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By Electronic Delivery

James H. Freis, Jr.
Director
Financial Crimes Enforcement Network
U.S. Department of the Treasury
1500 Pennsylvania Avenue
Washington, DC 20220

RE: *Proposed Regulations Applying Foreign Bank Account Reporting (RIN 1506-AB08) to Persons Providing Services to Registered Investment Companies*

Dear Mr. Freis:

The Investment Company Institute[1] ("ICI") appreciates the steps that FinCEN has taken to address the industry's concerns regarding reporting by certain individuals of foreign accounts owned or maintained by investment companies ("regulated funds") that are registered with the Securities and Exchange Commission ("SEC") under the Investment Company Act of 1940 ("the 1940 Act").[2] We urge that individuals who are employees of firms that provide services to regulated funds, and who have signature or other authority (hereafter "signature authority") over a regulated fund's foreign accounts but no financial interest in those accounts, not be required individually to file Form TD F 90-22.1 -- Report of Foreign Bank and Financial Accounts (the "FBAR").

Our request should be adopted because, among other reasons, the authorization provided to the Treasury Department by the Bank Secrecy Act ("BSA") to require reporting of foreign accounts is limited to situations in which such reports "are determined to have a high degree of usefulness in criminal, tax, regulatory, and counterterrorism matters."[3] Given the extensive oversight of regulated

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[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $11.66 trillion and serve almost 90 million shareholders.

[2] 15 U.S.C. sections 80a-1 *et seq*.

[3] 31 U.S.C. section 5311.

funds by the SEC, under both the 1940 Act and the BSA, we submit that the reports that would be filed by these individuals do not provide the necessary degree of usefulness. Indeed, as discussed below and in our prior submissions,[4] these reports merely would duplicate the reports that the regulated funds are required to file.

FinCEN's notice of proposed rulemaking ("NPRM"), published in the Federal Register as RIN 1506-AB08 on February 26, 2010,[5] addresses the industry's concerns in part. First, we are pleased that the proposed regulations provide an FBAR filing exception for an employee of an "Authorized Service Provider" who has signature or other authority over a foreign financial account owned or maintained by a regulated fund. We also are pleased by the FBAR filing exception for officers of financial institutions, such as regulated funds, that are registered with and examined by the SEC. These filing exceptions, which we support strongly, will address many of the industry's concerns.

We urge that the definition of Authorized Service Provider be expanded, however, so that the filing obligations imposed by the regulations will be fully consistent with the statutory requirement that the reports have a high degree of usefulness. In particular, as discussed below, filing relief should be extended to employees of service providers to regulated funds, with respect to accounts owned or maintained by the regulated funds, whether or not the service providers are regulated by the SEC. This guidance will provide the industry with the relief contemplated by the proposed regulations.[6]

In addition, we urge simplified reporting standards to ensure that any FBAR filings provide FinCEN with all of the information that it needs but without redundant or overly-comprehensive filings that burden the industry. These suggestions also are discussed below.

<u>Expanding the Authorized Service Provider Exception</u>

Background – Employees with Signature Authority over Fund Accounts

Funds are organized by fund management companies to provide collective investment opportunities. As noted by the NPRM[7] and discussed in detail in our January 2009 submission, a regulated fund typically does not have any employees of its own. Instead, it relies upon service providers to ensure that the regulated fund operates for the benefit of its investors and complies with all applicable laws and regulations.

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[4] *See, e.g.,* Investment Company Institute letter to James H. Fries and Jamal El-Hindi, dated January 15, 2009.

[5] 75 Fed. Reg. 8844 (Feb. 26, 2010).

[6] As discussed below, the Authorized Service Provider exception was provided "to address the fact that mutual funds do not have employees of their own." 75 Fed. Reg. at 8848.

[7] *Id.*

The fund manager may be a stand-alone investment adviser or part of a larger financial services firm. In the typical case, the fund manager will work in conjunction with affiliated and unaffiliated companies to provide services to the funds it has organized. These other service providers, depending on their functions, may or may not be registered directly with the SEC. For example, the affiliates providing investment advice, transfer agency and distribution (broker-dealer) services will be registered with the SEC, while the service company providing "back office support" (such as accounting and fund administration) may not be so registered.

FinCEN previously has recognized, in the anti-money laundering ("AML") context, that regulated funds conduct their operations through service providers that may not be registered with a federal regulator.[8] Regulated funds are permitted contractually to delegate the implementation and operation of their AML program to a service provider – whether or not the service provider itself is subject to SEC regulation – so long as the fund "obtains written consent from the third party ensuring the ability of federal examiners to obtain information and records . . . and to inspect the third party for purposes of the program."[9] In addition, where a regulated fund makes such a delegation, the regulated fund "remains responsible for assuring compliance" with the AML requirements. and must "develop and implement a program reasonably designed to achieve compliance with the [BSA] regulatory requirements."[10] Thus, whether or not the service provider is itself regulated by the SEC, the service provider has consented to federal examination for purposes of the AML program and the fund remains responsible for compliance with the BSA.

The operations of a regulated fund, regardless of whether the service providers register directly with the SEC, also are subject to significant substantive securities law requirements. The 1940 Act governs a regulated fund's structure and operations by imposing restrictions on the fund's investments and requiring that the fund, among other things, maintain detailed books and records, safeguard portfolio securities, and file periodic reports with the SEC. The Investment Advisers Act of 1940 (the "Advisers Act")[11] provides a regulatory regime for investment advisers, including advisers to regulated funds. Requirements under the Advisers Act include those relating to recordkeeping, conflicts of interest, reporting and other regulatory responsibilities.

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[8] 67 Fed. Reg. 21117, 21119 (April 29, 2002).

[9] *Id.* These rules apply only to open-end investment companies ("mutual funds").

[10] *Id.* FinCEN has issued several other BSA rules that are directed to mutual funds. *See Customer Identification Programs for Mutual Funds,* 68 Fed. Reg. 25131 (May 9, 2003); *Amendment to the Bank Secrecy Act Regulations—Requirement That Mutual Funds Report Suspicious Activity,* 71 Fed. Reg. 26213 (May 4, 2006); *Anti-Money Laundering Programs; Special Due Diligence Programs for Certain Foreign Accounts,* 71 Fed. Reg. 496 (Jan. 4, 2006); *Anti-Money Laundering Programs; Special Due Diligence Programs for Certain Foreign Accounts,* 72 Fed. Reg. 44768 (Aug. 9, 2007).

[11] 15 U.S.C. sections 80b-1 *et seq*.

The custody requirements of the 1940 Act are particularly robust. Specifically, funds are required to maintain strict custody of their assets, separate from the assets of the adviser. Nearly all regulated funds utilize bank custodians. The typical custody arrangement for a regulated fund is far more elaborate than that used for other bank clients. The custodian's services generally include safekeeping and accounting for the regulated fund's assets, settling securities transactions, receiving dividends and interest, providing foreign exchange capabilities, paying fund expenses, reporting failed trades, reporting cash transactions, monitoring corporate actions and tracing loaned securities. These strict custody rules protect the regulated fund's investors.

The SEC examines regulated funds and their registered service providers for compliance with the federal securities laws. Under a recently issued final rule, SEC examiners also are tasked with ensuring compliance by mutual funds with the BSA, including the filing of reports regarding foreign accounts.[12] SEC examiners could be tasked as well with ensuring compliance by regulated funds and their registered advisers with FBAR. Examination authority already has been delegated by FinCEN to the SEC to ensure FBAR compliance by broker-dealers.

The NPRM's Authorized Service Provider Exception

FBAR reporting is not required, under the NPRM's authorized service provider exception, for "[a]n officer or employee of an Authorized Service Provider . . . that has signature or other authority over a foreign financial account owned or maintained by an investment company registered with the [SEC] if the officer or employee has no financial interest in the account." The phrase "Authorized Service Provider" is defined in the proposed regulations as "an entity that is registered with and examined by the [SEC] and that provides services to an investment company registered under the Investment Company Act of 1940."

This exception was provided, according to the NPRM,[13] "to address the fact that mutual funds do not have employees of their own." Officers or employees of an Authorized Service Provider may utilize this exception without receiving notice from the employer that the employer has filed FBARs "provided that the fund they service is also registered with the [SEC]."[14]

Need for the Requested Expansion

The expanded guidance that we request herein is necessary because, as noted above, some employees affiliated with the fund management company may not be employed directly by a firm that itself is registered with the SEC. Employees of the typical services company that may not register with

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[12] 75 Fed. Reg. 19241 (April 14, 2010).

[13] 75 Fed. Reg. at 8848.

[14] *Id.*

the SEC will include accounting staff and back-office employees who are responsible for allocating cash to pay for a fund's expenses and other administrative duties that require disposition of the fund's assets. Absent additional filing relief, thousands of persons providing services to regulated funds will remain subject to FBAR's filing requirements, even though those filings will not have the "high degree of usefulness" that the statute contemplates.

Importantly, the controls over individuals with signature authority over a regulated fund are identical, in all relevant respects, whether the person is employed by a subsidiary of the fund management company that is registered with the SEC or by a related subsidiary (such as a service company) that is not so registered. In both situations, the extensive securities laws applicable to the regulated fund's assets adequately safeguard the assets from being used for improper purposes. In addition to the custody requirements over a regulated fund's assets (which include cash received and disbursed), the funds must satisfy the U.S. securities laws that govern the investment of the fund's assets in conformance with its prospectus. Similarly, the BSA requirement that a service provider to a mutual fund agree to federal inspection and the fund's obligation to ensure BSA compliance are exactly the same whether or not the service provider is registered with the SEC.

Moreover, the benefits (such as eliminating redundant filings) that FinCEN foresaw in providing the authorized service provider exception arise equally in both situations. The regulated fund itself, for example, will make all applicable FBAR filings. Thus, the expanded guidance that we request would reduce burdens for the government, fund service providers, and their employees; the FBAR's purposes of thwarting abusive tax schemes and combating terrorism and the Treasury Department's goals for improving compliance would not be impacted negatively.

Finally, the requirement that the employee with signature authority work for an SEC-registered firm seems inconsistent with the general employee exception, which applies both to all domestic corporations the shares of which are registered with the SEC – whether or not the company itself is regulated directly by the SEC – and to the employees of the corporations' domestic subsidiaries. Because of the extensive securities law regulation of funds registered under the 1940 Act (including the custody requirements discussed above), the activities of employees of fund service providers are more highly regulated than the activities of employees who benefit from the general employee exception.

Consequently, we repeat the suggestion that we made in January 2009 that an "authorized service provider" be defined as "an entity that provides services to an investment company registered under the Investment Company Act of 1940 and for which one or more employees of the service provider have signature or other authority for one or more such investment companies."

Simplified Reporting by Persons with Authority Over 25 or More Foreign Financial Accounts

The ICI also supports strongly the provision in the proposed regulations that any person who has signature authority over 25 or more foreign financial accounts, but who is not eligible for one of the reporting exceptions, need provide only the number of financial accounts and certain other basic

information for each person for which the filer has signature authority. Detailed additional information would be required for each account, however, if requested by the Treasury Secretary or his delegate.

Finally, ICI urges that additional consolidated reporting relief be provided to funds organized by the same fund manager. Specifically, all foreign financial account information for all funds in this same fund "family" should be reportable in a single consolidated FBAR filing. Detailed information regarding the accounts of each fund in the fund family would be provided, upon request, to the Treasury Secretary or his delegate.

III. Conclusion

We support strongly the steps taken by FinCEN in the NPRM to provide an FBAR reporting exception for fund service provider employees. Our requests for expanding the guidance will further FBAR's objectives without diminishing in any way FBAR's effectiveness.

We also support the simplified reporting requirements included in the NPRM. Our requests to simplify further the FBAR reporting regime will reduce the reporting burdens of concern to the industry without diminishing the reporting regime's effectiveness.

Please contact the undersigned at 202-326-5832 if you have any questions regarding this letter or you would like additional information regarding the organization or operation of funds registered under the 1940 Act or their service providers.

Sincerely,

/s/ Keith Lawson

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