



June 19, 2009

Via Facsimile

The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
1111 Constitution Ave., N.W.
3000 IR
Washington, D.C. 20224

Re: Application of FBAR Requirements to Private Investment Funds

Dear Commissioner Shulman:

This letter supplements the submissions previously made by Managed Funds Association (“MFA”)¹ and others commencing in 2006 with respect to issues arising with respect to the application of the filing requirements for Foreign Bank and Financial Accounts Reports (“FBAR”) as they apply to hedge funds and other private investment funds. We write to request your assistance in providing guidance and providing temporary relief in resolving these issues before the June 30, 2009 FBAR filing deadline.

MFA noted with interest the recent issuance of Announcement 2009-51 (June 5, 2009), in which the Internal Revenue Service (“IRS”) temporarily suspended the FBAR reporting requirements for those persons who are not U.S. citizens, residents or domestic entities and announced that all persons may rely on the definition of “United States person” found in the July 2000 FBAR instructions. MFA applauds this action and once again renews its request that the IRS take similar actions now with respect to the key issues raised by MFA in its prior submissions.

Notwithstanding the IRS’ recent action, there is widespread confusion among private investment fund industry and professional service providers to the industry on a different and more important issue. Specifically, MFA urges that the IRS use the announcement process to clarify that, until further guidance is issued, a private investment fund organized outside the United States as a foreign partnership or foreign corporation, will not be treated as a “financial account” with respect to which FBAR filings must be made. Unlike other types of foreign accounts that permit funds to be transferred in or out on a daily basis (*e.g.*, foreign bank accounts, foreign securities accounts, and foreign mutual funds with daily net asset value), private investment funds do not permit subscriptions or redemptions more frequently than monthly or quarterly. Additionally, as MFA has emphasized, investors in private investment funds organized as foreign corporations typically include only non-U.S. persons and U.S. entities that are generally exempt from U.S. tax. This is because the passive foreign investment company rules of the Internal Revenue Code make such funds an unattractive form of investment vehicle for U.S. persons that

¹ MFA is the voice of the global alternative investment industry. Its members are professionals in hedge funds, funds of funds and managed futures funds, as well as industry service providers. Established in 1991, MFA is the primary source of information for policy makers and the media and the leading advocate for sound business practices and industry growth. MFA members include the vast majority of the largest hedge fund groups in the world who manage a substantial portion of the approximately \$1.5 trillion invested in absolute return strategies. MFA is headquartered in Washington, D.C., with an office in New York.

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are subject to U.S. tax. As MFA has pointed out in prior submissions to the IRS², most of the private investment fund managers it represents believe that not treating hedge funds as financial accounts is the proper result and, in the only IRS guidance of which our members are aware, the IRS representatives at a National Taxpayer Forum appeared to confirm that foreign hedge funds would not be treated as reportable foreign accounts. It was only after last week's joint American Bar Association/American Institute of Certified Public Accountants conference call during which IRS representatives made contrary statements, that many of our members became aware that the IRS may be taking a contrary view. In light of the uncertainty, however, we recognize that some private investment fund managers have filed in light of the significant civil penalties that may be imposed.

It should also be noted that, to the extent that U.S. taxable persons or entities do invest in private investment funds organized outside of the United States, in many cases such investors are currently required to report their investment to the IRS on either Form 8865 (Return of U.S. Persons With Respect to Certain Foreign Partnerships) or Form 926 (Return by a U.S. Transferor of Property to a Foreign Corporation), in accordance with the instructions for those forms, and may also be required to file Form 8621 (Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund) and Form 5471 (Information Return of U.S. Persons with Respect to Certain Foreign Corporations).

In MFA's view, the continued absence of guidance on such a fundamental question creates a continuing level of uncertainty that seems inappropriately and unacceptably high given the penalties for non-compliance with FBAR requirements.

We stand ready to respond to your questions and otherwise to facilitate the prompt issuance of the requested guidance. Please feel free to contact my colleague, Carl Kennedy, if you have any additional questions at (202) 367-1140.

Respectfully submitted,

\s\ Richard H. Baker

Richard H. Baker
President & C.E.O.

CC by Regular Mail: J. Richard Harvey Jr., Special Advisor to the Commissioner, IRS
John Harrington, International Tax Counsel, U.S. Department of the Treasury
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² The following submissions were made to the IRS relating to FBAR concerns: MFA letter dated May 13, 2009; MFA letter dated May 7, 2007; MFA letter dated April 9, 2008; and June 19, 2006 by the law firm of Schulte, Roth & Zabel LLP (collectively, the "Prior Submissions"). MFA will provide copies of the Prior Submissions under a separate cover letter.