The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

MEMO# 25054

March 31, 2011

Draft ICI Letter Requesting Clarification of Application of FBAR Final Regulations; Please Provide Comments by Tuesday, April 12

[25054]

March 31, 2011

TO: TAX COMMITTEE No. 16-11
ACCOUNTING/TREASURERS COMMITTEE No. 3-11
INTERNATIONAL COMMITTEE No. 6-11
SEC RULES COMMITTEE No. 25-11
PENSION COMMITTEE No. 7-11 RE: DRAFT ICI LETTER REQUESTING CLARIFICATION OF APPLICATION OF FBAR FINAL REGULATIONS; PLEASE PROVIDE COMMENTS BY TUESDAY, APRIL 12

The ICI has prepared the attached draft letter to the Treasury Department's Financial Crimes Enforcement Network ("FinCEN") requesting clarification of two points regarding the Foreign Bank and Financial Accounts Report ("FBAR"), Form TD F 90-22.1. Final regulations ("Final Regulations") for filing the FBAR were issued on February 24, 2011. [1]

The draft letter, based on questions raised during the March 9 Tax Committee conference call, requests clarification of two points. Although the Final Regulations appear to provide unambiguous answers, the preamble to the Final Regulations creates ambiguities.

First, the letter requests confirmation that officers of investment companies may utilize the signature authority reporting exception available to officers of a financial institution. The definition of "financial institution" under the Bank Secrecy Act, the statute under which the Final Regulations are issued, clearly includes investment companies. However, the preamble, in explaining why the officers and employees of investment advisors are not covered by the signature authority reporting exception, references a narrower regulatory definition. There is no evident policy reason for the narrower definition. The letter asks FinCEN to confirm that investment companies registered with the SEC under the Investment Company Act of 1940 are "financial institutions" for purposes of the reporting exception.

Second, the letter requests confirmation that a U.S. investment company does not have to file an FBAR with respect to a "segregated account" – created for the benefit of the U.S. investment company but held in the name of the of a U.S. global custodian in a non-U.S. market – so long as the U.S. investment company cannot direct the disposition of the account assets. The preamble's discussion of omnibus accounts creates some concern that a "for benefit of" ("FBO") designation on a segregated account might cause the account to be viewed as held in the name of the beneficiary. The letter asks FinCEN to confirm that the "segregated account" is not a foreign financial account of the investment company so long as the investment company does not have the ability to access directly the segregated account.

Please provide any comments on the draft letter to me, at pinank.desai@ici.org or 202/326-5876 by Tuesday, April 12th. Thank you.

Pinank Desai
Assistant Counsel - Tax Law

Attachment

endnotes

[1] See Institute Memorandum [24991] to Tax Members No. 4-11, Accounting/Treasurers Members No. 3-11, International Members No. 8-11, SEC Rules Members No. 39-11 and Pension Members No. 16-11, dated February 24, 2011.
