NATIONAL FOREIGN TRADE COUNCIL, INC.

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October 15, 2009

The Honorable Max Baucus	The Honorable Charles Grassley
Chairman	Ranking Member
Committee on Finance	Committee on Finance
United States Senate	United States Senate
Washington, D.C. 20510	Washington, D.C. 20510

Dear Chairman Baucus and Ranking Member Grassley:

The NFTC, organized in 1914, is an association of some 300 U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial and service activities, and the NFTC therefore seeks to foster an environment in which U.S. companies can be dynamic and effective competitors in the international business arena.

The NFTC supports your efforts to combat tax evasion by improving the Internal Revenue Service's ability to detect illegal tax avoidance through effective enforcement activities. We offer our strong support for these efforts that are targeted at taxpayers who engage in tax evasion rather than those who make every effort to comply with existing tax laws.

Conversely, the NFTC urges the Senate to reject S. 506, the "Stop Tax Haven Abuse Act," either as a stand-alone bill or as an amendment offered to legislation on the Senate floor. We believe this legislation is outdated, unnecessary and would put our tax treaty network in jeopardy. The result would be to drive in-bound investment out of the United States, at the cost of American jobs.

It is important for policymakers to carefully evaluate legislative proposals intended to combat offshore tax avoidance to ensure that such proposals are adequately targeted and do not confuse illegitimate tax avoidance strategies by U.S. companies and individuals with legitimate operations of worldwide American companies attempting to compete globally and serve non-U.S. markets. Without careful evaluation and proper targeting, such proposals may undermine normal international business practices and even disrupt U.S. international relations without achieving their desired goal. In this regard, it is important for policymakers to understand:

- the importance of American business competitiveness to the U.S. economy;
- the normal business reasons for the organization of U.S. businesses investing in growing markets around the world; and

- the current restrictions on the erosion of the U.S. corporate tax base.

International Growth is Critical to the U.S. Economy. The growth of U.S. businesses in markets abroad produces positive returns for the firm itself, the U.S. labor market, and the U.S. economy as a whole. Consumer markets and the need for new infrastructure in developing countries offer opportunities for U.S. firms to expand their customer base, which in turn produces demand for U.S.-manufactured inputs, U.S. management and other services, and U.S. know-how and other intangible property. Direct investment abroad creates high-paying, U.S.-based jobs.

U.S. Policy Should Not Seek to Police the Tax Rates of Sovereign Countries – Some of the rhetoric associated with the location of foreign subsidiaries of worldwide American companies in low-tax jurisdictions suggests either these jurisdictions are "bad actors" or that U.S. tax policy wrongly encourages the shift of U.S. jobs and capital to such jurisdictions. The U.S. corporate tax rate is one of the highest among developed and developing countries, so the notion that foreign subsidiaries of worldwide American companies tend to locate in lower tax jurisdictions is not only not surprising, but it is almost unavoidable.

Sovereign jurisdictions have every right and duty to establish tax rates that meet their social and fiscal policy needs. U.S. policy makers should take great care in labeling some lower-tax jurisdictions as "tax havens" when these countries have robust economies, have been loyal friends of the United States from a foreign relations perspective, consume large amounts of U.S. goods and services, and may have developed their economies in part to serve as hubs for commerce within a particular region. U.S. tax policy should not discourage U.S. companies from serving customers in such jurisdictions, nor should it seek to police the use of such jurisdictions as a hub for regional commerce.

According to the OECD, all jurisdictions considered to be "tax havens" have now committed to internationally agreed standards. The internationally agreed tax standard, which was developed by the OECD in co-operation with non-OECD countries and which was endorsed by G20 Finance Ministers at their Berlin Meeting in 2004 and by the UN Committee of Experts on International Cooperation in Tax Matters at its October 2008 Meeting, requires exchange of information on request in all tax matters for the administration and enforcement of domestic tax law without regard to a domestic tax interest requirement or bank secrecy for tax purposes. It also provides for extensive safeguards to protect the confidentiality of the information exchanged. See A PROGRESS REPORT ON THE JURISDICTIONS SURVEYED BY THE OECD GLOBAL FORUM IN IMPLEMENTING THE INTERNATIONALLY AGREED TAX STANDARD, attached.

Low-Tax Jurisdictions Facilitate International Growth Of U.S. Businesses. U.S. businesses with operations abroad organize in low-tax jurisdictions for legitimate business reasons apart from U.S. tax considerations. U.S. businesses establish legal entities in low-tax jurisdictions to: (1) serve customers in those jurisdictions; (2) coordinate efficient business financing; (3) access countries with well-developed legal environments that provide a base from which to invest in a host country with an inhospitable legal environment or high political risk; (4) protect against unstable and volatile currencies; (5) facilitate the avoidance of damage to property from hostile foreign host government actions; and (6) minimize foreign taxes on overseas operations.

Current Law Prevents Erosion of U.S. Corporate Tax Base. The current U.S. international tax law and regulations restricts abusive offshore planning schemes and structures that erode the U.S. corporate tax base. The IRS has undertaken an ambitious and successful enforcement agenda to further reduce the potential for offshore tax avoidance. The IRS has identified several international tax issues among its top enforcement priorities. The Treasury Department has expanded its network of tax information exchange provisions with many other countries, which help further curtail U.S. tax base erosion by deterring offshore tax abuse.

Proposals Should Target Abusive Transactions. U.S. international tax rules can protect the U.S. tax base without undermining the international competitiveness of U.S. businesses. To the extent that additional legislative or administrative efforts are viewed as helpful in contributing to ongoing efforts to combat illegitimate offshore tax avoidance, such efforts should be focused on targeting specific abuses, rather than on curtailing all activities within certain low-tax jurisdictions. For example, the IRS should be applauded for its recent initiative to ensue that U.S. persons living abroad are adequately documented and their income is appropriately reported. Without such a focus, these efforts run the risk of undermining the competitiveness of legitimate U.S. businesses without achieving the desired goal of combating offshore tax avoidance.

As mentioned above, the NFTC strongly opposes S. 506, a proposal by Senator Carl Levin that would put our tax treaty network in jeopardy and would drive in-bound investment out of the United States. Senator Levin's "Stop Tax Haven Abuse Act" contains a list of "Offshore Secrecy Jurisdictions" that contains many countries with which the U.S. has either double taxation treaties or Tax Information Exchange Agreements. Given the recent activities by the G-20 countries in cracking down on tax havens, and the increased number of tax treaty or Tax Information Exchange Agreements reached by many of those jurisdictions, the "black list" included in the Levin legislation is outdated and unnecessary.

"Management and Control" Test

Under current law, the United States determines the residence of a corporation based on its place of incorporation. This longstanding rule is a clear rule that does not require the application of a subjective facts and circumstances test. The Levin proposal has broad and negative consequences for legitimate cross-border businesses, appears to violate many existing U.S. tax treaties, and could have negative repercussions for U.S. employment. As such, it demands very careful analysis by Congress before any action is taken.

The "managed and controlled" proposal included in the Levin legislation would generally treat foreign corporations as U.S. corporations for U.S. federal income tax purposes, if their management and control occurs primarily in the United States. It would apply a facts and circumstances test with a series of undefined terms to determine where "substantially all" of the executive officers and "senior management" of the corporation, or of its direct and indirect subsidiaries, exercise "day-to-day responsibility" for making decisions involving "strategic, financial, and operational policies" of the corporation. The subjectivity and uncertainty introduced by this facts and circumstances test may well cause foreign corporations with a portion of their operations in the United States to eliminate or seriously curtail their management presence here.

Senator Baucus has drafted a proposal that would address many of the critical issues discussed in this letter. NFTC believes that the Baucus draft is a workable approach to addressing the so-called "tax haven" issues. We urge the Senate to reject any amendment by Senator Levin to add his tax haven legislation to the health care package or other legislation on the Senate floor. We look forward to working with you to address these important issues.

Sincerely,

Catherine G. Schultz

Catherine Schultz
Vice President for Tax Policy