

By Electronic Delivery

August 31, 2011

William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224James H. Freis, Jr.
Director
Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183RE: *Proposal for Simplified FBAR Reporting*

Dear Chief Counsel Wilkins and Director Freis:

The Investment Company Institute¹ (“ICI”) urges the Financial Crimes Enforcement Network (“FinCEN”) and the Internal Revenue Service (“IRS”) to announce promptly that they will conduct a comprehensive review of the FBAR reporting requirements finalized earlier this year. Because most filing obligations have been postponed until June 30, 2012, FinCEN and IRS have the time necessary to reconsider comments made by the ICI and others to eliminate FBAR filings that will not have the “high degree of usefulness in criminal, tax, regulatory, and counterterrorism matters” required by the Bank Secrecy Act (“BSA”).²

Our primary concern, as discussed below, is with the narrow scope of the authorized service provider (“ASP”) reporting exception provided to certain persons with signature authority over, but no financial interest in, foreign financial accounts (hereafter “signature authority”). We urge that this exception be expanded to encompass the ICI’s January 2009 proposal. Indeed, the guidance issued by FinCEN in May and June of this year, to extend the reporting deadline until 2012, largely adopted our broader definition of ASP.

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 \$13.3 trillion and serve over 90 million shareholders.

² 31 U.S.C. 5311.

We also urge that the filing extension provided by IRS Notice 2011-54 until November 1, 2011, be extended until June 30, 2012, while FinCEN and the IRS reconsider exactly what filings will be required.

I. Introduction

ICI has raised substantial concerns over the past few years with how the FBAR filing requirements apply to persons with signature authority over certain accounts, including those of regulated investment companies (“RICs”); mutual funds are the most common form of RIC. We appreciate that FinCEN and the IRS have addressed some of these concerns, such as through clarification that a person has signature authority only if the person can control the account by direct communication to the person with whom the financial account is maintained. Many concerns, however, remain.

The FBAR filing extensions provided by FinCEN Notices 2011-1 and 2011-2 and IRS Notice 2011-54 (the “Notices”) were welcome, as they generally provided additional time to persons with signature authority filing responsibilities. These extensions were less than optimal, however, because they were provided too close to the June 30th filing deadline, and with too little clarity, to prevent many persons from making these filings.

The FBAR reporting framework cannot be efficient unless changes are announced within the next few months and finalized no later than the first calendar quarter of 2012. The filing extension provided by the Notices should be utilized to reconsider exactly what FBAR filings are necessary to maximize the benefits intended by the BSA. Inundating FinCEN with redundant filings from compliant industries is counterproductive and costly. A more targeted approach to meeting the BSA’s “high degree of usefulness” standard is essential.

II. Background

A. January 2009 ICI Submission

ICI urged an expanded signature authority exception in our January 2009 submission³ because the unique structure of the fund industry prevented most persons with signature authority over a fund’s accounts from qualifying for any other reporting exception. Specifically, because funds do not have employees of their own, persons with signature authority over a fund’s accounts are not employees of the fund; instead, they are employed by an investment manager. Our specific request was for a reporting exception for persons with signature authority who are employed by an ASP – a term we created. We proposed that an ASP be defined as an entity that provides services to an investment company registered under the Investment Company Act of 1940⁴ and for which one or

³ See ICI letter to James H. Freis, Jr. and Jamal El-Hindi, dated January 15, 2009.

⁴ 15 U.S.C. sections 80a-1 et seq.

more employees of the service provider or an affiliate have signature or other authority for one or more such investment companies.⁵

B. Supplemental ICI Submissions

On June 16, 2009, after learning that the guidance we requested would not be issued in time to prevent thousands of duplicative FBAR filings by employees of companies that manage funds, ICI wrote to Commissioner Shulman and Under Secretary Levey to urge their attention to our concerns.⁶ The IRS responded by extending the June 30, 2009 filing deadline for 2008 and earlier calendar years, first to September 23, 2009, and then to June 30, 2010.

ICI filed five subsequent submissions,⁷ several of which are discussed below. These submissions focused on the need both to expand the signature authority filing exception and to simplify reporting and clarify the types of accounts for which reporting is required.

C. Proposed Regulations

The proposed regulations issued on February 26, 2010 addressed the industry's concerns, in part, by providing a specific signature authority filing exception for an employee of an ASP. The term ASP, however, was defined more narrowly than we recommended. Specifically, the entity providing services to a fund must itself be registered with and examined by the Securities and Exchange Commission ("SEC").

ICI urged that the ASP exception be expanded, in our April 27, 2010 comments on the proposed regulations, to cover individuals who are employees of service providers that are not registered with the SEC. These service providers are affiliated with entities that are within the proposed regulation's definition of ASP. For all of the reasons provided in our comment letter, this broader definition of ASP is appropriate. Our comments on the proposed regulations also urged additional simplifications, such as by permitting consolidated reporting for funds organized by the same fund manager.

⁵ Under our proposal, employees of an ASP or an affiliate would be eligible for the reporting exception with respect to financial accounts of investment vehicles not registered under the 1940 Act also.

⁶ See ICI letter to Douglas H. Shulman and Stuart A. Levey, dated June 16, 2009.

⁷ See ICI letters to Clarissa C. Potter (July 15, 2009); to William J. Wilkins and Michael Mundaca (September 30, 2009); and to James H. Freis, Jr. (April 27, 2010, May 23, 2011, and June 9, 2011).

D. Final Regulations

The final regulations issued on February 24, 2011 maintained the proposed regulations' narrow ASP definition. In certain other respects, the final regulations clarified the FBAR filing rules and reduced the burdens of unnecessary and redundant FBAR filings.

Unfortunately, the preamble to the final regulations created new uncertainties; the final regulations left other issues unresolved. ICI filed another letter on May 23 to request clarification of three issues, two of which involved the scope of various signature authority reporting exceptions.⁸ The letter also requested guidance on three additional issues, all of which involved the scope of signature authority reporting exceptions.⁹

III. **May/June 2011 Guidance**

A. FinCEN Notice 2011-1

On May 31, FinCEN issued Notice 2011-1 and extended the FBAR filing deadline until June 30, 2011 for the following two categories of employees or officers:

- officers and employees of a regulated entity (as specified in the final regulations) who have signature authority over foreign financial accounts of an entity more than 50 percent owned, directly or indirectly, by the regulated entity (a "controlled person"); and
- officers and employees of a controlled person of a regulated entity who have signature or other authority over a foreign financial account of the regulated entity, the controlled person, or another controlled person of the regulated entity.

⁸ First, we asked for clarification that a so-called "segregated account" in a foreign country that is created by a U.S. global custodian for the benefit of an investment company is not a foreign financial account of the investment company so long as the investment company cannot access directly the foreign account. Second, we requested clarification that officers of investment companies may utilize the signature authority exception for officers of financial institutions. Third, we requested clarification that an officer or employee of a U.S. parent company that is either a financial institution or publicly traded has no FBAR reporting obligation for any foreign account of a domestic or foreign subsidiary of the parent for which the individual has signature authority (so long as he or she has no financial interest in the account).

⁹ First, we requested that officers and employees of a subsidiary, the parent of which is a financial institution or publicly traded, should receive the same signature authority exception provided to officers and employees of the parent with respect to *all* of the parent's financial interests. Second, we requested that the reporting exception for officers and employees of foreign subsidiaries (provided by the 2008 FBAR instructions) be restored. Third, we requested that officers and employees of non-bank affiliates of banks that perform transfer agency and other administrative functions for their investment company clients, when the affiliate is registered with an "appropriate regulatory authority" and examined by its Federal functional regulator or the SEC, be eligible for the ASP reporting exception.

This Notice apparently was intended to respond to concerns that we raised in our May 23 letter, that also were raised by others, regarding how the signature authority reporting exceptions apply within affiliated groups when an employee of one affiliate has signature authority over accounts of another affiliate.

We responded to the May 31 Notice on June 9 because of continuing concerns regarding whether the filing relief was intended to apply in the ASP context. Our specific concern was that the Notice used the term “entity” in the singular, assuming apparently that a single entity is involved in all five signature authority exemption situations. Two entities are involved, however, in the ASP situation. A June 17 phone call from FinCEN staff, speaking on their own behalf, informed the ICI that there was not enough time, before the June 30 filing deadline, to respond in writing to our June 9 letter. The staff further indicated, albeit in a manner that prevented reliance, that the May 31 Notice’s filing relief was intended to apply in the ASP situation as well.

B. IRS Notice 2011-54

On June 16, the IRS issued Notice 2011-54 to provide additional filing relief from the June 30 deadline. Specifically, the Notice extended the filing deadline to November 1, 2011 for signature authority filings for 2009 and earlier calendar years by persons required to file for calendar year 2010 by June 30, 2011. This filing relief was provided, according to the Notice, because individuals were having difficulty compiling all of the information necessary to file for the prior years.

C. FinCEN Notice 2011-2

On June 17, FinCEN issued additional filing relief. Specifically, FinCEN Notice 2011-2 addressed concerns we and others had raised earlier by extending until June 30, 2012 the FBAR filing deadline for officers and employees of registered investment advisors (“RIAs”) who have signature authority over foreign financial accounts of persons that are not RICs. While the scope of Notice 2011-2 is not entirely clear, the Notice could be read to apply to officers and employees of affiliates to the same extent as the relief provided by FinCEN Notice 2011-1. Given the lack of certainty and the date on which the relief was provided, it is unclear exactly how many officers and employees utilized this relief.

IV. Proposal

The events of the past several months illustrate the need for a comprehensive review of the FBAR reporting requirements, including the filing requirements for persons with signature authority over foreign financial accounts. Unless substantial changes are made, FBAR filings that must be made by June 30, 2012 will not provide the high degree of usefulness required by the BSA.

Consequently, we propose that the final regulations be amended to adopt the broader definition of “authorized service provider” that we proposed in January of 2009. The filing extensions

provided by FinCEN Notices 2011-1 and 2011-2 effectively cover all persons who would have been covered by our ASP definition. Filings by these persons will be redundant to the filings made by others and will not provide the high degree of usefulness required by the BSA. At a minimum, FinCEN should (1) clarify the scope of FinCEN Notice 2011-1 to reflect the oral observations made to the ICI on June 17, (2) clarify that FinCEN Notice 2011-2 applies to officers and employees of affiliates to the same extent that FinCEN Notice 2011-1 applies, and (3) make permanent the relief provided to those persons covered by the notices.

We also urge that signature authority filings for 2009 and earlier calendar years be forgiven. The value of this information diminishes with time. In addition, some employees have resigned their positions and cannot be located. Moreover, providing former employees with confidential account information is problematic. At a minimum, the filing extension provided by IRS Notice 2011-54 until November 1, 2011, should be extended until June 30, 2012, while FinCEN and the IRS reconsider exactly what filings will be required.

We will be contacting your office in the near future to arrange a meeting to discuss our recommendations. If you have questions in the meantime, please contact Pinank Desai (at 202/326-5876 or pinank.desai@ici.org) or me (at 202/326-5832 or lawson@ici.org).

Sincerely,

/s/ Keith Lawson

Keith Lawson
Senior Counsel – Tax Law

cc: Jamal El-Hindi