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*Submitted Via Regulations.gov*

May 9, 2016

Jennifer Shasky Calvery
Director
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: Amendment to the Bank Secrecy Act Regulations – Reports of Foreign Financial Accounts; 81 Federal Register 12613 (March 10, 2016).

Dear Director Shasky Calvery:

The American Bankers Association[1] ("ABA") and the Securities Industry and Financial Markets Association ("SIFMA"), including SIFMA's Asset Management Group[2] ("SIFMA AMG") appreciate this opportunity to provide comments to the Financial Crimes Enforcement Network ("FinCEN") regarding proposed amendments to rules for the Reports of Foreign Bank and Financial Accounts ("FBAR"). Many of our member banks, asset managers, and broker-dealers and their employees, officers, and agents must file FBARs on behalf of foreign accounts maintained by the institution. As such, they have a great interest in complying with the regulations by keeping records and filing reports that have a "*high degree of usefulness* in criminal, tax, regulatory, and counter-terrorism matters"[3] in the least burdensome manner as possible. [Emphasis added]

**Background on the Proposed Amendments**

Currently, under 31 CFR 1010.350(f)(2), officers and employees of federally-regulated financial institutions who have signature authority but no financial interest over a foreign financial account are exempt from FBAR reporting with respect to that account. The proposal would remove the existing signature authority exemptions and replace them with a single signature authority exemption that would exempt officers, employees, and agents from reporting on accounts over which they have signature authority, but no financial interest, as long as their employer or its affiliate is required to report on the account. In other words, the proposed employee exemption would depend on whether the account is required to be reported by the employer or a related entity within the employer's group. The proposed rules further require institutions to maintain a list of all officers and employees with signature authority for a period of 5 years that must be made available to FinCEN and law enforcement upon request.

[1] The American Bankers Association is the voice of the nation's $16 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $12 trillion in deposits and extend more than $8 trillion in loans. For more information, visit http://www.aba.com.

[2] SIFMA is the voice of the nation's securities industry, bringing together the shared interests of hundreds of broker-dealers, banks and asset managers. SIFMA's Asset Management Group ("AMG") represents U.S. asset management firms whose combined assets under management exceed $30 trillion. The clients of AMG member firms include, among others, registered investment companies, endowments, state and local government pension funds, private sector Employee Retirement Income Security Act of 1974 ("ERISA") pension funds, and private funds. For more information, visit http://www.sifma.org.

[3] Release, 81 Fed. Reg. 12614.

In addition, under the current rules, when a person or entity has signature authority over, or a financial interest in, 25 or more foreign financial accounts, it is required to report information about the number of accounts and identifying information, but is not required to provide detailed information on the accounts. The proposal would remove the provisions that limit the information reported in these situations, and instead would require all U.S. persons obligated to file an FBAR to report detailed account information on all reportable foreign financial accounts. These details will include information such as the account number, the name of the foreign financial institution holding the account and its address, the maximum value of the account during the calendar year, and the type of account. Unfortunately, these changes will substantially increase the burden on our member institutions, while providing little additional material information for the government.

**Signature Authority Exemption Must Be Expanded to Accommodate Employees of Financial Institutions**

FinCEN and the Internal Revenue Service ("IRS") have long given officers and employees of banks and registered broker-dealers either an exemption or a deferral from reporting if they have signature authority over, but no financial interest in the foreign financial account.[4] Additionally, under existing FBAR rules, employees of SEC registered investment advisers are exempted from filing reports with respect to fund accounts governed by the Investment Company Act of 1940.

Part of the reason for giving the employees of financial institutions such an exemption is due to the fact that the institutions are extensively regulated and examined for Bank Secrecy Act ("BSA") and FBAR compliance by federal and state banking regulators, the Securities and Exchange Commission ("SEC"), and the Financial Industry Regulatory Authority ("FINRA"). Under BSA rules, financial institutions[5] must implement customer identification programs ("CIP") to screen customers and report on any suspicious activity that may occur through Suspicious Activity Reports ("SAR"). These CIP and SAR efforts, more so than FBAR filings by employees of financial institutions, provide information with the "high[est] degree of usefulness in criminal, tax, regulatory, and counter-terrorism matters."

Unfortunately, under the proposed amendment, the financial institution employee and officer exemption would be dependent upon whether the "account is *required* to be reported under 31 CFR 1010.350 by the entity or any other entity within the same corporate or other business structure."[6] Because not all accounts that a financial institution maintains are required to be reported by the entity, this narrowing of the exemption would result in numerous bank, broker-dealer, and asset management employees having to report on thousands of accounts from which they are currently exempt or have received a deferral. We, therefore, urge FinCEN to retain the existing exemptions for employees and officers of banks, broker-dealers, and others that are currently provided in 31 CFR 1010.350.

In addition to retaining the current exemptions, we ask that the newly proposed exemption be expanded as described below. Unless these suggestions are adopted, the new filing requirement would be extremely burdensome, while providing information of only minimal benefit to FinCEN. Law enforcement and FinCEN can obtain the information necessary for enforcement from other sources at less burden to our members and the sizeable class of employees that otherwise would be affected. In these circumstances,

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[4] Bank employees and officers have had an exemption from reporting since at least 1992, as indicated in the instructions to the former FBAR Form TD F 90.22-1 that were revised in October 1992. Broker-dealers have had an exemption since 2011, as prescribed in 31 CFR 1010.350(f)(2)(i). All other financial institution employees have been given a deferral in FinCEN Notices 2011-1, 2011-2, 2012-1, 2012-2, 2013-1, 2014-1, and 2015-1.

[5] Although the current definition of "financial institution" does not include registered investment advisers, FinCEN has recently proposed expanding the definition to include those entities. See 80 Federal Register 52680.

[6] Proposed 31 CFR 1010.350(f)(2) [emphasis added].

information from the individual officers, employees, and agents who may have signatory or other authority over (but no financial interest in) the foreign financial accounts would be superfluous and would be of no real value. We, therefore, request that FinCEN extend the existing financial institution employee exemption to any employee of a highly-regulated entity, such as a financial institution, a public company, a public company subsidiary, and an investment adviser that is registered under the Investment Advisers Act of 1940 ("Advisers Act") and that provides services to an investment company registered under the Investment Company Act of 1940 (the "Investment Company Act"), in cases where the employee has signature authority over accounts solely because of his or her employment responsibilities, but has no financial interest in those accounts.

Furthermore, the Preamble to the proposed regulations states that the proposed exemption would apply to "officers, employees, and agents of *U.S. entities* to report signature authority over entity-owned foreign financial accounts."[7] The final rules should clarify that the exemption applies not just to officers, employees, or agents of U.S. entities, but also to employees of their U.S. or *non-U.S.* affiliates with respect to signature authority over accounts maintained by the employer or any other entity within the same corporate structure.

In addition, investment advisers and their affiliates provide asset management, as well as fund administration and other services, to hundreds or even thousands of domestic and foreign funds and other pooled investment vehicles (collectively, "funds").[8] These funds generally do not have their own employees, and therefore all fund-related services (other than those performed by fund officers and trustees/directors) are performed by employees of entities that have contracted with the funds. These service providers may or may not be affiliated with each other, but, as noted, can include an investment adviser providing asset management services and one or more of its affiliates providing administrative or other services to the fund. Pursuant to its services contract with the funds, the investment adviser or affiliate maintain signature authority over the foreign accounts of the funds, but frequently do not have a reportable financial interest in the funds. Designated employees of the investment adviser or its affiliates exercise the signatory authority granted to the investment adviser or an affiliate over the foreign accounts of the funds. We understand that, under the current proposal, these employees (as "agents") would be exempt from filing an FBAR in respect of fund accounts, provided that the fund itself is required to file a FBAR report for, and the employee does not have a financial interest in, the accounts. Foreign funds are not U.S. persons and thus not required to file FBAR reports in respect of their accounts. Accordingly, we request that the employees of the investment adviser or an affiliate with signature authority over, but no financial interest in, foreign accounts of foreign funds be exempt from filing an FBAR report if the investment adviser or applicable service-provider affiliate, itself, files an FBAR report to report these accounts over which its employees have signature authority.

**Filing Obligations for Employees Who Have Received Deferrals Should Be Permanently Waived**

We urge FinCEN to waive *permanently* the filing obligations of those employees who had received a deferral over the past several years.[9] Such a permanent waiver would finally address the deferred, but still growing, problem for certain employees and officers who have been given signature authority over foreign accounts simply to fulfill their employment duties.[10]

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[7] Release 12618 [emphasis added].

[8] These funds can include investment companies registered under the Investment Company Act, collective investment trusts, or unregistered private funds.

[9] FinCEN Notices 2011-1, 2011-2, 2012-1, 2012-2, 2013-1, 2014-1, 2015-1.

[10] In certain cases, it may be nearly impossible for some deferred employees to file if they are no longer employed by the institution and no longer have access to the information required to complete the reporting. In addition, this

**Employee List Requirement Is Burdensome and Unnecessary**
In order to take advantage of the proposed signature authority exemption, financial institutions would have to keep records on the officers, employees and agents with signature authority over foreign financial accounts for five years. Many of our bank, asset manager, and broker-dealer members are in the business of facilitating client investments in more than a hundred foreign markets through a global network of accounts that require large staffs to open, manage, and close. It would be very challenging to create and maintain accurate lists of numerous persons with signature authority over accounts, because these employees work in various groups and would change frequently as a result of staff changes.[11] In addition, because the reporting would not indicate who the client or true owner of the account is, but simply the name of the financial institution employee who has signature authority, it would not provide any pertinent information about the underlying potential bad actor.

We therefore recommend eliminating the list creation and maintenance requirement at least for financial institutions and their affiliates, as well as publicly-traded entities. Instead, we urge FinCEN to allow financial institutions to create and furnish a list for FinCEN upon request.

**Special Rule for 25 or More Accounts Should Be Maintained**
Under the current rules, U.S. persons with a financial interest or signature authority over more than 25 accounts may employ special authority under the rule to only provide certain basic account information together with the number of accounts over which the person has authority. As an industry, banks and broker-dealers have a financial interest in hundreds of thousands of foreign financial accounts, because they are in the business of facilitating the financial dealings of their clients, including foreign investments and transactions. For example, in 2014 alone, each of three large custodian banks had between 52,000 and 484,000 reportable accounts. And not surprisingly, as interest in international investments continues to grow, so too does the number of foreign financial accounts maintained by our members.

FBAR reporting is already time consuming, and the cost to these financial institutions to comply with the rule significant. Banks, asset managers, and broker-dealers currently gather and maintain voluminous data to file the current FBAR reports. We estimate that the proposed changes, by requiring additional review and validation of data before submission, would impose significant costs on each financial institution with a broad network of subcustody accounts, at a minimum hundreds hours of work to change and implement a new system, as well as hundreds of hours of work per year subsequently.

The current simplified filing for 25 or more accounts is a helpful and reasonable way to reduce burden. Although the proposed modification to the simplified filing rule may provide FinCEN with additional data, the additional information reported by banks and broker dealers will not provide a "*high degree of usefulness* in criminal, tax, regulatory, and counter-terrorism matters." In fact, the added information will provide no discernible value to warrant the burden on financial institutions. Banks and broker-dealers do not identify clients in their FBAR filings, and requiring them to detail tens or hundreds of thousands of accounts would not facilitate the government's goal of using "link analysis … to expand investigations of potential criminal and civil violations of law."[12]

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requirement could conflict with other regulatory requirements, such as privacy laws that protect client information from the disclosure.

[11] It is important to note that although many employees may have signature authority, they may never actually *exercise* that authority.

[12] Release 12617.

For these reasons, the abbreviated reporting for entities maintaining significant numbers of accounts must be preserved. We recommend that the threshold be raised no higher than a few hundred, instead of eliminating the simplified filing option altogether. Such a threshold would allow FinCEN to continue receiving detailed information from the vast majority of FBAR filers, while recognizing that the likelihood for abuse by financial institutions maintaining thousands of accounts is low. Should FinCEN wish to review detailed data with respect to a particular financial institution, it may request such information in accordance with existing 31 CFR 1010.350(g)(1).

**FBAR Account Value Reporting Requirements Should Be Modified**

We further request simplification for reporting the maximum value of a foreign financial account as required in the FBAR. The highest account balance is not readily available on many accounting systems without costly and time-consuming systems changes that would be able to capture that value across the enormous volume of accounts, and some financial institution filers must use the best data available – normally account balances at month or year end. Therefore, we recommend that FinCEN allow these determinations to be based on the maximum account value disclosed in relevant account statement(s), or if no statement is available, to use the year-end balance on the account. This reasonable change would allow financial institutions to rely on automated processes to determine whether an account is reportable, and to provide data to clients that must file FBAR. If the bank, asset manager, or broker-dealer must take further steps beyond a review of periodic statements, then the FBAR reporting will become unreasonably burdensome for the level of risk presented. We believe it is highly unlikely that U.S. persons intentionally manipulate the value in their foreign accounts simply to remain beneath the very low $10,000 threshold.

**FinCEN Should Provide a Reporting Exemption for Segregated Accounts**

As ABA requested in a 2011 letter,[13] we continue to urge FinCEN to eliminate FBAR reporting for segregated accounts when a U.S. bank or broker-dealer maintains the accounts. A segregated account arises in a non-U.S. market when a client (U.S. person or not) opens an account at a U.S. bank or broker-dealer and then the U.S. financial institution facilitates the client's accounts outside the U.S. in the name of the client. Local market practice and in some cases financial institution trading requirements drive this result. It is clear from the preamble to the 2011 regulations that an FBAR filer need not report most accounts on or through a U.S. financial institution because those accounts are operated in the U.S. by that institution. The Preamble in the 2011 regulations ("2011 Preamble") stated:

> [A] U.S. bank may act as a global custodian and hold [a U.S.] person's assets outside the United States. In many cases, the custody bank creates pooled cash and securities accounts in the non-U.S. market to hold the assets of multiple investors. These accounts, commonly called omnibus accounts, are in the name of the global custodian. Typically, the U.S. customer does not have any legal rights in the omnibus account and can only access their holdings outside of the United States through the U.S. global custodian bank. FinCEN wishes to clarify that in this situation, the U.S. customer would not have to file an FBAR with respect to assets held in the omnibus account and maintained by the global custodian. In this situation, the U.S. customer maintains an account with a financial institution located in the United States. However, if the specific custodial arrangement permits the United States person to directly access their foreign holdings maintained at the foreign institution, the United States person would have a foreign financial account.[14]

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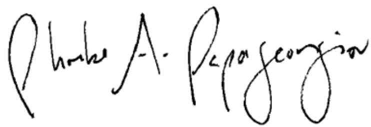
[13] ABA Letter to FinCEN (June 11, 2011).

[14] 76 Federal Register 10234, 10235 (February 24, 2011).

The 2011 Preamble clarifies that clients with a global custody account with a U.S. custodian should not have to file an FBAR with respect to any of their foreign holdings in omnibus accounts in non-U.S. markets. However, the 2011 Preamble and FBAR regulations generally were unclear as to whether the same clients have a filing obligation with respect to foreign assets held in segregated accounts (or sub-accounts) by sub-custodians appointed by a U.S. custodian in non-U.S. markets. Consistent with the operation of an omnibus account, clients do not typically have the ability to direct a sub-custodian with respect to the operation of a segregated account, even when the accounts identify the client as the underlying beneficial owner of the assets held in those accounts. The same client with the same relationship with a U.S. bank or broker-dealer should not have to report segregated accounts maintained for that client by the bank or broker-dealer.

**Conclusion**
ABA, SIFMA and SIFMA AMG appreciate this opportunity to provide comments on FinCEN's proposed changes to the FBAR. We urge FinCEN to retain the existing signature authority exemption for financial institution employees, while expanding the proposed additional exemption to accommodate employees of other entities and permanently waiving the reporting obligation for employees who have received a deferral. In addition, we ask that FinCEN maintain the Special Rule for reporting entities, and raise the threshold to at most a few hundred accounts instead of eliminating the exemption altogether. Lastly, we ask for clarification on identifying the maximum account balance on a foreign financial account so as to facilitate automated monitoring and reporting on accounts, and on the reporting requirements with respect to certain segregated accounts.

Sincerely,



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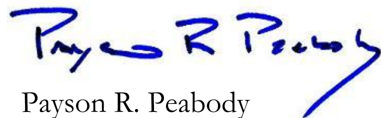

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