



*Invested in America*

June 17, 2011

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

Re: FinCEN Final Rule on FBAR Responsibilities

Dear Mr. El-Hindi:

The Asset Management Group (the “AMG”)<sup>1</sup> of the Securities Industry and Financial Markets Association (“SIFMA”) appreciates the opportunity to provide FinCEN with comments regarding new final regulations (the “Final Regulations”) implementing the requirements of the Report of Foreign Bank and Financial Accounts (“FBAR”), used by US persons to annually report to the US Department of the Treasury their financial interest in, or signature authority over, foreign financial accounts.

Among the requirements set forth in the Final Regulations is a requirement that an employee who has signatory authority over a foreign account of either (1) a non-US company, or (2) a US company of which the employee is neither an employee nor an officer, comply with the FBAR reporting rules. While there are certain exceptions from this requirement, the guidance contained in the release clearly states that these exceptions would not apply to SEC registered investment advisers when they are providing advisory services to clients that are not registered investment companies.

As described in more detail below, we respectfully request that employees of AMG member firms be exempted from the requirement to file individual FBAR reports relating to any authority that they have to instruct foreign banks and custodians on behalf of clients. Not only do we think it is unduly burdensome and duplicative to impose this requirement on individual employees but, we believe that the volume of duplicative reporting this entails serves no substantive purpose and would be disruptive to the mission of FinCEN.

#### **Client Relationships and Operational Processes**

As investment advisers, many AMG member firms enter into contracts where clearly defined investment authority is given over clients’ foreign bank and custody

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<sup>1</sup> The AMG’s members represent U.S. asset management firms whose combined assets under management exceed \$20 trillion. The clients of AMG member firms include, among others, registered investment companies, ERISA plans, and state and local government pension funds, many of whom invest in commodity futures, options, and swaps as part of their respective investment strategies.

accounts. While firms have investment discretion over these accounts, this discretion is limited to effecting clearly stated investment goals. Each client relationship is governed by explicit guidelines which are monitored on a continued basis. It is clear in each relationship, that firms do not have unfettered access to, or control over, client funds and assets. In addition, AMG members generally do not have a general power of attorney over clients' assets held in these foreign bank accounts.

In order to carry out its investment advisory responsibilities, AMG member firms employ individuals ("Authorized Employees") who, in the course of their day to day responsibilities, are authorized to communicate with foreign banks and custodians and, instruct these entities to settle securities transaction and move client assets. Larger AMG members may employ hundreds of Authorized Employees that have signature authority on behalf of their firm for hundreds, or even thousands, of client accounts that have non-US sub custodian bank relationships. These Authorized Employees are acting solely as an agent of the firm in the scope of their employment and have no personal control over these accounts. Their activities are subject to numerous checks and balances at both the firm and individual client level. Member firms can comfortably represent, and are prepared to demonstrate, that there are numerous controls around client account activity which make movements of money outside investment process nearly impossible to achieve.

### **Compliance Process and Burden**

To comply with the requirements of the Final Regulation as they now stand, many firms will be forced to retain the services of an external vendor to create a program to import the client data required by Form TD F 90 - 22.1 and, then provide identical sets of the forms to each of the Authorized Employees. For example, a firm with 1,000 client accounts that lists 3 accounts per page will require each employee to submit a 330-page (roughly) filing. This is in addition to the time required to manually complete this paperwork for each individual. As there is no electronic filing option, the IRS will receive nearly 30,000 pages of paper from this firm (assuming 100 Authorized Employees) since an identical list of accounts will be attached to each employee's filing. In effect, IRS will receive 100 times more paper (only one set is needed) than is necessary to provide FinCEN with the identity of the foreign accounts Authorized Employees have authority over for this one firm.

Based on the foregoing, and given the nature of the information sought by FinCEN, we respectfully submit that it serves no purpose to require Authorized Employees to file FBAR reports in their capacity as individual taxpayers. As noted above, applying this requirement to the individual Authorized Employees will result in submission of over 30,000 pages of duplicative information for 1 firm that has 1,000 client accounts and 100 Authorized Employees. It should be noted, that we have been told anecdotally, that a certain investment advisor faced with an identical situation will be filing more than 1,500,000 pages of paper on or before June 30, 2011 if this requirement stands. This is not only inordinately burdensome and wasteful but, as we have also

noted, it is potentially disruptive to FinCEN's mission, given the time and effort required to process that volume of reports.

### **Other Considerations**

**Non US Employees.** Given the global footprint of many AMG member firms, the requirement to collect this information from Authorized Employees raises other issues. Essentially, any Authorized Employee who is not subject to US jurisdiction would be exempt and, arguably, since the information sought by FinCEN is now being gathered at the individual level, FinCEN will most likely get an incomplete picture of the non-US accounts that a US-controlled investment adviser has authority over. Additionally, firms may be incentivized to move these functions outside the US to be performed by individuals not subject to US jurisdiction.

**Pre 2010 Filing Responsibilities.** The Final Regulations also require that both current and former employees file FBAR filings for the calendar years 2004 through 2009. With respect to currently employed Authorized Employees, we reiterate all of the points raised above to support our position and, respectfully request that this requirement be revised as noted above. With respect to individuals that are no longer employed by member firms but, who previously acted in the capacity of an Authorized Employee, AMG firms would be placed in the position of providing confidential client information to individuals no longer employed and, no longer subject to firm policies and practices. Not only is business risk clear but, requiring firms to provide this information to non-employees may, in certain cases, violate client confidentiality agreements.

### **Conclusion**

Based on the foregoing, we respectfully request that employees of AMG member firms be exempted from the requirement to file individual FBAR reports relating to any authority that they have to instruct foreign banks and custodians on behalf of clients for the 2010 calendar year and all prior years. As an alternative, consideration should be given to one FBAR report being filed by a member firm, listing the client accounts along with a statement that details individuals with signature authority. This is consistent with prior year procedures for filing FBAR reports.

The AMG appreciates your attention to this matter and welcomes the opportunity to provide foregoing comments and recommendations regarding FBAR reporting.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Timothy W. Cameron', with a long horizontal flourish extending to the right.

Timothy W. Cameron, Esq.  
Managing Director, Asset Management Group  
Securities Industry and Financial Markets Association