SwissBanking

By Electronic Mail
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FinCEN, PO Box 39
Vienna, Virginia 22183-1618

Basel, November 25, 2002
L.162 AHU/mga

Re: NPRM – Section 352 Unregistered Investment Company Regulations

Ladies and Gentlemen:

The Swiss Bankers Association (the "SBA")[1] appreciates this opportunity to comment on the Financial Crimes Enforcement Network's ("FinCEN") proposed regulation under section 352 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act") prescribing standards for unregistered investment companies to establish anti-money laundering programs.[2] As we have stated in relation to other regulatory initiatives undertaken pursuant to the USA PATRIOT Act, the SBA fully supports the intent of the Act and is proud of the support that Switzerland and its banks have provided to the United States in the fight against terrorism and money laundering.

Our comments are focused on provisions in the proposed rule that could have an extra-territorial effect and unnecessarily broaden the definition of unregistered investment company and burden such companies with a broader scope of information submission than required by the purposes of the USA PATRIOT Act. As explained further below, the SBA recommends that the proposed rule be amended to cover only unregistered investment companies organized under the laws of a State or the United States, or, to the extent that the regulation is applied outside the United States, that an exemption be granted for companies incorporated in jurisdictions that satisfy the Financial Action Task Force ("FATF") anti-money laundering criteria and for other countries that at a minimum, it be amended to (i) clarify the proposed jurisdictional limitation in the definition of unregistered investment company, and (ii) narrow the categories of information required to be supplied in the notice

[1] The Swiss Bankers Association represents approximately 400 banks, including non-Swiss banks, with operations in Switzerland. Several members of the SBA have substantial operations in the United States through branches, agencies and affiliates.

[2] To be codified at 31 C.F.R. 103.132 (the "proposed rule").

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to FinCEN and state that the information in the notice will be maintained and used solely by FinCEN for measuring compliance with the proposed rule.

As a general matter, under the Bank Secrecy Act (which the USA PATRIOT Act amends) anti-money laundering requirements only apply to U.S. financial institutions. Thus, to the extent the proposed rule covers financial institutions that are not organized or licensed in the United States, it has an extra-territorial effect that is inconsistent both with the Bank Secrecy Act and principles of international comity. In this regard, the jurisdictional limitation of the proposed rule (described in detail below) would cause investment companies that have no contact with the United States other than some tangential relationship to a U.S. person or an investment by as few as one U.S. person to become subject to the proposed rule. Moreover, many of these investment companies, as is the case with those organized in Switzerland, are already subject to comparable anti-money laundering requirements. For example, in Switzerland, all investment companies must comply with the due diligence obligations imposed on all financial intermediaries under the Swiss Money Laundering Act. The SBA recommends that the proposed rule be amended so that it applies only to unregistered investment companies organized by a State or the United States.

As an alternative, if FinCEN believes that circumstances warrant application of the rule to investment companies organized outside of the United States, an exemption should be granted for companies that are incorporated or licensed in jurisdictions that satisfy the FATF recommendations on anti-money laundering and terrorist financing. This would require investment companies worldwide that do business in U.S. financial markets to either have a Patriot Act anti-money laundering program in place, or to be compliant with comparable FATF standards. Additional, and potentially inconsistent anti-money laundering requirements should not be imposed on investment companies that are already subject to robust anti-money laundering regulation and supervision in their home jurisdiction. Requiring duplicative standards would only serve to undermine the FATF process that has been successfully used by the international community to persuade non-conforming offshore jurisdictions to adopt rigorous anti-money laundering standards.

Furthermore if FinCEN believes that the requirements of the proposed rule should apply to investment companies located in countries whose supervisory systems do not meet the FATF anti-money laundering criteria, it should clarify the substantial nexus to the United States that justifies extra-territorial application of the proposed rule, and, at a minimum, amend the proposed rule in the following ways.

1. Clarify the Proposed Jurisdictional Limitation

FinCEN has proposed that any issuer that would be an investment company under the Investment Company Act of 1940 (the "Company Act") but for the exclusions provided by sections 3(c)(1) and 3(c)(7) of that Act would be considered an "unregistered investment company" under the proposed rule. This definition is subject to three limitations related to asset size, redemption rights and jurisdictional factors. The proposed jurisdictional limitation would narrow the definition of unregistered investment company to only those

issuers that: (i) are organized under the laws of a State or the United States; (ii) are organized, operated or sponsored by a U.S. person[3]; or (iii) sell ownership interests to a U.S. person.[4]

The proposed jurisdictional limitation uses several terms that are not defined under the USA PATRIOT Act, the proposed rule or other sources that could be relevant, such as the Company Act or the U.S. Tax Code. In particular, none of the terms in the phrase "organized, operated or sponsored" by a U.S. person is defined. Thus, the scope of the proposed jurisdictional limitation is difficult to interpret. For example, it is not clear whether an investment company that would not otherwise come within the ambit of the proposed rule would be considered "operated" by a U.S. person simply because it retained an adviser or sub-adviser that was a U.S. person to advise it with respect to investing a portion or all of its assets. Similarly, it is not clear what level of involvement by a U.S. person that is a service provider (such as an administrator or placement agent) to an investment company not otherwise subject to the proposed rule would cause the investment company to be considered "operated" or "sponsored" by a U.S. person. The SBA recommends that FinCEN clarify the specific nature of the relationship between an investment company and a U.S. person that would cause it to be "organized, operated or sponsored" by a U.S. person. In this regard, the SBA recommends that FinCEN limits the application of the proposed rule to unregistered investment companies that have a substantial relationship with a U.S. person.

Further, the phrase "sells ownership interests to a U.S. person" can also be interpreted broadly and, therefore, arguably could apply extra-territorially to investment companies that should not be subject to the proposed rule. The SBA appreciates that investment companies organized outside of the United States that directly, or through agents, market ownership interests exclusively to U.S. persons may reasonably be regarded as benefiting from the financial system of the United States and thus could be considered by FinCEN to be within the class of investment companies to which the proposed rule could apply. However, the language as drafted does not preclude the possibility that an investment company could become subject to the proposed rule simply because one, or some nominal number of, U.S. person is able to purchase an ownership interest through means outside of the investment company's (or its agents') control. For example, a U.S. person could acquire an ownership interest in an investment company (not otherwise subject to the proposed rule) by a purchase made in the secondary markets outside of the United States. Under those circumstances, the investment company may not even know that a U.S. person has an ownership interest. The SBA recommends that FinCEN clarify that to be covered by the proposed rule, (i) the investment company's ownership interests must be predominantly marketed to and owned by U.S. persons, and (ii) any ownership interest purchased by a U.S. person must be purchased directly from the investment company or its agents.

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[3] The proposed rule would use the definition of U.S. person found in Regulation S under the Securities Act of 1933.

[4] Section 103.132(a)(6)(i)(D) of the proposed rule.

2. Narrow the Categories of Information Required in the Proposed Notice

FinCEN proposes to require unregistered investment companies to file a notice with FinCEN[5] to permit FinCEN a practical means of identifying and locating investment companies subject to the proposed rule.[6] The SBA recognizes that, in order to fulfill its statutory mandate under the USA PATRIOT Act, FinCEN should have some means to identify the class of financial institutions it has made subject to regulation under the USA PATRIOT Act and so may reasonably require contact information for the unregistered investment company. However, as noted above, application of the regulation to investment companies with little or no nexus to the United States or U.S. persons, is an unwarranted extraterritorial extension of U.S. law, and requiring reporting by such companies would be unprecedented.

Further, there are three categories of information called for in the proposed notice under the proposed rule that do not appear to be necessary for FinCEN to fulfill its mandate. In particular, the proposed notice calls for information regarding the dollar amount of assets under management by the unregistered investment company, the number of interest holders in the unregistered investment company and identifying information for each investment adviser, commodity trading adviser, commodity pool operator, organizer or sponsor of the unregistered investment company. It is not necessary for FinCEN to collect this information to identify and locate unregistered investment companies that would be subject to the proposed rule. Furthermore, disclosure of this information may unnecessarily implicate competitive concerns or privacy issues for those unregistered investment companies. The SBA recommends that FinCEN eliminate the provisions in the proposed notice calling for information from unregistered investment companies regarding their assets under management, their number of interest holders and their investment advisers, commodity trading advisers, commodity pool operators, organizers or sponsors.

Further, it is not clear whether the notice (which can be filed through FinCEN's internet website) will be generally available to the public or otherwise shared by FinCEN with other regulatory bodies for purposes other than measuring compliance with the proposed rule. The SBA recommends that FinCEN clarify that the data gathered by the proposed notice will be maintained solely by FinCEN and used solely by FinCEN to meet the purpose of the proposed rule.

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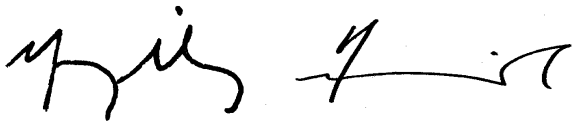
[5] Section 103.132(d) of the proposed rule.

[6] 67 Fed. Reg. 60622.

Please contact the undersigned or our U.S. counsel, Thomas J. Delaney (202.663.8045) or Cecelia A. Calaby (202.663.8984) of Shaw Pittman LLP, if you wish to discuss these comments further.

Yours sincerely,
Swiss Bankers Association



C.-A. Margelisch A. Hubschmid