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June 10, 2011

Via Electronic Mail

Mr. Jamal El-Hindi
Associate Director for Regulatory Policy and Programs
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: Final Rule on Reports of Foreign Financial Accounts; RIN 1506–AB08; 76 Federal Register 10234 (February 24, 2011).

Dear Mr. El-Hindi:

The American Bankers Association¹ (ABA) would like to take this opportunity to request certain clarifications about the final rule amendments to the regulations governing reports of foreign financial accounts. Financial Crimes Enforcement Network (FinCEN) regulations generally require U.S. persons having a financial interest in or signature or other authority over a bank, securities, or other financial account in a foreign country to file the Report of Foreign Bank and Financial Accounts, Form TD–F 90–22.1, otherwise known as FBAR. FinCEN amended the rule in February 2011, providing much needed relief and clarification about which accounts were subject to reporting, as well as who needed to file a report.

We appreciate those helpful changes and ask that FinCEN provide additional guidance on another important area that needs clarification – the FBAR’s application to global custody accounts. Many of our member institutions provide custody² and other services to U.S. persons, including pension plans, tax-exempt entities, trusts, and individuals who may be required to file FBARs concerning their foreign financial accounts. The customers often look to the bank for guidance on filing FBARs, in particular pension and other employee benefit plans. Indeed, sometimes both the bank acting in its capacity as a fiduciary and the customer are obligated to file duplicate reports. Both our member institutions and their customers wish to comply with the regulation, while providing information to the government that has a “high degree of usefulness in criminal, tax, regulatory, and counter-terrorism matters.”³

¹ The American Bankers Association represents banks of all sizes and charters and is the voice for the nation’s \$13 trillion banking industry and its two million employees.

² For more information on custody services generally, please refer to the Office of the Comptroller of Currency Handbook, *Custody Services* (January 2002), available at <http://www.occ.gov/static/publications/handbook/custodyservice.pdf>

³ Preamble to the final rule, 76 Federal Register 10234 (February 24, 2011).

Global Custody Accounts Are Not Reportable “Foreign” Accounts

As we stated in our past letters to FinCEN⁴ and the IRS⁵, guidance is needed on what makes a particular account “foreign” and therefore reportable. The narrative portion of the final rule states a very reasonable principal to follow for certain types of accounts, in particular global custody accounts:

U.S. banks may act as a global custodian and hold the person’s assets outside the United States. In many cases, the custody bank creates pooled cash and securities accounts in the non-U.S. market to hold the assets of multiple investors. These accounts, commonly called omnibus accounts, are in the name of the global custodian. Typically, the U.S. customer does not have any legal rights in the omnibus account and can only access their holdings outside of the United States through the U.S. global custodian bank. FinCEN wishes to clarify that in this situation, the U.S. customer would not have to file an FBAR with respect to assets held in the omnibus account and maintained by the global custodian. In this situation, the U.S. customer maintains an account with a financial institution located in the United States.

However, if the specific custodial arrangement permits the United States person to directly access their foreign holdings maintained at the foreign institution, the United States person would have a foreign financial account.

We are grateful for the acknowledgement that omnibus custody accounts are not reportable by the bank customer. We strongly urge FinCEN to apply this same commonsense reasoning to similar types of custody accounts, such as segregated custody accounts, in which the sub-account is in the name of the bank customer and not in the name of the U.S. bank custodian due to local regulation or custom. These accounts function like omnibus custody accounts and are segregated into separate sub-custody accounts solely due to foreign legal requirements. Most important, the bank customer has no control or authority over the assets in the segregated accounts.

Below are two examples of global custody arrangements that illustrate why these accounts should not be reportable by the bank customer.

Example of Typical Global Custody Arrangement

Assume that the U.S. bank custodian provides, among other things, global custody services to bank customers who are U.S. persons covered by FBAR rules. Consistent with the investment strategies pre-established by the bank customer, the U.S. bank custodian holds bank customer assets both domestically and abroad. Such assets are held in this example in a custodial capacity, either by the U.S. bank custodian or by non-U.S. sub-custodians chosen by the U.S. bank custodian, for the benefit of the bank customer. To assist the bank customer with preparing its individual FBAR

⁴ ABA Letter to FinCEN, April 27, 2010, Re: Amendment to the Bank Secrecy Act Regulations—Reports of Foreign Financial Accounts; RIN 1506–AB08; 75 Federal Register 8844.

⁵ ABA Letter to IRS, August, 7, 2009, Re: Report of Foreign Bank and Financial Accounts (FBAR); Form TD F 90-22.1; Notice 2009-62.

submissions, the U.S. bank custodian provides annually a summary of the investment assets held by the U.S. bank custodian or non-U.S. sub-custodians on behalf of the bank customer.

In some non-U.S. markets, local market practice dictates that an investor maintain its cash and securities accounts in its own name. In other words, the U.S. bank custodian may not maintain bank customer positions in omnibus accounts, and instead must create separate accounts for each bank customer investing into those markets.

In this example, the U.S. bank custodian is operating in one of these markets and, therefore, it must open the segregated accounts in order to facilitate the bank customer's investments abroad. The U.S. bank custodian selects and monitors the local market sub-custodian; the bank customer has nothing to do with selecting the non-U.S. sub-custodian and often little to do with the account opening process. Although the bank customer's name typically is on the sub-custody accounts, in many cases the bank customer does not even sign account opening documents or even is aware that the accounts exist in its name. If the bank customer does sign the account statements, the bank customer then gives the U.S. bank custodian power of attorney over the account – thereby transferring authority to direct or control the assets in the account.

Importantly, the bank customer is effectively unknown to the non-U.S. sub-custodian. As dictated by the contract between the U.S. bank custodian and the non-U.S. sub-custodian, the non-U.S. sub-custodian only contracts with - and deals with - the U.S. bank custodian in its role as global custodian bank. Therefore, a non-U.S. sub-custodian will not accept bank customer instructions to move cash or securities into or out of the segregated accounts; the non-U.S. sub-custodian only deals with the U.S. bank custodian. Further, the bank customer has no contact person at the non-U.S. sub-custodian. Notwithstanding the naming convention, the bank customer has no signature authority over those segregated accounts because the non-U.S. sub-custodian would not accept instructions from the named bank customer.

Non-U.S. Deposit Accounts in Global Custody Arrangements

In the course of holding the bank customer's foreign investments, the sale and purchase of assets regularly occur, which result in the U.S. bank custodian temporarily holding foreign currency pending its reinvestment on behalf of the bank customer. When, for example, Euro-denominated securities held in Germany on behalf of the bank customer are sold, the U.S. bank custodian receives Euros in exchange. The U.S. bank custodian's practice may be to deposit such funds into an account at a non-U.S. branch of the U.S. bank custodian bearing the bank customer's name and denominated in the appropriate foreign currency pending reinvestment of the funds. Often times, for internal accounting convenience, such accounts are separate accounts and not sub-accounts of a larger omnibus account. These accounts, like any deposit account, are general obligations of the U.S. bank custodian to its bank customer. However, from a legal perspective, these deposits function more like an escrow account with the U.S. bank custodian as escrow agent rather than a traditional deposit account that belongs to the customer.

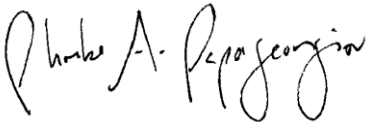
While the bank customer has a claim against the U.S. bank custodian for these funds, the account is not the sort of "foreign account" that should require FBAR reporting by both the U.S. bank custodian and the bank customer. Indeed, these deposit accounts are simply a feature of the bank customer's global custody account with the U.S. bank custodian. In addition, it would be inconsistent to consider these non-U.S. deposit accounts as reportable if the bank customer's omnibus or segregated accounts held at non-U.S. sub-custodians under the bank customer's global

custody arrangements with the U.S. bank custodian are not reportable. For this reason, we request that the non-US deposits held in custody by the U.S. bank custodian need only be reported by the U.S. bank custodian and not by the bank customer.

Conclusion

ABA appreciates this opportunity to request needed clarification on the FBAR filing requirements for segregated sub-custody accounts in the name of the U.S. person bank customer. We strongly urge FinCEN to clarify that these accounts are not reportable on the FBAR, because the U.S. person has no control over the account. If you have any questions about the letter, please write the undersigned at phoebep@aba.com.

Sincerely,

A handwritten signature in black ink that reads "Phoebe A. Papageorgiou". The signature is written in a cursive style with a large initial "P" and a long, sweeping underline.

Phoebe A. Papageorgiou
Senior Counsel