

COMMENT LETTER

September 30, 2009

ICI Submits Comments on FBAR Reporting

By Electronic Delivery September 30, 2009 William J. Wilkins Michael Mundaca Chief Counsel Acting Assistant Secretary (Tax Policy) Internal Revenue Service U.S. Department of Treasury 1111 Constitution Avenue, NW 1500 Pennsylvania Avenue, NW Washington, DC 20224 Washington, DC 20220 RE: FBAR Reporting Dear Chief Counsel Wilkins and Assistant Secretary Mundaca: The Investment Company Institute¹ ("ICI") and its members appreciate greatly the filing extension provided by Notice 2009-62 for Form TD F 90-22.1 – Report of Foreign Bank and Financial Accounts (the "FBAR") – and urge that revised FBAR guidance be issued early in 2010. For the FBAR program to be administrable, we submit, it is critical that the FBAR filing requirement's employee exception be expanded to cover persons who are employees of firms that provide services to investment companies ("funds") registered under the Investment Company Act of 1940 ("the 1940 Act");² these persons may have signature or other authority over (but no financial interest in) a fund's foreign accounts.³ Additional guidance also should be provided that would simplify reporting and clarify the types of accounts for which reporting is required. This additional guidance, as discussed below, would assist the funds in meeting their own FBAR reporting responsibilities.

Expanding the Employee Exception The ICI urges that the employee exception be expanded, as discussed in detail in our January 15, 2009 submission (attached),⁴ to ensure that the Internal Revenue Service ("IRS") is not inundated 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 \$11.02 trillion and serve over 93 million shareholders. 2 15 U.S.C. sections 80a-1 et seq. 3 Hereafter, we refer to this authority as "signature authority." 4 See also, the attached ICI letters to Commissioner Shulman and Under Secretary Levey, dated June 16, 2009, and to Clarissa C. Potter, dated July 15, 2009. ICI Letter Proposing Simplified FBAR Reporting September 30, 2009 Page 2 of 5 with unnecessary and duplicative FBAR filings. Absent this guidance, tens of thousands of employees of firms providing services to funds could face filing obligations that will impose substantial compliance burdens on them, their employers, and the government.⁵ Our requested guidance is entirely consistent with the FBAR's purposes of thwarting abusive tax schemes and combating terrorism and with the IRS' goals for improving compliance. By eliminating redundant filings by persons who work for highly-regulated firms and have no financial interest in foreign accounts, the government will be able to direct its focus on filings by persons who may be engaged in the behavior that FBAR is designed to detect. Many other commentators, we understand, recently have urged expansions of the

employee exception to address additional situations in which employee reporting is unnecessary and redundant. We urge that any such expansion be drafted sufficiently broadly to apply to all persons included in our request. If the employee exception is not expanded as we have requested, two changes should be made. First, any employee filing obligation should involve substantially shorter disclosures. Employees of firms managing funds, for example, should not be required to report more than their names, the name of their employer, contact information for the person and the employer, and the funds for which each person has signature authority. As the IRS will receive FBAR filings regarding these foreign accounts from the funds themselves, no additional information should be required from the employees. Second, persons who have only signature authority over foreign accounts should not be required to include their tax returns with any FBAR filing. No purpose is served by requiring burdensome and duplicative filing of these extremely sensitive documents (going back as far as six years) by persons with no financial interest in the foreign accounts. Maintaining an Appropriate Definition of Financial Interest In applying the employee exception, it also is essential that the definition of “financial interest” take into account (in a manner similar to current law) the unique aspects of the mutual fund industry. Specifically, persons with signature authority over foreign accounts should remain able to invest in the funds serviced by their employers without being deemed automatically to have a financial interest in the funds’ foreign accounts. An investment in a corporation is treated, under the FBAR instructions,⁶ as a financial interest only if the investor owns more than 50 percent of the corporation’s shares or has more than 50 5 The exact extent of this filing burden is unclear because of uncertainties regarding (1) the precise definitions of “signature or other authority” and “foreign account” and (2) any additional reporting exceptions that might be provided. 6 See Form TD F 90-22.1 (Rev. 10-2008), page 6. ICI Letter Proposing Simplified FBAR Reporting September 30, 2009 Page 3 of 5 percent of the voting power of the corporation’s shares. Because funds are corporations for federal tax purposes, a person presently is not treated as having a financial interest in the fund unless the person owns more than 50 percent of the fund’s shares. This standard for financial interest clearly is appropriate when an employee of a fund service provider has signature authority over a fund’s foreign accounts and also has a personal investment in the fund itself. Treating a shareholder interest in the fund itself as a financial interest in the fund’s underlying accounts would reduce substantially the compliance benefits that would be gained by adopting the ICI’s suggestion for expanding the employee exception. Simplifying Reporting Reporting should be simplified by permitting: (1) consolidated filings by service providers with respect to all funds for which they provide services; and (2) electronic filings by all persons. These suggestions would enhance the effectiveness of FBAR filings. Guidance should permit a service provider managing funds (which could number in the hundreds) to file one FBAR identifying all of the funds for which the filing is being made; this consolidated filing provision should be available irrespective of the number of funds (or underlying accounts owned by the funds) for which reporting is required.⁷ This change would simplify greatly what is today for fund managers a very time-intensive process with little apparent benefit to the IRS. Under our proposal, the IRS could request follow-up information with respect to one or all of the funds’ accounts just as it today can request account-level detail for any filer with signature authority over 25 or more foreign accounts. Electronic filing of FBARs should be encouraged because it would both reduce administrative burdens and enhance the IRS’ ability to use the filings for enforcement purposes. By encouraging or requiring that FBARs be filed electronically, the IRS would gain much more efficient access to the information needed to pursue inappropriate activities involving foreign accounts. The current paper filing requirement, particularly when applied to the quantity of filings anticipated by the current FBAR requirements, almost ensures that the IRS will have little practical ability to identify those bad actors who benefit when the IRS

is inundated with paper filings from the overwhelmingly compliant majority. Clarifying the Definition of Foreign Accounts Finally, it is important that the IRS clarify, in published (i.e., readily-accessible) guidance, the types of accounts for which FBAR filings are required. Confusion exists, for example, regarding the 7 Similar guidance should be provided for (1) trustees to pension plans or IRAs and (2) insurance companies that own more than 50 percent of variable insurance products (such as a variable annuity fund) offered to their clients. ICI Letter Proposing Simplified FBAR Reporting September 30, 2009 Page 4 of 5 reporting requirements when a fund retains a U.S. bank to provide global custody services and the U.S. bank then engages foreign banks, or foreign branches of U.S. banks, to act as sub-custodians. In this scenario, the only financial account in the fund's name may be its account in the U.S. with the U.S. global custodian. We understand that this factual scenario, and others,⁸ have been presented for clarification. Timing of Guidance We urge that clarifying guidance be issued early in 2010. The relevant guidance deadline is not tied to the June 30, 2010 FBAR reporting due date. Instead, because individuals with FBAR reporting responsibilities must check a box on a schedule attached to their IRS Form 1040 individual income tax return, the guidance is needed before the April 15, 2010 tax return due date. Moreover, because many individuals will file their tax returns sooner, the guidance is needed far earlier. * * * Thank you for your continued interest in addressing these issues. We would be pleased to meet with you at your convenience to describe further the substantial burdens created by the current, over-inclusive FBAR filing requirements and to discuss our proposals and alternative approaches for reducing these burdens while improving the value of the filings you receive. Sincerely, /s/ Keith Lawson Keith Lawson Senior Counsel – Tax Law Attachments 8 Due to confusion regarding the FBAR's application to commingled accounts, some have questioned whether passive foreign investment companies ("PFICs") – which are foreign corporations – may be foreign accounts. While these corporations would not appear to be foreign accounts for these purposes, clarification would be appreciated. ICI Letter Proposing Simplified FBAR Reporting September 30, 2009 Page 5 of 5 cc: Stephen E. Shay Josh Odintz Clarissa C. Potter Steven T. Miller Beth M. Elfrey Sara M. Coe Samuel Berman Jamal El-Hindi notice.comments@irs.counsel.treas.gov (attention: Notice 2009-62) regcomments@fincen.gov (attention: Notice 2009-62)