement is regardless of whether the U.S. person has a continuing interest in the trust. We suggest that the FBAR instructions be changed to mirror the language in the proposed regulations so

that an FBAR filing requirement is required only if the trust protector is subject to the U.S. person's direct or indirect instruction, and not automatically simply because a trust protector is involved.

In addition, we recommend that the phrase "direct or indirect instruction" contained in the regulations be clarified so that it is clear when an FBAR filing requirement occurs for the U.S. settlor of a trust with a protector. For example, direct instruction could be clarified to include actual instructions in the trust document or other writing.

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We appreciate the opportunity to comment on these proposed regulations, and welcome a further discussion of the comments. If you have any questions, please contact Neil A.J. Sullivan, Chair, AICPA FBAR Task Force at (914) 713-0503, or neilsullivan@att.net; Karen A. Brodsky, Chair, AICPA Foreign Trusts Task Force at (212) 436-3025, or kbrodsky@deloitte.com; Joseph M. Calianno, Chair, AICPA International Taxation Technical Resource Panel at (202) 521-1505, or joe.calianno@gt.com; F. Gordon Spoor, Chair, AICPA Trust, Estate and Gift Tax Technical Resource Panel at (727) 343-7166, or fgs@spoorcpa.com; Eileen R. Sherr, AICPA Technical Senior Manager, at (202) 434-9256, or esherr@aicpa.org; or Michelle R. Koroghlanian, AICPA Technical Manager, at (202) 434-9268, or mkoroghlanian@aicpa.org.

Respectfully submitted,

Patricia A. Thompson
Chair, AICPA Tax Executive Committee

cc: Lara Banjanin, Attorney-Advisor, International – Branch 1, IRS
Samuel Berman, IRS Special Counsel, SB/SE Division Counsel
Bryon A. Christensen, Attorney-Advisor, Tax Legislative Counsel, Treasury Department
Manal Corwin, International Tax Counsel, Treasury Department
Ron Dabrowski, IRS Deputy Associate Chief Counsel (International)
M. Grace Fleeman, Senior Technical Reviewer, International – Branch 1, IRS
Donna Hansberry, IRS, LMSB
Joseph Henderson, IRS
Catherine Hughes, Attorney Advisor, Treasury Department, Room 4212B
Rodney A. Lundquist, IRS SB/SE SBA Policy Liaison to FinCEN, SE:S:F/BSA:PO:P
John C. McDougal, IRS Special Trial Attorney, Counsel SB/SE
John J. Merrick, IRS Special Counsel to Associate Chief Counsel (International)
Stephen E. Shay, Deputy Assistant Secretary for International Affairs, Treasury Department
Willard Yates, Attorney-Advisor, International – Branch 1, IRS
Terra-Lynn Zentara, IRS