INVESTMENT ADVISER
ASSOCIATION

July 31, 2009

Via Electronic Mail

Douglas H. Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: FBAR Issues for Investment Advisers Registered with the SEC

Dear Commissioner Shulman:

The Investment Adviser Association (IAA) is writing with respect to the reporting obligations under Form TD F 90-22.1 – Report of Foreign Bank and Financial Accounts (FBAR). IAA is a not-for-profit association that represents the interests of investment adviser firms that are registered with the US Securities and Exchange Commission (SEC).[1] Specifically, we seek guidance on behalf of our members regarding reporting obligations of investment advisory personnel or directors or officers of a fund who may have signatory or other authority over (but no financial interest in) foreign accounts solely as a result of their employment with their investment advisory firms[2] or their position with a fund managed by an investment adviser. As described below, we believe that requiring these individuals to make separate FBAR filings would be redundant and unnecessary to further the Treasury Department's goals of uncovering abusive tax schemes and combating money laundering.

Background

Our members manage assets for a variety of institutional and individual clients. For purposes of this letter, we focus on FBAR issues as they relate to the management of pooled investment vehicles that are domiciled or organized in the United States and that are sold privately to certain investors without registration under the Investment Company Act of 1940

[1] IAA's membership consists of investment advisory firms that manage assets for a wide variety of institutional and individual clients, including pension plans, trusts, investment companies, endowments, foundations, and corporations. For more information, please visit our web site: www.investmentadviser.org.

[2] We understand that certain employees of investment advisers are not required to file FBAR in circumstances in which a person has power to direct how an account is invested but otherwise cannot make disbursements to the account because the person has no power of disposition of money or other property in the account. Question 7 of IRS *FAQs Regarding Report of Foreign Bank and Financial Accounts (FBAR) – Financial Accounts* available at http://www.irs.gov/businesses/small/article/0,,id=210249,00.html.

(US private funds).[3] US private funds typically do not have any employees of their own (but may have directors and officers) and are managed by a separate entity – investment advisory firms that may be registered with the SEC under the Investment Advisers Act of 1940. US private funds that invest abroad may have financial interests in foreign accounts and these funds would make FBAR filings as appropriate.

Certain directors or officers of US private funds or employees of an investment adviser that manages one or more US private funds investing abroad may be considered to have signature or other authority over the funds' foreign accounts (*e.g.*, bank or custodial accounts) solely because of responsibilities within the scope of their official position with a fund or their employment with an investment adviser.[4] These individuals, however, do not have any financial interest in those accounts. Under these circumstances, we do not believe it would further the Treasury's goals to require separate filings by these individuals because the filings would not provide any additional information to Treasury. Rather, requiring annual FBAR filings would impose a significant burden on these individuals for no reason other than their status as an employee of an investment adviser or as a director or officer of a US private fund.[5]

Information regarding a US private fund's foreign accounts and the fund's financial interest in those accounts are already being provided to Treasury. Information regarding the individual employees of investment advisers and directors and officers of US private funds who may have signatory or other authority but no financial interest in the foreign accounts would inundate the Treasury with information that would be, at best, of limited value. Moreover, we are concerned about the hardship placed, and the potential penalties for failing to submit FBAR filings that could be assessed, on directors or officers of a US private fund or employees of an investment adviser who may have signatory or other authority over foreign accounts only within the scope of their official position or employment.

[3] We understand that the Investment Company Institute has submitted several requests to the IRS seeking guidance regarding persons who are employees of firms that provide services to investment companies that are registered under the Investment Company Act of 1940. *See e.g.*, ICI Letter to Clarissa C. Potter, Chief Counsel (Acting), IRS (July 15, 2009); ICI Letter to James H. Freis, Jr. and Jamal El-Hindi (Jan. 15, 2009). We support the IRS providing the requested guidance, which also would be beneficial to our members that manage registered funds.

[4] Directors and officers of non-US private funds and employees of managers of those funds may be subject to similar FBAR filing obligations that have been raised with the IRS by the Managed Funds Association. *See e.g.*, MFA Letter to Carol P. Nachman, Special Counsel, Administrative Provisions & Judicial Practice Division, IRS (May 13, 2009). We support the IRS providing the guidance requested by the MFA that each person with signature or other authority over an account should not be required to file separate FBAR forms if the US manager has filed the form, referencing that account, provided those persons do not have any personal financial interest in the account and the US manager has provided notice that it filed the form. Guidance on this issue will assist our members that manage non-US private funds.

[5] For those individuals who were not aware of their filing obligation until very recently, the IRS has allowed persons to file an FBAR by September 23, 2009. If an individual discovers that he or she is required to file an FBAR, it appears that the individual would need to attach an amended tax return with the FBAR filing.

Proposed Alternatives to Individual FBAR Filings

To alleviate the concerns described above, we offer two alternative proposals for your consideration.

First, we request that directors, officers or employees of federally-registered advisers be provided the exception that is available for an officer or employee of a "bank that is currently examined by Federal bank supervisory agencies for soundness and safety" for a foreign bank, securities or other financial account maintained by the bank over which he or she has signature or other authority if the officer or employee has no personal financial interest in the account. Similar to the bank employees, employees of federally-registered investment advisers are subject to extensive controls and regulatory oversight.

For example, rule 206(4)-7 of the Investment Advisers Act requires SEC-registered investment advisers to adopt and implement written compliance programs. SEC-registered investment advisers generally include within their compliance program all material regulatory obligations to which they are subject. The compliance program would include establishing various controls that are designed to prevent employees from misappropriating client assets and to ensure that the firm is in compliance with all applicable Bank Secrecy Act, OFAC or similar regulations that prohibit effectively the firm from engaging in activities that support terrorist organizations. These requirements are enforced through the SEC's examination process, which will bring any "deficiencies" it finds in an adviser's compliance program to the adviser's attention for immediate remedy. Deficiencies also may be referred to the SEC's Enforcement Division if a matter is deemed by the staff to be sufficiently serious to warrant this course of action. Thus, like bank employees, employees of SEC-registered investment advisers are closely supervised by the adviser, and ultimately by the SEC, to ensure that the employees' activities are in compliance with all applicable laws and other legal obligations.

As recognized by Treasury in the context of a bank examined by a federal regulatory agency, it would not further Treasury's goal of tackling tax fraud or combating money laundering to require filing of a separate FBAR by an employee of a regulated entity who has signature or other authority over a foreign account within the scope of his or her employment. As in the case of federally regulated banks, US private funds, as US persons, would make their own FBAR filings. As a result, Treasury would have all the relevant information both in the case of accounts maintained by federally-regulated banks and of funds managed by SEC-registered investment advisers. Because Treasury will receive all the relevant information from the US private funds, we also request that directors and officers of these funds who may have signature or other authority be exempt from submitting their own individual FBAR filings.

In the alternative, if Treasury decides not to provide an exception as requested above, we request that SEC-registered investment advisers be permitted to submit an FBAR filing on behalf of all their directors, officers, and employees and directors or officers of US private funds managed by SEC-registered advisers who may have signature or other authority over foreign accounts on a consolidated basis. If a consolidated FBAR is filed on behalf of these

individuals, we seek confirmation that they would not have to file a separate FBAR.[6] We believe that a consolidated filing would provide the same information as individual filings of FBAR but allow Treasury to review this information more easily by consolidating the information into one filing.

Moreover, because signature or other authority arises within the scope of employment or an individual's position as a director or officer of a fund, it would be appropriate for the investment advisers that have access to all the relevant information to file FBARs on behalf of these individuals. We appreciate that Treasury may be concerned about not receiving all relevant information if individuals do not submit their own FBAR. Our proposal, however, would ensure that all of the information that would have been submitted to Treasury on individual FBARs would be filed by the investment adviser.

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We appreciate that Treasury seeks to obtain all the relevant information necessary to take action against tax evaders and to monitor for money laundering. We believe, however, that the circumstances that we have outlined above do not present any such concerns. The guidance we seek is intended to alleviate any unnecessary burden on individuals from having to submit their own FBAR filings in circumstances where the obligation only arises from their employment or their official position and a US person with financial interest in those foreign accounts files an FBAR. Our proposal would enable Treasury to focus on key risk data without being overwhelmed with duplicative information. We would be happy to discuss these issues with you in person and to provide any additional information. Please contact the undersigned or Karen L. Barr, General Counsel, at (202) 293-4222 with any questions regarding these matters.

Respectfully submitted,

/s/ Jennifer S. Choi

Jennifer S. Choi
Assistant General Counsel

cc: William J. Wilkins
Clarissa C. Potter
Linda Kroening
Beth M. Elfrey
Sara M. Coe
Samuel Berman

[6] As noted previously, individuals using the extension provided by the IRS to file by September 23, 2009 may be required to attach their tax returns to the FBAR filings. We request that these individuals not be required to submit an amended tax return. Because the individual tax returns have already been filed, these individuals should not have to file an amended Schedule B merely to state that they technically have signature or other authority over a foreign account. These individuals would not need to make income tax or other amendments to the tax returns because they do not have any financial interest in a foreign account.