MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

May 9, 2016

Via Electronic Filing:

Financial Crimes Enforcement Network (FinCEN)
P.O. Box 39
Vienna, VA 22183

Re: Managed Funds Association Comments on RIN 1506–AB26; Amendment to the Bank Secrecy Act Regulations – Reports of Foreign Financial Accounts

Dear Sir or Madam:

Managed Funds Association ("MFA")[1] welcomes the opportunity to provide comments to the Financial Crimes Enforcement Network ("FinCEN") in response to its proposed rules on amendments to the Bank Secrecy Act regulations regarding Reports of Foreign Bank and Financial Account Reporting ("FBAR"). MFA supports the goal of providing a simplified and expanded exemption from FBAR filing obligations for U.S. persons who have signature authority over, but no financial interest in, a reportable foreign financial account.

For the reasons discussed below, we encourage FinCEN to clarify that the proposed exemption in 31 CFR §1010.350(f)(2) includes employees of entities registered as investment advisers with the Securities and Exchange Commission ("SEC") or registered as commodity trading advisors ("CTA") or commodity pool operators ("CPO") with the Commodity Futures Trading Commission ("CFTC") with respect to foreign financial accounts for all clients of the registered adviser.[2] We further encourage FinCEN not to delete 31 CFR §1010.350(g)(1) and (2), which permit a U.S. person to file limited information when that

[1] The Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and many other regions where MFA members are market participants.

[2] For ease of reference, we use the term registered adviser in this letter to include investment advisers, CTAs, and CPOs.

person has 25 or more foreign financial accounts. At a minimum, we encourage FinCEN to re-evaluate the information that U.S. persons with 25 or more accounts have to submit on their FBAR filings to provide information comparable to current reporting requirements to FinCEN, while reducing the administrative burdens on filers. We also support FinCEN's proposed changes to 31 CFR §1010.306(c), which changes the FBAR filing deadline to April 15 (and permits extensions to October 15).

Exemption from FBAR Filings

We believe that FinCEN should clarify that the exemption in paragraph (f)(2) applies to persons in similar situations to those persons specified in the proposing release. Paragraph (f)(2) of the proposed rule provides a general exemption from FBAR filing obligations, stating:

> an officer, employee, or agent of an entity need not submit a[n] [FBAR] regarding signature or other authority over a foreign financial account in which such entity, or a subsidiary, parent entity, or other entity within the same corporate or other business structure of such entity has a financial interest, if [such person] has no financial interest in the account and the account is required to be reported under 31 CFR 1010.350 by the entity or any other entity within the same corporate or business structure.

The preamble to the proposed rule states that the exemption in paragraph (f)(2) applies to the categories of persons set out in the release, leaving significant uncertainty regarding the application of paragraph (f)(2) to similar categories of persons that the release does not specifically identify. One category included in the release is an officer or employee of a financial institution that is registered with and examined by the SEC or the CFTC with respect to foreign financial accounts maintained by that financial institution. This would exempt an employee of a registered adviser with respect to foreign financial accounts of the registered adviser entity; however, this category does not seem to cover foreign financial accounts of a private fund managed by the registered adviser. A second category includes an employee of an "Authorized Service Provider", which is defined as an entity that is registered with and examined by the SEC and that provides services to a registered investment company. Because private funds are not registered investment companies, this category also would not include employees of registered advisers to private funds. The other categories set out in the release similarly would not seem to apply to employees or officers of registered advisers with respect to foreign financial accounts of their private fund clients.

We believe that officers and employees of investment advisers registered with the SEC or CTAs and CPOs registered with the CFTC generally should be able to rely on the exemption in paragraph (f)(2) of the rule with respect to client foreign financial accounts.[3] Providing an exemption to officers and employees of a registered adviser is consistent with

[3] Some registered advisers have affiliated management companies or similar affiliated entities, which is the company that technically employs the individuals who provide services to the adviser and its clients. We believe that such employees should be included within the scope of paragraph (f)(2), to the same extent that they would be included if they worked directly for the registered adviser.

the policy rationale for the two exemptions described above and providing a clear exemption for additional categories of registered adviser officers and employees would better address the different types of client relationships that registered advisers have. As such, we encourage FinCEN to specifically include in the final rule release that officers and employees of SEC-registered investment advisers and CFTC-registered CTAs and CPOs are within the scope of the exemption set out in (f)(2) with respect to foreign financial accounts owned by clients of the registered adviser.

Reporting on 25 or More Accounts

The proposed rule also seeks to delete 31 CFR §1010.350 (g)(1) and (2) in the existing rules, which provide special reporting rules that require a U.S. person who has a financial interest in 25 or more foreign financial accounts to report some of the information on Form 114 to FinCEN, while maintaining more detailed information that must be made available to FinCEN upon request. The result of this deletion would be to subject such persons to the complete disclosure requirements of Form 114. We believe the existing provisions appropriately balance the need for FinCEN to have information about foreign financial accounts owned by U.S. persons without imposing unnecessary administrative burdens on U.S. persons and businesses. We believe that removing these provisions would impose unnecessary, substantial burdens on many private fund registered advisers.

Private investment funds, such as hedge funds, often have multiple financial accounts with different financial institution counterparties, for example, maintaining prime brokerage relationships with multiple registered broker-dealers. Private funds maintain multiple accounts as a common risk management practice to protect their clients' assets. For example, after the failure of Lehman Brothers, many hedge funds concluded that they should manage their counterparty risk by using more than one prime broker. Moreover, many registered advisers manage multiple private funds and related entities. As a result, many registered advisers to private funds will have FBAR reporting obligations with respect to greater than 25 foreign financial accounts, in some cases with respect to significantly greater than 25 accounts.

While we understand and acknowledge FinCEN's stated reasons for requiring full FBAR reporting, we do not believe that foreign financial accounts of private funds managed by SEC or CFTC registered advisers present the policy concerns underlying the proposed deletion of paragraphs (g)(1) and (2). SEC and CFTC registered advisers are subject to examination by the SEC and/or CFTC with respect to the records and activities of the adviser and of the funds, including private funds, managed by the adviser. U.S. advisers to non-U.S. private funds also are subject to other government oversight and reporting rules, including FATCA and proposed FinCEN anti-money laundering rules.[4] Many non-U.S.

[4] In 2015, FinCEN proposed rules that would require SEC registered investment advisers to develop anti-money laundering programs and file suspicious activity reports. The proposed rule is available at: https://www.gpo.gov/fdsys/pkg/FR-2015-09-01/pdf/2015-21318.pdf. On November 2, 2015, MFA submitted comments to FinCEN expressing support for efforts to combat money laundering and the financing of terrorist activities, and the adoption of its proposed Anti-Money Laundering rule. MFA's comment letter is

private funds are incorporated in jurisdictions that also have their own tax reporting and anti-money laundering rules. Given these multiple layers of government oversight and reporting, we believe that private funds managed by U.S. registered advisers do not present the risks of money laundering or terrorist financing that are of primary concern to FinCEN.

Requiring full FBAR reporting on all these accounts would impose a significant administrative burden on many investment advisers. This is particularly the case because Form 114 requires information that many registered advisers do not otherwise keep as part of their regular course of business. For example, we understand from members that the specified methodology to convert the maximum account value for accounts not denominated in U.S. currency for purposes of Item 15 differs from how many registered advisers maintain records of the balances in their funds' financial accounts. This requires registered advisers to do a separate calculation solely for purposes of making their FBAR filing. Accordingly, we encourage FinCEN to maintain the special rule provisions in paragraphs (g)(1) and (2) of the existing rules, at least with respect to foreign financial accounts of investment funds (registered or unregistered funds) managed by an investment adviser registered with the SEC or a CTA or CPO registered with the CFTC.

We further note that the FinCEN release says that the expanded exemptions for persons with only signature authority will reduce the burdens of requiring full FBAR reporting for persons with 25 or greater accounts. As discussed above, however, there are concerns that FinCEN's proposed exemptions for persons with signature authority may not capture all persons who should be exempt. As such, removing the special reporting provisions could impose significant burdens on any persons who are inadvertently still subject to FBAR reporting obligations. In that regard, we note that, despite prior guidance from FinCEN with respect to the scope of persons subject to FBAR reporting, because of the severity of the sanctions for violating FBAR, many persons elected to make protective FBAR filings to the extent there was uncertainty whether an exemption applied. We appreciate FinCEN's efforts to provide greater clarity regarding the scope of persons subject to FBAR requirements; however, we believe that there will continue to be some level of uncertainty regarding the final scope of the exemption in paragraph (f)(2) for some period of time. To the extent that FinCEN continues to support removing the special reporting provisions in paragraphs (g)(1) and (2), we encourage FinCEN to finalize the rules regarding the scope of persons subject to FBAR requirements before making a final decision to delete the special reporting provisions.

Finally, to the extent that FinCEN decides to proceed with deleting paragraphs (g)(1) and (2) at the same time it finalizes the exemption from reporting for persons with signature authority only, we encourage FinCEN to consider amendments to the instructions to Form 114 that would minimize the administrative burdens on FBAR filers while continuing to provide FinCEN with the information it needs to achieve its oversight responsibilities. Specifically, we encourage FinCEN to amend the instructions to Item 15 to permit an FBAR filer to calculate its maximum account value, including any currency conversions, in accordance with the method that it calculates those values in the ordinary course of its

---

available at: https://www.managedfunds.org/wp-content/uploads/2015/11/MFA-Comments-on-FinCEN-AML-Proposal.pdf.

business. This approach would continue to provide FinCEN with the account value information it seeks, while minimizing administrative burdens on filers by eliminating the need to make a separate determination of account values solely for purposes of filing an FBAR.

MFA appreciates the opportunity to provide comments on the proposed changes to FBAR filing requirements. If you have any questions regarding any of the issues discussed above, please do not hesitate to contact Benjamin Allensworth or me at (202) 730-2600.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell

Executive Vice-President and Managing Director, General Counsel