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April 27, 2010

By Electronic Delivery

James H. Freis, Jr.
Director
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: Comments on Proposed Amendment to Bank Secrecy Act Regulations – Foreign Account Reporting (RIN 1506-AB08)

Dear Director Freis:

We represent a coalition (the "Coalition") of public and private employee benefit pension plans, plan sponsors, and plan service providers. Included in this Coalition is the Committee on the Investment of Employee Benefit Assets ("CIEBA").[1] Together, the members of the Coalition are responsible for investing and safeguarding trillions of dollars in assets intended to provide retirement security for millions of working Americans. On behalf of the Coalition, we write to provide comments to the Financial Crimes Enforcement Network ("FinCEN") regarding the proposed amendments to the Bank Secrecy Act regulations addressing the "Report of Foreign Bank and Financial Accounts" (commonly referred to as "FBAR") published on February 26, 2010 (75 Fed. Reg. 8844) (the "Proposed Regulations").

As discussed in detail below, the policy goals of the foreign account provisions of the Bank Secrecy Act – to detect and prevent taxpayers from hiding assets offshore to avoid income taxes or launder money – are not advanced by requiring U.S persons to file FBAR with respect to "foreign financial accounts" held by or for the benefit of employee benefit pension plans, voluntary employee beneficiary associations ("VEBAs"), and individual retirement accounts

[1] CIEBA is the voice of the Association of Financial Professionals on employee benefit plan asset management and investment issues and is a nationally recognized forum for ERISA-governed corporate pension plan sponsors on fiduciary and investment matters. CIEBA represents more than 115 of the country's largest retirement funds. Its members are the senior corporate financial officers who individually manage and administer corporate retirement plan assets. CIEBA members manage $1.4 trillion of defined benefit and defined contribution plan assets on behalf of approximately 16 million participants and beneficiaries.

("IRAs," and collectively, "Plans").[2] Moreover, preparing the multitude of duplicative Plan-related FBAR filings is an expensive and time consuming process that is unduly burdensome to Plans, which generally lack ready access to the information needed to file FBAR. Thus, we respectfully request that FinCEN:

- Exempt U.S. persons from any obligation to report their financial interest in or signature or other authority over a foreign financial account maintained or held, directly or indirectly, by a Plan; and

- Retain the clarification in the Proposed Regulations that FBAR need not be filed by any person with respect to employee retirement or welfare benefit plans of a governmental entity ("Governmental Plans").

If FinCEN is unwilling to grant a complete exemption for U.S. persons with a covered relationship to a Plan's foreign financial account(s), we request that, at the very least, FinCEN limit the number of FBAR filings that must be made with respect to Plan investments by, for example, requiring only a single filing by the Plan's trust. We further request that FinCEN provide guidance with respect to the difficult interpretive issues raised by the Proposed Regulations, which are discussed in Part III of the Comments section of this letter.

BACKGROUND

As long-term investment programs exempt from taxation, Plans are subject to an extensive and comprehensive regulatory scheme under the Code and the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The Code sets strict controls on the flow of money into and out of Plans. *See, e.g.*, Code §§ 401(a)(9) (required distributions); 401(a)(13) (prohibition on assignment and alienation); 404(a) (deduction limitations). Persons responsible for the managing of Plan assets are subject to ERISA's stringent fiduciary duties – among the highest established under law – that require prudent management and prohibit related-party transactions and self-dealing. ERISA §§ 404, 406. ERISA also requires that Plan fiduciaries diversify the assets of the Plan so as to minimize the risk of large losses. ERISA § 404(a)(1)(C). Plan fiduciaries frequently seek to fulfill this mandate by investing in non-U.S. markets. In this regard, ERISA includes special rules regarding the holding of foreign securities by ERISA-covered Plans. ERISA section 404(b) generally requires that Plan fiduciaries hold the "indicia of ownership" of foreign investments within the jurisdiction of U.S. courts. While typically not subject to ERISA, IRAs are subject to substantially identical prohibited transaction rules under the Code as apply to ERISA-covered Plans. Code § 4975.

[2] All the Plans discussed in this letter are entities described in section 402(c)(8) or 501(c)(9) of the Internal Revenue Code of 1986, as amended (the "Code").

Most Plans covered by ERISA are also required to file Form 5500 annually. Form 5500 is filed with IRS and other agencies and contains disclosures regarding Plan participants, investments, assets, service provider arrangements, insurance contracts, prohibited transactions, and the Plan's funded status. These Plans must also submit financial statements along with Form 5500 that have been audited by a certified public account in compliance with Generally Accepted Accounting Principles. The persons filing Form 5500 must sign a penalty of perjury statement, and there are significant penalties for failure to file.

Plan service providers, too, are subject to a multitude of federal and state regulation governing their conduct with respect to Plans and in managing Plan assets. For example, custodians and other financial institutions are regulated by federal and/or state banking laws that control the holding and management of client assets and frequently require extensive reporting and routine compliance audits. Financial institutions generally are also subject to the recordkeeping requirements of the Bank Secrecy Act, the anti-money laundering and anti-terrorism provisions of the USA PATRIOT Act (the "Patriot Act"), and certain customer identification requirements. *See, e.g.,* 31 U.S.C. § 5318(h); 31 C.F.R. §§ 103.121, .122. Similarly, insurance companies are highly regulated and monitored at the state level, and investment service providers, such as investment managers, advisers and investment funds, may be required to comply with a variety of federal laws, including, among other things, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Commodity Exchange Act.

Over the past three decades, Plans gradually have become more focused on international investment opportunities and, as a general matter, have increased their investments outside of the U.S. In addition, the types of investments available to Plans that may involve foreign financial accounts have also expanded. For instance, Plan fiduciaries may elect to accomplish certain types of investment objectives (both foreign and domestic) by investing through "feeder" funds located outside of the U.S. in order to minimize administrative expenses. For example, where a Plan fiduciary determines that a manager may make investments that could trigger unrelated business income tax (*e.g.*, investments employing leverage), such investments are frequently made through an offshore investment fund that "feeds" into a domestic master fund. Notably, feeder funds are still required to file and pay U.S. taxes (*i.e.*, effectively connected income tax), but the administrative burden and costs on Plans is significantly reduced as taxes are reported and paid by the feeder fund and not each individual investor.

In recent years, service providers, such as custodians, trustees, and investment managers have facilitated Plans' foreign investment by establishing foreign brokerage, securities, and sub-custody accounts all over the world. For example, U.S. financial institutions frequently utilize vast, world-wide custody networks for their Plan clients. These custody networks include large numbers of sub-custody accounts that are opened with either unrelated foreign financial institutions or, in some cases, foreign branches or affiliates of U.S. financial institutions. The record ownership of sub-custody accounts depends on local law and the practice of each

particular financial institution, but sub-custody accounts will generally be opened either in (i) the Plan client's name or (ii) the financial institution's name as "omnibus" accounts for multiple clients. Plans generally have no direct right to deliver instructions to a sub-custodian to transfer assets to or from sub-custody accounts, regardless of who the record owner of the sub-custody account is. We are aware that some financial institutions routinely open sub-custody accounts all over the world on behalf of their Plan clients to facilitate potential future investments, even though some or all of these sub-custody accounts may not be used by Plans during a given calendar year.

COMMENTS

As a preliminary matter, we commend FinCEN for taking steps to address Plan-related FBAR issues in the Proposed Regulations. In particular, we support FinCEN's decision to create an exception to the FBAR filing requirements for owners and beneficiaries of IRAs and participants and beneficiaries in retirement plans described in Code sections 401(a), 403(a), and 403(b). We think these exceptions are helpful in reducing the overall burden of the FBAR filing obligation without having any negative effect on the availability of information to FinCEN and IRS. However, we remain concerned that the application of the FBAR rules in the Proposed Regulations would impose substantial costs on Plans without providing any appreciable benefit to the government.

Thus, on behalf of the members of the Coalition, we respectfully submit the following comments for consideration by FinCEN:

I. FinCEN should exempt *all* Plan-related filers.

We respectfully request that FinCEN exempt *all* U.S. persons from any obligation to report their "financial interest in" or "signature or other authority over" a "foreign financial account" maintained or held, directly or indirectly, by a Plan. Below, we discuss the basis for our request, namely that requiring Plan-related filings (i) does not further the purposes of the Bank Secrecy Act and (ii) is costly and burdensome for Plans.

A. Purposes of Bank Secrecy Act are not furthered by Plan-related filings.

The primary purpose of the Bank Secrecy Act – and by extension FBAR – is to "furnish American law enforcement authorities with the tools necessary to cope with the problems created by so called secrecy jurisdictions… [w]hich simply do not recognize cheating on taxes, violations or securities laws, and many other acts as criminal." H.R. Rep. No. 91-975 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4394, 4405. Congress was particularly concerned that foreign financial institutions were being used to avoid U.S. laws and, in particular, to evade income taxes, conceal assets illegally, and finance organized crime. *Id.* at 4397. These purposes are

not furthered by requiring Plan-related FBAR filings because Plans pose virtually no risk of tax evasion or money laundering.

Plans are long-term investment programs exempt from income taxation and subject to extensive regulation under the Code and ERISA. Together, the Code and ERISA form a comprehensive regulatory scheme that is specifically designed to ensure that Plans are administered for their intended purpose (*i.e.*, to provide retirement benefits for participants and beneficiaries) by placing rigorous controls on nearly all aspects of Plan administration, including Plan participation, contributions to and distributions from Plans, and the management of Plan assets. In fact, Plan fiduciaries generally have no authority to distribute assets from the trust other than to pay benefits or the reasonable expenses of administering the Plan. Plans also are subject to a number of reporting and disclosure requirements. For example, ERISA-covered Plans must disclose information about plan administration, investments, service provider relationships, and their finances on Form 5500, which is filed annually. Plans also are required to: report transfers of property to foreign corporations and partnerships (Form 926 and Form 8865), report certain interests in foreign corporations (Form 5471), and file returns with respect to passive foreign investment companies (Form 8621). Compliance with the regulatory scheme imposed on Plans is overseen by a number of federal agencies, including IRS, the Department of Labor, and the Pension Benefit Guaranty Corporation. These agencies routinely conduct compliance audits and bring enforcement actions. Financial institutions that provide services to Plans ensure that Plans are not used for illicit purposes as financial institutions are required by the Patriot Act to have anti-money laundering programs and to report suspicious activity. Because Plans pose virtually no criminal threat, requiring Plan-related FBAR filings provides virtually no information that would be useful to Treasury in detecting and preventing the crimes that are the focus of FBAR reporting.

It is telling that in the Foreign Account Tax Compliance Act ("FATCA") – the most comprehensive legislation in decades aimed at combating tax evasion – Congress has specifically created an exception to the foreign account reporting requirements for Plans and other tax-exempt entities. Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, sec. 501, et. seq.; Code § 1471, et. seq. Specifically, FATCA provides that a "Foreign Financial Institution" ("FFI") is not required to withhold 30% of the proceeds of certain payments if the FFI enters an agreement with IRS to provide IRS with information about "United States Accounts," including the name of the account holder, the account number, and the account balance. Code § 1471(a)-(c). "United States Account" is defined to include foreign financial accounts held by "specified United States persons." Code § 1471(d). Importantly, organizations exempt under Code section 501(a) (*e.g.*, retirement plans qualified under Code section 401(a)) and individual retirement plans are specifically excluded from the definition of "specified United States person." Code § 1473(3)(c). Thus, an FFI need not report information about retirement Plans to IRS to avoid the 30% withholding requirement under FATCA. Presumably, Congress fashioned this exception for Plans recognizing that Plans are tax-exempt and pose virtually no risk of tax evasion or money laundering.

B. High cost of information gathering for FBAR compliance.

The FBAR filing requirements impose significant administrative costs on Plans. As a general matter, the person or persons primarily responsible for the administration of a Plan will not have ready access to a list of all of their Plans' "foreign financial accounts." This is because Plans are institutional investors with diverse portfolios managed by dozens of internal and external investment managers, and each of those managers may have investments that are foreign financial accounts. Further, Plan services providers (*i.e.*, institutional trustees, investment managers, broker-dealers) frequently establish financial accounts on behalf of various Plan clients in foreign jurisdictions as a matter of course in order to facilitate the Plans' international investments. Thus, in many cases, the Plan administrator (or the person responsible for regulatory filings) will have no knowledge of all of the Plan's foreign financial accounts and cannot readily identify foreign financial accounts by reviewing the Plan's portfolio. Rather, the person compiling information for the FBAR filing must send information requests to the Plan's investment service providers, most of which have no automated system for identifying plan-related foreign financial accounts and reporting the necessary information to the Plan and are unable to provide the Plan with a legal opinion as to what investment-related products and services constitute a foreign financial account for FBAR purposes.

After identifying foreign financial accounts, Plans must determine which persons have a relationship to the foreign financial accounts that triggers an FBAR filing. As with most institutional investors, Plans are typically managed and administered by a large number of people, so under the broad definitions of "financial interest" and "signature or other authority" in the Proposed Regulations, dozens of Plan-related FBAR filings could be required. For example, a single investment in a foreign financial account could trigger FBAR filings for (i) the trust under the Plan; (ii) the Plan's trustees, which may be a financial institution or a board comprised of corporate employees and/or union members; (iii) each member of the Plan's investment and/or administrative committees; (iv) the Plan's investment managers; (v) the Plan's custodians; (vi) the company and/or union that established and maintains the Plan and trust; and (vii) various officers, employees, and/or members of the Plan sponsor. Importantly, each Plan-related FBAR filing will contain virtually identical information, and where a person has two roles with respect to a Plan, he or she may be required to file two identical FBARs (*e.g.*, where a trustee files FBAR for its own interest in a Plan's foreign financial account as well as on behalf of the Plan's trust).

The costs of coordinating the FBAR filings for multiple parties can be significant, particularly in light of the fact that Plans may experience routine personnel and/or service provider changes many times during each calendar year. And the costs of this compliance process are frequently paid with dollars that would otherwise be used to pay retirement benefits to participants and beneficiaries of the Plans.

In addition to the substantial direct costs, the FBAR reporting requirement also imposes indirect costs because it discourage qualified people from working with Plans in the future. Corporate officers, employees, and union members, for example, may simply be unwilling to accept Plan-related responsibilities if such responsibilities could subject them to the FBAR reporting requirements because (i) the potential penalties for failing to file (or incorrectly filing) are significant, and (ii) there is a myriad of unresolved interpretive issues (some of which are discussed below). The FBAR filing obligation also triggers reporting on individual tax returns that could subject those working with Plans to penalties under the Code. Often, these burdens go far beyond what those working with Plans can reasonably be expected to bear.

C. Proposal for complete Plan-related exemption.

In light of the costs of FBAR compliance and lack of any public policy justification, we respectfully request that FinCEN exempt U.S. persons from any obligation to report their financial interest in or signature or other authority over a foreign financial account maintained or held, directly or indirectly, by a Plan. As you are aware, Congress granted Treasury broad power to exempt persons from the FBAR reporting requirements under 31 U.S.C. § 5134(b). That authority was specifically intended to prevent burdensome and valueless filing requirements like those imposed on Plans by FBAR. H.R. Rep. No. 975, 91st Cong., 2d. Sess. 1970, 1970 U.S.C.C.A.N. 4394, 4398 ("Obviously, the Secretary [of Treasury] could impose recordkeeping and reporting requirements which would create a substantial and harmful burden on the free flow of legitimate international commerce or could result in a requirement of much valueless paperwork, but your committee has every confidence that he will not, especially in view of his broad powers of exemption.").

If FinCEN is unwilling to grant exemptive relief for all Plan-related FBAR filers, we requests that, at the very least, FinCEN curb the excessive burdens placed on Plans by limiting the scope of the filing requirements. One viable option would be to require an FBAR filing from the Plan's trust but exempt all other U.S. persons with a financial interest in or signature or other authority over a foreign financial account maintained or held, directly or indirectly, by a Plan. Such an exemption could be conditioned on the U.S. persons having no *personal* financial interest in the Plan's foreign financial account other than any interest that person may have as a participant or beneficiary of the Plan. The Proposed Regulations already grant analogous exceptions for officers and employees of certain banks, publicly traded corporations, and financial institutions registered with the SEC. In the preamble to the Proposed Regulations, FinCEN states that granting the exception would be "appropriate in light of the federal oversight of these entities." 75 Fed. Reg. 8848. The same logic should apply with respect to Plans, which as discussed above, are subject to a comprehensive and reticulated regulatory regime and stringent oversight by multiple federal agencies.

II. FinCEN should retain the exemptions for Governmental Plans in the Proposed Regulations.

We support FinCEN's decision to provide clarification that FBAR need not be filed by any person with respect to Governmental Plans. We think this clarification is necessary in light of the recent confusion and makes sense as a policy matter. In particular, requiring FBAR filings with respect to Governmental Plan investments would not further the goals of FBAR. As with private sector Plans, Governmental Plans are tax-exempt entities under the Code, and the management of Governmental Plan assets is regulated by state and/or local law requirements that often resemble ERISA. Additionally, Governmental Plans are subject to extensive oversight from state and/or local officials, and because considerable amounts of information are made available under state laws similar to the federal Freedom of Information Act, Governmental Plans are monitored by the general public. Therefore, like private sector Plans, Governmental Plans pose virtually no risk of tax evasion, money laundering, or other criminal activity with respect to the use of foreign financial accounts.

Complying with the FBAR filing requirements would impose substantial costs on Governmental Plans. As with private sector Plans, identifying foreign financial accounts and all of the persons who must file would be extremely difficult. Additionally, many Governmental Plans would face the added practical difficulty of coordinating FBAR filings with countless elected and appointed officials at all levels of government. For example, where a Governmental Plan holds assets in a segregated account within a government's treasury, high level executive and legislative officials may have sufficient power to dispose of assets of the treasury (either alone or in conjunction with other officials and/or staff) that would give them "signature or other authority" over a Governmental Plan's foreign financial accounts.

III. Interpretive Issues on which further guidance is needed.

We strongly recommend that FinCEN adopt a complete exemption for U.S. persons with a covered relationship to a Plan's foreign financial account as that approach is by far the best solution to the otherwise intractable set of problems and high costs that FBAR presents for Plans. However, if FinCEN is unwilling to grant this exemptive relief, then it is critical for FinCEN to provide specific guidance with respect to the interpretive issues discussed below.

A. Do Plan sponsors have a financial interest in Plan-related accounts?

The Proposed Regulations provide that a person has a "financial interest in" a "trust that was established by the person and for which the person has appointed a trust protector that is subject to the person's direct or indirect instruction." "Trust protector" is not defined in the Proposed Regulations. However, under the current FBAR instructions, a "trust protector" is "person who is responsible for monitoring the activities of a trustee, with the authority to influence decisions of the trustee or to replace, or recommend replacement of, the trustee."

The broad definition of "trust protector" in the current FBAR instructions appears to apply to every Plan's "named fiduciary" (as defined by ERISA section 402) who by operation of law bears ultimate authority for management of the assets in the trust and, in most cases, may replace – or recommend replacement of – the Plan's trustee. Thus under the current rules, Plan sponsors appear to have a financial interest in the foreign financial accounts of their Plans because Plans will almost universally have trusts for which a named fiduciary meeting the definition of "trust protector" has been appointed. This result is counter-intuitive because, as a practical matter, Plan sponsors have no personal financial interest in the foreign financial accounts of a Plan. Instead, the assets of the Plan are held for the exclusive benefit of Plan participants and beneficiaries and may not be distributed to the Plan sponsor, except in unusual circumstances (*i.e.*, Plan termination). Notably, both ERISA and the Code impose substantial penalties on fiduciaries that use the assets of the Plan to benefit the Plan sponsor. ERISA §§ 406(a), 407; Code §§ 4975, 4976.

We recommend that FinCEN either (i) define "trust protector" in a manner that excludes Plan sponsors or (ii) provide explicit guidance that Plan sponsors are not required to file FBAR merely by reason of having established a Plan trust.

B. Does a Plan trust or individual trustee have a financial interest in foreign sub-custody or securities accounts?

The Proposed Regulations provide that a person has a "financial interest" in a financial account when, among other things, the persons is (i) the owner of record or holder of legal title of the account or (ii) the owner of record or holder of legal title of the account is an agent nominee, attorney, or other person authorized to act on behalf of the person with respect to the account. The application of this rule is unclear in the context of certain custodial accounts, which are frequently established by institutional trustees and custodians to facilitate international investment by Plans.[3] In some cases, accounts are "omnibus" accounts established for multiple trust or custody clients. In other cases, institutional trustees and custodians are required by the law of foreign jurisdictions to "open" a new account in the Plan client's name, which may entail merely adding the Plan to the list of clients that *may* utilize the account.

Under the Proposed Regulations (and the current FBAR rules), a Plan trust may have a "financial interest" in foreign sub-custody accounts opened in the Plan's name because it is the record owner of the account. Similarly, an individual trustee may have a "financial interest in" a Plan's sub-custody account because it is a person acting on behalf of the Plan's trust. However,

[3] Subject to certain exceptions, most Plans are required to hold their assets in trust, and this is accomplished either by (i) hiring an institutional trustee (typically a bank or trust company) or (ii) appointing one or more individuals as trustees and holding Plan assets in a custody account established with a bank or other financial institution. *See, e.g.,* ERISA § 403.

as a practical matter, even where a Plan is the record owner of a foreign sub-custody account, Plan fiduciaries are rarely able to directly transfer assets into or out of the account. Instead, Plan fiduciaries move assets into and out of the foreign sub-custody account by directing the institutional trustee or custodian that established and maintains the sub-custody account. Many Plan fiduciaries are not even aware that sub-custody accounts are opened in the Plan's name. If reporting is required with regard to these accounts, the trust and the trustee(s) may be required to report large numbers of sub-custody accounts that they have no direct control over and no knowledge of. Additionally, in many cases, sub-custody or securities accounts contain no assets at any time during the calendar year, and it is not clear whether such empty accounts must be reported on FBAR.

In light of the foregoing, we ask that FinCEN clarify whether the trust of a Plan and/or individual trustees have a "financial interest" in foreign sub-custody accounts and whether "zero balance" accounts need not be reported on FBAR.

C. How are sub-custody accounts treated for purposes of determining who has signature authority over an account?

The Proposed Regulations state that a person will have "signature or other authority" where that person can control (alone or in conjunction with any other individual) the disposition of money, funds, or other assets held in a financial account by delivery of instructions directly to the financial institution (or other person performing the services of a financial institution) with which the financial account is maintained. However, it is not clear how this rule should be applied in the context of sub-custody accounts.

As noted above, sub-custody accounts are frequently established to facilitate international investment. Plans always have the authority over these foreign sub-custody accounts established by custodians or institutional trustees (*e.g.*, the authority to direct the custodian or trustee with respect to the account), but they are rarely able to directly transfer assets into or out of the account on their own. Similarly, Plan fiduciaries frequently hire investment managers to manage some or all of their Plans' assets, and those investment managers may invest in or through foreign financial accounts. Technically, Plan fiduciaries may have the authority to dispose of the assets of such financial accounts (*i.e.*, by liquidating the investments or otherwise closing accounts). However, as a practical matter, financial institutions maintaining a foreign account established by a manager will generally only act on directions from that investment manager. Therefore, Plans typically cannot, as a practical matter, directly dispose of the assets of such accounts.

We recommend that FinCEN clarify that a person has signature or other authority over an account only if that person has a direct, contractual relationship with the financial institution with which the account was established.

D. Who has signature or other authority when there is a corporate named fiduciary?

It is not clear if the tenuous authority of the directors, officers, and employees of a corporate named fiduciary would be considered "signature or other authority" under the Proposed Regulations. As discussed above, ERISA requires that each Plan have a "named fiduciary" that is responsible for the management and administration of the Plan. In some instances, the named fiduciary will be the corporation (or other entity) sponsoring the Plan. Frequently, large numbers of directors, officers, and employees have the authority to enter into transactions on behalf of a corporation. Thus, where a corporation is a Plan's named fiduciary, all of those officers, directors, and employees may arguably have the power to dispose of the assets of the Plan's foreign financial accounts and may have signature or other authority over the account. However, as a practical matter, most service providers would not accept instructions from every officer, director, or employee of a corporation without the consent of those persons that typically manage the assets of the Plan.

We recommend that FinCEN provide specific guidance limiting the reporting obligation where there is a corporate named fiduciary (as defined in ERISA section 402) to the corporation itself and exempt all officers, directors, and employees of that corporation (regardless of the size of the corporation and whether or not the directors, officers, and employees participate in the Plan).

E. Are private equity funds and hedge funds "foreign financial accounts"?

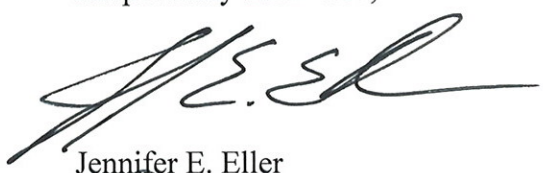
The Proposed Regulations specifically decline to address whether "other investment funds" (i.e., hedge funds and private equity funds) are "financial accounts" for purposes of FBAR. As noted above, Plans frequently invest in offshore "feeder" funds for legitimate administrative reasons. Therefore, whether these funds need to be reported is of critical importance to Plans.

In this regard, we recommend that FinCEN specifically exclude hedge funds and private equity funds from the definition of "financial account" for the multitude of reasons discussed in the New York State Bar Association's letter dated July 17, 2009 and titled "Request for Formal Guidance on FBAR Reporting Obligations." We also note that FATCA has imposed new reporting requirements with respect to these funds, so requiring Plans to report hedge funds and private equity funds on FBAR would be needlessly duplicative.

* * *

We sincerely appreciate FinCEN's consideration of our comments, and we respectfully request that FinCEN hold a hearing on these issues. In the meantime, if you would like to discuss any of our comments, please do not hesitate to contact us.

Respectfully submitted,



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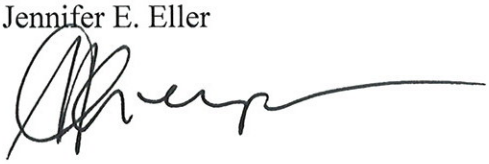

Michael P. Kreps

cc: J. Mark Iwry, Senior Advisor to the Secretary of the Treasury and Deputy Assistant Secretary for Retirement and Health Policy

Helen H. Morrison, Deputy Benefits Tax Counsel, Department of Treasury

Douglas H. Shulman, Commissioner, Internal Revenue Service

Beth M. Elfrey, Director, Fraud/Bank Secrecy Act, Small Business/Self Employed Division, Internal Revenue Service