

By Electronic Delivery

June 9, 2011

James H. Freis, Jr.
Director
Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183

RE: *Notice 2011-1*

Dear Mr. Freis:

The Investment Company Institute¹ (“ICI”) appreciates greatly the FBAR filing deadline extension provided by Notice 2011-1 (the “Notice”). We understand the Notice to provide signature authority filing relief for officers and employees of entities that are part of a controlled group of the Authorized Service Provider (“ASP”) with respect to foreign financial accounts of registered investment companies (“RICs”).

This letter calls your attention to our understanding of the Notice’s extension so that FinCEN can issue clarifying language should FinCEN determine that such clarification is needed. In addition, we ask that FinCEN expeditiously issue clarifying guidance to confirm that officers and employees of an entity under common control with an ASP (a brother-sister entity) are covered by the Notice. Given the pending June 30 filing deadline, this clarification is needed on an urgent basis.

The Parent-Subsidiary Issue

The Notice’s extension (as revised on Monday, June 6) applies to the following two categories of individuals. First, the extension applies to “an employee or officer of a regulated entity (as specified in the FBAR regulations) who has signature or other authority over and no financial interest in a foreign financial account of another entity more than 50 percent owned, directly or indirectly, by the regulated entity (a ‘controlled person’).” The extension also applies to “an employee or officer of a

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 \$13.41 trillion and serve over 90 million shareholders.

controlled person of a regulated entity who has signature or other authority over and no financial interest in a foreign financial account of the regulated entity or another controlled person of the regulated entity.”²

The first category describes employees and officers of a covered entity with signature authority over foreign financial accounts of a controlled person of the covered entity. The second category essentially describes employees and officers of members of the controlled group of the covered entity who would qualify for the exemption if they were officers or employees of the covered entity itself. In other words, if an employee of the covered entity would be exempt with respect to a particular foreign financial account, then an officer or employee of a controlled person of the entity with signature authority over such account is eligible for the extension. The second category also describes officers and employees of controlled persons of the covered entity when the foreign financial account is owned by a controlled person of the covered entity.

A technical issue arises from the Notice’s use of the word “entity.” The Notice, in effect, extends for one year the FBAR filing deadline for persons who are either officers or employees of (1) the “entity” and have signature authority over accounts of a controlled person of the “entity” or (2) a controlled person of the “entity” and have signature authority over accounts of the “entity” or a person controlled by the “entity.”

This singular use of “entity” throughout the Notice appears to assume that a single entity is involved in all five exemptions under section 1010.350(f)(2)(i)-(v). Although this assumption is appropriate in four of the five exemption situations, it does not reflect properly the fact that the ASP situation involves two entities. As explained in the ICI’s FBAR submissions and acknowledged in the preamble to the FBAR regulations, the ASP exemption was necessary because the ASP – the first entity – provides services to a RIC – the second entity – that does not have employees of its own.³

The Notice’s intent, in the context of the ASP exception, nevertheless appears clear. Specifically, we understand the Notice’s relief to apply to officers and employees of “controlled

² These five categories, which are set forth in section 1010.350(f)(2)(i)-(v), are as follows:

- (i) Officers and employees of certain banks with signature authority over foreign financial accounts of the bank.
- (ii) Officers and employees of financial institutions registered with the SEC or CFTC with signature authority over foreign financial accounts of the financial institution.
- (iii) Officers and employees of ASPs with signature authority over foreign financial accounts of an investment company registered with the SEC.
- (iv) Officers and employees of entities listed on a U.S. national securities exchange with signature authority over foreign financial accounts of such entity. (This exemption also applies to officers and employees of a U.S. subsidiary of such an entity who have signature authority over an account of the subsidiary if the subsidiary is included in a consolidated FBAR filed by the parent entity.)
- (v) Officers and employees of an entity registered under section 12(g) of the Securities Exchange Act with signature authority over foreign financial accounts of such entity.

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

persons” of the ASP who have signature or other authority over a foreign financial account of the RIC.⁴ This interpretation is consistent with the way the interim relief applies with respect to the other categories of persons who are exempt from filing FBARs pursuant to section 1010.350(f)(2)(i)-(v).

The Notice’s filing extension clearly is intended to apply to the ASP exemption; the Notice expressly refers to all five exemptions in describing persons eligible for the extension. Because the ASP exemption applies only to accounts of the RICs, and not to accounts of the ASP, the only sensible way for the extension to operate in the ASP context is as described above.

The alternative interpretation of the Notice, one based on a literal reading of the language, would produce absurd results. Read literally, the extension in the context of the ASP exemption would apply to the following persons:

- an employee or officer of the ASP with signature authority over a foreign financial account of a controlled person of the ASP; and
- an employee or officer of a controlled person of the ASP with signature authority over a foreign financial account of the ASP or a controlled person of the ASP.

This reading would make no sense. An officer or employee of the ASP with signature authority over a foreign financial account of the ASP is *not* covered by the ASP exemption, and therefore *must* file an FBAR by June 30, 2011 (unless some other exception applies). Under this alternative (literal) reading of the Notice, the same officer or employee *not* covered by the ASP exemption nevertheless *would* qualify for the extension to the extent he or she has signature authority over a foreign financial account of a controlled person of the ASP. Likewise, an officer or employee of a controlled person of the ASP *would* be eligible for the extension if he or she has signature authority over a foreign financial account of the ASP or a controlled entity of the ASP.

Since the ASP exemption itself applies *only* with respect to foreign financial accounts of RICs – and we have raised considerable concerns with certain aspects of that application – we are confident that FinCEN (1) intended to address the concerns we raised and (2) did not intend to grant an extension to (a) officers and employees of controlled persons of the ASP who have signature authority over the ASP’s foreign financial accounts or (b) officers and employees of the ASP with signature authority over foreign financial accounts of controlled persons of the ASP.

⁴ Similarly, the interim relief would apply to officers and employees of the ASP or any controlled person of the ASP with respect to foreign financial accounts of any controlled person of the RIC. However, RICs typically do not own more than 50 percent of other entities.

We believe the intent of the Notice is sufficiently clear in this regard that no further clarification is needed. We bring this drafting issue to your attention solely so that FinCEN can issue clarifying guidance if FinCEN determines that such guidance is needed.

The Brother-Sister Entity Issue

While we appreciate the interim relief provided by the Notice, the benefit to the RIC industry is quite limited. As we pointed out in our letters of January 15, 2009 and April 27, 2010, employees of affiliates of the ASP (as defined in the regulations) often have signature authority over accounts of the RIC for which the ASP serves as investment advisor. The affiliates provide a variety of administrative services to the RIC. These affiliates are occasionally subsidiaries of the ASP, but more typically they are under common control with the ASP (*i.e.*, they and the ASP are “brother-sister” entities). No practical distinction exists, from a business operations perspective, between these two organizational structures.

It is unclear if the Notice applies to officers and employees of ASP affiliates that are not ASP subsidiaries. The definition of “covered person” under the Notice includes entities that are controlled *indirectly* by the ASP. Under one interpretation, this could include entities under common control with the ASP (brother-sister entities) since control by the common parent could be imputed to the ASP.⁵

Because of the large number of ASP brother-sister affiliates who have signature authority over foreign financial accounts of RICs, a failure to interpret the Notice to cover these affiliates will result in thousands upon thousands of FBAR filings for no useful purpose. Accordingly, we urge FinCEN to issue guidance expeditiously clarifying that ASP affiliates with signature authority over accounts of a RIC for which the ASP provides investment advisory services are covered by the Notice.

Sincerely,

/s/ Keith Lawson

Keith Lawson
Senior Counsel – Tax Law

cc: Samuel Berman
Mark E. Cottrell
Jamal El-Hindi
Emily M. Lesniak
Robert Zack

⁵ *Cf.* I.R.C. § 318(a) (if 50 percent or more of the stock in a corporation is owned by a person, the corporation is considered as owning stock owned by such person.)