October 6, 2009

Via Electronic Mail

Douglas H. Shulman
Commissioner
Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2009-62)
Room 5203
P.O. Box 7604
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: FBAR Issues for Investment Advisers Registered with the SEC, Notice 2009-62

Dear Commissioner Shulman:

The Investment Adviser Association (IAA)[1] appreciates the opportunity to comment on the filing requirements under the Report of Foreign Bank and Financial Accounts, Form TD F 90-22.1 (FBAR) as they relate to investment advisers registered with the US Securities and Exchange Commission (SEC) and their officers and employees. On July 31, 2009, the IAA submitted a letter to Treasury seeking guidance on the filing requirements for certain investment advisory personnel and directors and officers of US funds managed by SEC-registered investment advisers and expressing our concerns that filings by these persons would be redundant and unnecessary to further the Treasury Department's goals of uncovering abusive tax schemes and combating money laundering.[2]

The IAA was pleased that the IRS published Notice 2009-62 on August 7, 2009, extending the FBAR filing date for certain persons and requesting public comments on FBAR filings requirements. Specifically, the Notice provided administrative relief extending the filing deadline (1) for persons with no financial interest in a foreign financial account but with signature or other authority over the foreign financial account and (2) for persons with a financial interest in, or signature authority over, a foreign financial account in which the

[1] The IAA is a not-for-profit association that represents the interests of investment adviser firms that are registered with the SEC. 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] Letter from Jennifer S. Choi, Assistant General Counsel, IAA, to Commissioner Douglas H. Shulman, on July 31, 2009 (July 2009 IAA Letter) (a copy of the letter is attached).

assets are held in a commingled fund. Treasury intends to issue regulations clarifying the FBAR filing requirements pertaining to these persons and is soliciting comments related to the FBAR filing requirements.

Consistent with the July 2009 IAA Letter, the IAA strongly supports the Treasury Department's efforts to clarify the FBAR filing requirements for those persons described in the IRS notice. As suggested by the IRS in its notice, we recommend that the exception currently available for officers and employees of banks and certain publicly traded domestic companies be expanded. This exception should apply to all officers and employees of SEC-registered investment advisers who have only signature authority over (but no financial interest in) foreign financial accounts in which client assets managed by their employers are held. Moreover, as specifically raised in the IRS notice, we submit that when a person, due to the nature or scope of his or her employment, has signature or other authority over (but no financial interest in) a foreign financial account, that person should be relieved of filing an FBAR for that account if a person with a financial interest in the account has filed an FBAR.

These exceptions to the FBAR filing requirement would address the concerns the IAA expressed in its earlier letter regarding the filing obligations of investment advisory personnel and directors or officers of US funds who may have signature or other authority over (but no financial interest in) foreign financial accounts solely as a result of their employment with their SEC-registered investment advisory firms or their position with funds managed by a SEC-registered investment adviser.

Bank Employees Exception Should be Extended to Employees of SEC-Registered Investment Advisers

SEC-registered investment advisers manage assets for a variety of institutional and individual clients. For clients that have international assets in their portfolios, the IAA is concerned that employees of a registered adviser may be deemed to have signature or other authority over the foreign financial accounts in which the non-US assets of such clients are held. We believe that, in those situations where an FBAR has been filed on behalf of a foreign financial account, officers and employees of investment advisory firms who may be deemed to have signature or other authority over the client's account while acting within the scope of their employment should not be required to file a separate FBAR.

To illustrate our concerns, we discuss two specific situations where employees of advisers may have to submit FBAR filings because of the authority provided to them within the scope of their employment.

First, many IAA members provide investment management services to pooled investment vehicles that are domiciled or organized in the United States ("Funds"). These Funds typically do not have any employees of their own (but may have directors and officers). Instead, the Funds are managed by separate service providers, including an investment adviser. Funds that invest abroad may have financial interests in the foreign custodial accounts where the Fund's non-US assets are held, and these Funds would need to make FBAR filings as appropriate. Therefore, information regarding a Fund's foreign financial

accounts and the Fund's financial interest in those accounts are already being provided to Treasury. In these circumstances, information from the individual employees of investment advisers who may have signatory or other authority over (but no financial interest in) the foreign financial accounts would inundate the Treasury with information that would be of no real value. Requiring annual FBAR filings by such employees of advisers would impose a significant burden on these individuals without providing any useful additional information.

Second, we believe the circumstances in which SEC-registered investment advisers manage separate accounts for individuals and institutions present similar issues. For these types of accounts, the investment manager provides portfolio management services to the client accounts. The clients typically hire a separate financial institution to act as custodian and safekeep their assets. These custodial arrangements are negotiated directly between the client and the custodian (including the foreign accounts that may be necessary to hold foreign securities). In these circumstances, the investment managers may only direct the custodian as permitted by the terms of the applicable investment advisory agreement, in accordance with the procedures established by the client and the custodian.

Nonetheless, in certain separate account situations, employees of the investment advisory firm may be considered to have signature or other authority over foreign financial accounts of their clients because of particular terms provided in the advisory contract. We believe these employees should not be required to file a separate FBAR if the custodians or the clients have submitted an FBAR for the foreign financial accounts.[3] As stated above, information regarding these clients' foreign accounts would have been provided to Treasury and the information provided by individual employees of registered advisers who may have signature or other authority because of their employment would not provide Treasury with useful additional information.

The situations described above illustrate how certain employees of investment advisers may be required to submit FBAR filings only because they may have signatory or other authority over (but no financial interest in) foreign financial accounts while acting solely within the scope of their employment with the adviser. We are concerned that a requirement to make individual FBAR filings and the potential penalties for failing to submit FBAR filings impose an unreasonable burden on these individuals especially given that Treasury already receives information regarding the foreign financial accounts. Therefore, we believe extension of 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" that maintains a foreign bank, securities, or other financial account, over which the employee has signature or other authority and in which he or she has no personal financial interest would be appropriate for employees of SEC-registered investment advisers.

[3] We understand that US custodial banks that act as global custodians for investor assets outside the US typically hold cash and securities for clients in omnibus accounts. In certain jurisdictions, cash and securities accounts are required to be in the name of the client. For both omnibus and segregated accounts, we understand that the custodians file FBARs for those accounts because they have, respectively, financial interest in or signature authority over those accounts.

Moreover, similar to bank personnel, employees of SEC-registered investment advisers are subject to extensive controls and regulatory oversight. As discussed in more detail in the July 2009 IAA Letter, employees of SEC-registered investment advisers are closely supervised by their employer, and are subject to oversight by the SEC, to ensure that the employees' activities are in compliance with all applicable laws and other legal obligations.[4]

As recognized by Treasury in the context of a bank examined by a federal regulatory agency, the Treasury's goal of tackling tax fraud or combating money laundering would not be furthered by requiring an employee of a regulated entity who has signature or other authority over (but no financial interest in) a foreign financial account within the scope of his or her employment to file a separate FBAR. As in the case of federally regulated banks, US persons, such as US funds, other US clients of investment advisers, and global custodian banks, would make their own FBAR filings as appropriate. As a result, Treasury would have all the relevant information both in the case of accounts maintained by federally-regulated banks and of funds and separate accounts managed by SEC-registered investment advisers.

Certain Other Persons with Signature or Other Authority Over (But No Financial Interest In) a Foreign Account Should be Relieved of Filing an FBAR If an FBAR Has Been Filed by a Person with a Financial Interest for the Account

The IAA requests that certain other persons who may have signature or other authority over (but no financial interest in) a foreign financial account be relieved of filing an individual FBAR if an FBAR has been filed by a person with a financial interest in the account. As described in the July 2009 IAA Letter, pooled investment vehicles that are domiciled or organized in the United States typically do not have employees of their own except they may have directors and officers of the fund. Certain directors or officers of these 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. As with employees of the investment adviser that manages these funds, these individuals do not have any financial interest in those accounts.

For the reasons described above for investment advisory personnel, we believe it would not further the Treasury's goals to require separate filings by these directors and officers of the fund because the filings would not provide any additional information to Treasury. As US persons, these funds that invest abroad and have financial interests in foreign financial accounts would make FBAR filings as appropriate.[5]

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[4] *See supra* note 2 at page 3.

[5] Directors and officers of non-US private funds and employees of managers of those funds may be subject to similar FBAR filing obligations, which 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.

Because Treasury will receive all the relevant information from FBAR filings submitted by those with a financial interest in foreign financial accounts, we also request that directors and officers of US funds who may have signature or other authority be exempt from submitting their own individual FBAR filings.[6]

Proposed Alternative to Individual FBAR Filings

If, for some reason, Treasury does not provide an exception to employees of SEC-registered investment advisers and to officers and directors of US funds, we offer an alternative for your consideration.

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 funds that they manage who may have signature or other authority over (but no financial interest in) foreign financial 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.[7] We believe that a consolidated FBAR filing would provide the same information as individual filings and also allow Treasury to review the information more easily through a single, comprehensive 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 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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The IAA strongly supports the Treasury's efforts to obtain all the relevant information necessary to take action against tax evaders and to monitor for money laundering. We also support its efforts to clarify the FBAR filing obligations and make the requirements more

[6] We also believe that there is no policy reason to require US persons who may have signature or other authority over (but no financial interest in) foreign financial accounts of non-US funds that are not marketed or sold to US persons to file an FBAR. The IRS would have no policy interest in receiving information regarding accounts that are not for the benefit of any US person. In these circumstances, US persons with signature or other authority are filing FBARs purely for technical compliance. We recommend that when foreign financial accounts are not for the benefit of US persons, US persons who may have signature or other authority over (but no financial interest in) such foreign financial accounts should not have to file an FBAR.

[7] Individuals using the extension provided by the IRS to file by June 30, 2010 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.

efficient. We believe that the recommendations outlined above further those goals. Moreover, these recommendations will alleviate any unnecessary burden on individuals from having to submit their own FBAR filings in circumstances where a US person with a financial interest in a foreign account already has filed an FBAR, and the obligation only arises from the individual's official position. Our proposal would enable Treasury to focus on key risk data without being overwhelmed with duplicative information.

We appreciate the opportunity to provide our views on this issue and would be pleased 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

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