February 27, 2009

Via Electronic Transmittal

The Honorable Max Baucus
Chairman
Senate Finance Committee
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles Grassley
Ranking Member
Senate Finance Committee
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles B. Rangel
Chairman
House Ways and Means Committee
1102 Longworth House Office Building
Washington, DC 20515

The Honorable Richard Neal
Chairman
Select Revenue Measures Subcommittee
House Ways and Means Committee
1136 Longworth House Office Building
Washington, DC 20515

The Honorable Dave Camp
Ranking Member
House Ways and Means Committee
1102 Longworth House Office Building
Washington, DC 20515

Re: Comments in Response to Senate Finance Committee Staff Discussion Draft Proposal Relating to U.S. Subsidiaries of Foreign Based Insurance and Reinsurance Companies

Dear Sirs:

The Organization for International Investment ("OFII") welcomes this opportunity to respond to the Senate Finance Committee's request for comments on the Senate Finance Committee Staff Discussion Draft proposal to modify the tax treatment of U.S. subsidiaries of insurance and re-insurance companies headquartered abroad (the "Staff Discussion Draft").

Introductory Comments

OFII is a business association representing the U.S. subsidiaries of many of the world's largest international companies. The U.S. subsidiaries of companies based abroad directly employ over 5 million Americans and support an annual U.S. payroll of over $364 billion. As evidenced by the attached OFII membership list, many OFII members are household name companies with historic and substantial U.S. operations. On behalf of these companies, OFII advocates for the fair, non-discriminatory treatment of U.S. subsidiaries. We undertake these efforts with the goal of making the United States an increasingly attractive market for foreign investment, which will ultimately encourage international companies to conduct more business and employ more

Americans within our borders. Given the recent global financial turmoil, as well as companies' increasing ability to conduct worldwide operations through other jurisdictions, OFII's mission is more critical than ever to sustaining and rebuilding the American economy.

Our comments on the Staff Discussion Draft reflect our role as a representative of foreign-owned U.S. businesses engaged in diverse industries, including the insurance sector. Importantly, OFII members across all industries stand together in opposition to this proposed legislation.

We believe the proposed legislation should be rejected for the following reasons:

- The proposed legislation would violate U.S. treaty obligations, including prohibitions against discriminatory treatment of U.S. subsidiaries on the basis that they are foreign-owned. The proposal undermines the ability of the Senate to ensure that U.S. treaty obligations are respected.

- The proposed legislation would impose an artificial, punitive and discriminatory limit on the ability of U.S. subsidiaries to deduct legitimate business expenses. This violates fundamental tax principles that allow U.S. businesses to deduct the cost of doing business.

- Current law, as enhanced by legislation enacted in 2004, provides adequate tools to address any perceived concerns in this area. Those tools preclude the need for the proposed discriminatory and punitive legislation

- The proposed legislation would set dangerous policy precedent that would invite retaliatory measures from our trading partners.

Further, we believe that at a time of significant global financial turmoil, the United States should be encouraging, not discouraging, foreign capital to be invested in the U.S. insurance markets. The proposed legislation would send the wrong signal to these crucial markets.

The Staff Discussion Draft is similar to proposed legislation, H.R. 6969, that was introduced in the 110th Congress. OFII opposed that legislation for similar reasons. Attached for your reference is the letter we submitted to Chairman Rangel of the House Ways and Means Committee.

Background

Reinsurance is a common place business transaction in the insurance industry in which one insurance company, in exchange for a premium, indemnifies another insurance company for losses that it may sustain under one or more insurance policies it has issued. Insurance companies enter into reinsurance transactions for essentially the same reason that businesses and individuals purchase insurance policies: to limit their exposure to risk of loss.

Reinsurance also allows members of an affiliated group of insurance companies to diversify their risk portfolios and to quickly deploy capital where it is needed within the group. Each of these abilities benefits the consumer market by reducing the costs of insurance and, in the event of a disaster, decreasing the likelihood that an insurance company will be overwhelmed by losses and unable to honor its contractual obligations.

The Staff Discussion Draft proposes to disallow deductions by "covered insurance companies" for "excess non-taxed reinsurance premiums" paid to foreign affiliates.[1] A covered insurance company is any insurance company other than a life insurance company. Non-taxed reinsurance premiums are defined as those reinsurance premiums that are not subject to U.S. income tax when paid to an affiliated corporation. The bill proposes to disallow a deduction for these premiums to the extent they exceed the sum of a premium limitation and qualified ceding commissions with respect to such premiums.[2] The premium limitation is determined by comparing a covered insurance company's reinsurance payments in each of its lines of business with an industry average amount of reinsurance payments. The industry average is determined by reference to an "industry fraction," which is used to compute the allowable amount of affiliate reinsurance.[3] The numerator of the industry fraction is the industry aggregate reinsurance premiums paid by covered insurance companies to nonaffiliated corporations. The denominator is the aggregate gross premiums written by covered insurance companies. The industry fraction is multiplied by an insurance company's gross premiums written in each of its lines of business in the taxable year. The amount of the premium limitation for any line of business for the taxable year is the excess of this product over the aggregate reinsurance premiums paid by the company to unaffiliated reinsurers. An insurance company is disallowed a deduction for reinsurance premiums paid to foreign affiliates to the extent they exceed the sum of: (1) the premium limitation and (2) the qualified ceding commissions received from the reinsurance company.

The Proposal Violates U.S. Treaties

In consideration of its significant role in the ratification of international agreements, including tax treaties, the Senate traditionally has taken measures to honor the sanctity of such agreements by ensuring that domestic laws inconsistent with those agreements are not enacted. Indeed, Chairman Baucus recently proposed an amendment to the American Recovery and Reinvestment Act of 2009 to ensure that certain "Buy American" provisions would be interpreted in a manner consistent with U.S. obligations pursuant to international agreements, an effort that we applaud. In that spirit, we note that the Staff Discussion Draft would seriously violate U.S. obligations under its tax treaties and erode international confidence in the United States as a treaty partner.

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[1] For this purpose, a covered insurance company is any company subject to tax imposed by section 831; a company is treated as an affiliated corporation with respect to a covered insurance company if both corporations are members of the same controlled group of corporations.

[2] The term "qualified ceding commission" means the ceding commissions that are paid during the taxable year by a covered insurance company with respect to affiliated non-taxed reinsurance premiums multiplied by a fraction, the numerator of which is so much of such premiums as exceeds the premium limitation for the year and denominator of which is the aggregate amount of such premiums.

[3] The industry fraction for each calendar year is determined using data from annual statements of insurance companies and published by the Treasury Department. The industry fraction is determined separately for each line of business in which an insurance company is engaged.

The proposal violates the treaty protection against discriminatory disallowance of deductions

The prohibition against one country imposing discriminatory tax measures on residents of another country is a fundamental provision of virtually every U.S. income tax treaty, a protection the United States consistently insists upon to prevent discriminatory taxation of U.S. corporations. The Staff Discussion Draft clearly and directly violates one of the standard nondiscrimination protections that the United States insists upon with its treaty partners. "Paragraph 4 of Article 24" (Non-Discrimination) of the 2006 U.S. Model Income Tax Treaty (the Model is the starting point for every U.S. income tax treaty negotiation) provides:

> "Except [where specified treaty provisions address non-arm's length transactions], interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State."

This prohibition requires the United States to allow a U.S. company making premium payments to a corporation resident in the treaty country the same degree of deductibility on premium payments as would apply to payments by that U.S. payor to a U.S. recipient.

The Technical Explanation of the Staff Discussion Draft suggests that because it seeks only to provide a mechanism to effectively enforce the arm's length pricing standard, it does not violate the above treaty protection. We disagree with this assertion. First, as we discuss below, current tax law already contains provisions necessary to accomplish this goal. In addition, we note that U.S. tax treaties acknowledge the use of section 482 and equivalent foreign transfer pricing rules as the standard for enforcing the arm's length pricing rule. The use of traditional transfer pricing rules is supported by a well developed body of law. As further discussed below, a taxpayer's payment of premiums either above or below an industry average is not a meaningful indicator of a departure from arm's length dealing. Hence, the exception to the nondiscrimination prohibition to address non-arm's length dealing is not applicable. Accordingly, the proposal represents a clear treaty nondiscrimination violation.

The proposal violates the prohibition against discriminatory taxation based on ownership.

The Discussion Draft also violates Paragraph 5 of Article 24 of the U.S. Model which provides:

> Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

This prohibition requires the United States to refrain from imposing on any U.S. corporation owned by a company resident in the jurisdiction of the treaty partner any taxation or connected requirement that is other or more burdensome than the comparable taxation and connected requirements that apply to a U.S.-owned U.S. corporation. The proposal violates this prohibition because it imposes a greater tax burden -- as a result of the limitation of the deduction of premiums -- on a foreign-owned US company than would be suffered by a US-owned company. While the limitation on the deduction of premiums is not worded in terms of ownership of the U.S. corporation, its practical effect is the same as if the foreign ownership requirement was explicit. That is to say, since payments to a U.S.-controlled foreign corporation ("CFC") that are taxed as Subpart F income are excluded from the disallowance and a foreign subsidiary of a U.S. company would be subject to Subpart F taxation, it is only foreign-owned U.S. companies that would suffer the limitation on deductibility.

Proponents of the proposal might argue that if the premium is paid to a U.S. recipient, or a CFC, it is subject to U.S. tax whereas a payment to a foreign recipient, other than a CFC, is not subject to U.S. tax. There are two responses to this argument. First, by its clear terms, the "similar enterprise" reference is focused on the U.S. taxpayer, not other parties that may or may not be related to that party. Second, by focusing only on premiums subject to U.S. tax, the proposal's exclusion ignores the fact that premiums paid to foreign parties (related or unrelated) will be within the taxing jurisdiction of the recipient's country of residence. In every comprehensive U.S. income tax treaty, the United States has made a judgment prior to agreeing to the treaty, that the treaty partner has a comprehensive income tax system which justifies the reciprocal commitment to cede taxing jurisdiction and prevent double taxation. The application of treaty tax reductions are not conditioned on whether the foreign tax burden is higher or lower than the equivalent U.S. tax burden. The proposal's exclusion based solely on U.S. taxation conflicts with this principle of recognizing the other country's taxing rights.

<u>The proposal violates treaty protections against imposition of the insurance excise tax</u>

The proposal would also circumvent the intent of U.S. treaties to prevent additional taxation of foreign-controlled insurance companies. As noted in the Technical Explanation of the Staff Discussion Draft, reinsurance premiums paid to foreign reinsurance companies are subject to a U.S. federal excise tax, which is imposed on a gross basis. Several U.S. tax treaties provide an exemption from this excise tax and include well developed anti-conduit rules to ensure that the benefit of the exemption does not flow to companies resident in countries without treaties affording such an exemption.

The treaty provisions waiving this excise tax represent a reciprocal obligation of the United States and its tax treaty partners to tax insurance companies located in either jurisdiction similarly -- the United States agrees not to impose the excise tax and the treaty partner agrees not to tax a U.S. insurance company's business income generated within the treaty partner's borders absent the U.S. company maintaining an office or other fixed place of business in the treaty partner's jurisdiction. The proposal's denial of a deduction for the impacted premiums amounts to the equivalent of a full corporate tax on the gross amount of the premium income paid to the foreign reinsurer. That is, denying a deduction for the payment to the foreign recipient has the same economic impact as taxing the recipient of the premium; in either case, a U.S. tax burden of 35% of the disallowed deduction for the premium results. This effective taxation of the premium is the economic equivalent to an override of the mutual obligations to waive taxing rights over the premium income.

The proposal violates U.S. and international tax policy against double taxation

Another basic purpose of our income tax treaties is the avoidance of double taxation of cross-border income. Treaties implicitly acknowledge that subjecting the same income to two national taxes without any relief for that double taxation is inequitable. To avoid that inequity, income tax treaties follow a pattern of the source country -- the country where the income is generated -- ceding all or a part of its taxation rights in recognition of the income being subject to the taxing jurisdiction of the recipient's country of residence. This is the reason the United States has ceded the right to impose the insurance excise tax in some treaties and why treaty partners generally agree to not tax the business profits of a resident of the other country unless that resident is operating a business in the source country through a permanent establishment.

As noted, the disallowance of these business deductions effectively subjects the corresponding income to full U.S. taxation.[4] This result is in direct conflict with the fundamental principle of international tax equity which recognizes that such income is within the taxing jurisdiction of the country of residence and should be shielded from double taxation. Through domestic tax laws and treaty negotiations, the U.S. has undertaken significant efforts to ensure that income, regardless of where it is earned, is not subject to the tax imposed by more than one national jurisdiction. The proposal runs counter to this principle and, thus, represents serious discrimination against foreign-owned U.S. businesses.

The proposal would invite retaliatory action

OFII is concerned that a willingness on the part of the United States to enact laws that violate its international agreements would invite retaliatory actions on the part of our treaty partners, which would not necessarily be limited to the insurance industry. It is more likely that punitive taxation measures would be taken against U.S. based companies operating in other industries. Importantly, because the recent financial downturn has made protectionist economic policies the subject of significant debate, other nations are poised to take retaliatory actions swiftly and severely. Therefore, we believe that the enactment of this proposal would place the global operations of U.S. based companies in a precarious tax position and ultimately have a chilling effect on global financial activity.

The Proposal Violates Fundamental U.S. Tax Principles

The proposal would place artificial limitations on the deductibility of business expenses. This violates the fundamental concept of U.S. tax policy that the cost of doing business is deductible in arriving at the taxable income of a taxpayer. Importantly, reinsurance premium payments are an ordinary, necessary, and significant business cost incurred by insurance companies. It is no more appropriate to arbitrarily limit the deductions for such a basic cost of doing business than it

[4] Importantly, in cases where no treaty provision applies to waive the federal excise tax, discussed above, the proposal effectively results in double U.S. taxation of the premiums, once as a result of the deduction disallowance and again by imposition of the excise tax.

would be to disallow manufacturing costs for an automobile producer. This basic tax policy violation is compounded by the discriminatory manner in which this artificial limitation is imposed only when the recipient is a foreign person. [5]

Further, the proposal to disallow business expenses on a "gross basis" to the extent it exceeds an industry average is inherently arbitrary. Assuming a normal statistical distribution, one can expect half the companies in any given industry to be above the industry average and half to be below that average. There is no rational basis for concluding that those above the industry average are deemed to be engaging in some form of a tax abusive practice and, therefore, should be denied a deduction for a legitimate cost of doing business. We cannot identify any basis for the notion that the industry average can serve as a proxy for the arm's length standard.

Assume similar limitations were applied to the automobile industry. Using a similar industry average would mean that new entrants to the industry, with high start-up costs, would be denied deductions. This result would occur solely because of higher cost of operations, rather than any perceived abusive practices. As a fundamental matter, we believe that U.S. companies (whether U.S. or foreign-controlled) should not be denied the ability to be taxed on their net income simply based on exceeding an industry average which excess can be attributable to innumerable factors having nothing to do with taxation.

It is important to note that the Treasury Department, in a November 2007 study on earnings stripping, transfer pricing, and treaties that was requested the Congress, concluded that there was no conclusive evidence of widespread earnings stripping or transfer pricing abuse except for a handful of companies that had reincorporated abroad. The Treasury Department noted that there effectively is not the potential for abuse relating to business payments even in the affiliated context as such payments, even though they may have an impact on tax positions, may require a real change and impact on business operations.[6] The Treasury Report, which cited no abuse in the insurance industry, supports our view that the proposed legislation is inappropriate as an artificial limitation on business payments that have a real impact on the business operations of the insurance companies involved.

It is also notable that other prior attempts to deny deductions to foreign-owned U.S. businesses on a "gross" basis, similar to this proposal, have been rejected in the past. For example, prior proposals would have added an alternative test to disallow interest deductions of U.S. subsidiaries on a gross basis to the extent that the U.S. subsidiaries were more highly leveraged than elsewhere in the world.[7] Not only was this legislation rejected, it was pointed out

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[5] Moreover, aside from the issue of tax policy, the proposal's use of a disallowance that fluctuates from year to year would make it extremely difficult for insurance companies to effectively manage their business and contractual relationships.

[6] Report to the Congress on Earnings Stripping, Transfer Pricing, and U.S. Income Tax Treaties, Department of the Treasury (November 2007).

[7] See, H.R. 5095, 107th Cong. (2nd. Sess. 2002). (Section 201(a) of that proposed bill disallowed a deduction for "disqualified interest," to be determined in reference to gross interest expense, paid during the taxable year. Specifically, interest paid to foreign related parties was disqualified to the extent it exceeded the product of the total external debt of the worldwide affiliated group and a fraction, computed as the total assets of the U.S. subsidiary divided by the total assets of the worldwide affiliated group. Notably, that fraction bears significant conceptual similarity to the industry average used in the current proposal. Commentary addressing H.R. 5095 pointed out the

successfully that denying deductions for interest on a gross basis to those industries (such as banks and financial institutions) where the interest payments were paid in the ordinary course of their business was deemed to be inappropriate and a discriminatory and artificial limitation on their ability to conduct business in the United States. The proposal in the Staff Discussion Draft should be rejected for similar reasons.

Current Law Provides Adequate Tools to Police Any Perceived Concerns with Related Party Insurance Transactions

The Technical Explanation states that the draft legislation intends to discourage reinsurance transactions that "are likely to be motivated by avoidance of U.S. taxation because they exceed industry norms." We disagree with this view and would point out to the Committee that current law already addresses any perceived abuses.

The notion that income tax will be imposed on the parties to a transaction as if such transaction were executed on arm's length terms has long been a fundamental principle of U.S. tax law. Section 482 provides the primary mechanism for the application of this principle, and grants the Service broad authority to distribute, apportion, or allocate gross income, deductions, credits, or allowances between businesses if it is determined that such adjustments are necessary in order to prevent evasion of taxes or clearly reflect the income of such businesses. This is just one of several tools to combat abusive tax transactions already available to the IRS. Therefore, the idea that the IRS lacks the tools to police abusive transactions is misplaced.[8]

Even more to the point, section 845 provides the Service with the authority to allocate, recharacterize, or adjust the income of the parties to an affiliate reinsurance transaction where necessary to reflect the proper amount, source, or character of that income. Although similar to section 482, section 845 essentially operates as an anti-abuse provision applicable specifically to related party reinsurance transactions. In this regard, it provides the Service the ability to identify and recharacterize those reinsurance arrangements or transactions which it deems abusive. In support of the proposition that current law is inadequate to curb abusive reinsurance transactions, the Technical Explanation to the Staff Discussion Draft cites an article discussing

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inherent inequity of such an approach, in that it would, in some cases, result in the denial of deductions to U.S. subsidiaries with no net interest expense. See generally, Gary Clyde Hufbauer and Ariel Assa, "Rules Against Earnings Stripping: Wrong Answer to Corporate Inversions," Institute for International Economics, Policy Brief Number PB03-7 (May 2003). Importantly, the approach taken in the Staff Discussion Draft would result in the same inequity.)

[8] We note that state laws governing the insurance industry provide regulators an additional means of enforcing the arm's length standard. Specifically, Volume III, Section 5 of the National Association of Insurance Commissioners' (NAIC) Model Laws, Regulations and Guidelines, entitled 'Standards of Management of an Insurer Within a Holding Company System,' requires that transactions within an insurance holding company system be undertaken at fair and reasonable terms and that charges or fees for services performed shall be reasonable. Nearly every state has enacted laws identical or substantially similar to the NAIC Model Laws, giving state insurance regulators authority to recharacterize insurance and reinsurance transactions to the extent their terms are not arm's length. In addition, reinsurance agreements that exceed a certain size (often where the premium or liabilities exceed 5 percent of the policy issuer's surplus) must be filed with, and approved by, state regulators. Therefore, the determination of whether the terms of these transactions are arm's length is made by a disinterested third party.

those laws.[9] That article argues that because parties to reinsurance transactions are sophisticated and price their contracts at market rates, they avoid scrutiny by the Service. While market-rate pricing may avoid the application of section 482, section 845 grants the Service a more extensive ability to attack abusive transactions.

The changes to section 845, which were enacted in 2004, were specifically made to address the arguments that underlie the proposal. Therefore, we believe that section 845 is the proper tool to address related party reinsurance transactions and that new remedies such as the proposals are unwarranted.

Conclusion

OFII appreciates this opportunity to express its views regarding the Staff Discussion Draft. We urge the Committee to reject any further consideration of the proposal. The proposal purports to be aimed at policing a perceived abuse without any basic data to support that claim. As detailed in this comment letter, Congress has provided the Internal Revenue Service with adequate tools to police any perceived abuse. The proposal violates fundamental concepts of tax equity, uses an arbitrary standard to define the perceived abuse, and offers a remedy that is punitive, arbitrary, discriminatory and in violation of international standards and U.S. tax treaty obligations that are intended to protect both U.S. companies and their foreign counterparts against discriminatory and inequitable taxation. It would set a dangerous precedent that would invite international disrespect of the United States' commitments to its bilateral obligations and invite retaliatory action at a time when our nation should be, in the words of President Obama, "working with the nations of the G-20 to restore confidence in our financial system, avoid the possibility of escalating protectionism, and spur demand for American goods in markets across the globe."[10] Finally, the tax burden that the proposed legislation seeks to place on insurance companies would almost certainly be passed on to consumers in the form of increased prices for insurance coverage. The resulting chilling effect on U.S. business activity that relies on sufficient insurance coverage is particularly dangerous in the current economy.

We would be happy to further discuss our views with your staff and can be reached at 202-659-1903. Thank you in advance for your consideration. We appreciate your willingness to consider our serious concerns with this proposal.

Sincerely,

Nancy McLernon
President & CEO, OFII

cc: Russ Sullivan, Democratic Staff Director, Senate Finance Committee

[9] Lee A. Sheppard, "News Analysis - Would Imputed Income Prevent Escape to Bermuda?," 86 Tax Notes 1663, March 20, 2000. (Notably, this article also concludes that reinsurance contracts, which have long been subject to intense government and regulatory scrutiny, are generally priced correctly.

[10] Presidential Address to Congress, February 24, 2009.

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