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The Honorable Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue N.W.
Washington, D.C. 20224

Re: TD F 90-22.1 Report of Foreign Bank and Financial Accounts

Dear Commissioner Shulman:

We are writing on behalf of certain clients who sponsor pension plans in the United States for their U.S. employees and in foreign jurisdictions for their local employees to request guidance clarifying that foreign investments by U.S. qualified retirement plans are not considered "financial accounts" for purposes of TD F 90-22.1, Report of Foreign Bank and Financial Accounts (known as "FBAR"). If U.S. pension plans are required to file the FBAR, then we request an exception for officers and employees of the plan sponsor who are required to file solely because they have signature authority over investment decisions relating to pension trust assets. We also request an exception for officer and employees of multinational companies who are required to file an FBAR solely because they have signature authority over investment of the assets of their employer's foreign plans.

Foreign Investments by U.S. Qualified Plans

In order to diversify their investments, many U.S. qualified retirement plans invest a portion of their trust assets in foreign investment funds. In past years, it has generally been assumed that these investments are not reportable on FBAR, as long as the plan has a minority interest in the fund. In October 2008, however, the IRS added language to the FBAR instructions stating that "financial accounts" reportable on FBAR include mutual funds. We understand that certain IRS officials are taking the position that the term "mutual funds," for this purpose, includes offshore hedge funds and private equity funds.

We believe that this reading is overly broad. First, unlike most mutual funds, hedge funds and private equity funds require substantial minimum investments, triggering information reporting requirements. Second, such funds usually have long lock-up periods, during which investments are not redeemable, and thus cannot be used for money-laundering and other illicit purposes that are the focus of FBAR reporting. Finally, the requirement to report plan investments in such funds, which are typically structured as partnerships, appears to run against the FBAR instructions that require a U.S. taxpayer to "look through" its investment in a partnership to the underlying financial account only if its owns more than 50 percent of the profits or capital interest of the partnership.

For qualified retirement plans, disclosure of investment in foreign private funds falls particularly far from the policy goals of FBAR. As tax-exempt entities pursuant to Section 501(a) of the Code, qualified plan trusts have no incentive to use their foreign investments for the sort of mischief that FBAR is intended to bring to light. Rather, investing in foreign accounts and funds is a means of diversifying the holdings of the plans in order to protect participants from the risk of investing only in U.S. securities and funds. Furthermore, qualified retirement plans are already required to report their investments, both domestic and foreign, on Schedule D of their annual reports on Form 5500. Therefore, we urge the Service to clarify that these plans not be required to report much the same information on FBAR, subject to FBAR's additional penalties and requirements.

Signatory Authority over U.S. and Foreign Plan Trusts

We also request an exception for officers and employees of companies that fund U.S. retirement plans who would otherwise be required to file FBAR solely because of their signature authority over the investment decision of plan trusts, when the officers and employees have no personal financial interest in the foreign accounts and do not have authority to dispose of such plan assets to third parties except to pay expenses related to the plan. The FBAR instructions already provide an exception for officers and employees of certain publicly traded banks and domestic corporations who have no personal financial interest in the accounts over which they have signature authority and meet certain other criteria. A similar rationale applies to officers and employees with signature authority over plan investments of U.S. qualified plans. Like banks and public companies, U.S. qualified plans and their trusts are already subject to significant regulation and information reporting requirements on their overseas activities. In our opinion, the burden on officers and employees of preparing an FBAR filing and amending their past income tax returns, under risk of criminal and civil penalties, is not justified by the theoretical risk that they are causing the plans to engage in tax evasion, particularly in light of the disclosures on holdings of plan assets that these plans are already required to make each year.

This conclusion is no less true where officers and employees who are U.S. taxpayers have signature authority over trusts sited outside the United States that fund benefits for non-U.S. employees. U.S. corporations with foreign operations have legitimate reasons for investing overseas and owning financial accounts in various countries. For instance, in the interest of diversification, a plan may hire a number of third-party investment managers, each of whom may invest in different securities throughout the world. In certain countries, the securities must be custodied in a separate account, which would trigger the FBAR filing requirements since the U.S. taxpayer has signature authority over the account. We request that the officers and

employees who have authority over these plan investment decisions also be excepted from the FBAR filing requirement and the requirement to indicate their signature authority over these foreign financial accounts on their personal tax returns.

Please do not hesitate to contact us to discuss this request in more detail.

Respectfully submitted,

Susan P. Serota

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