AICPA

American Institute of CPAs
1455 Pennsylvania Avenue, NW
Washington, DC 20004-1081

June 27, 2011

FinCEN
Attention: Office of Regulatory Policy
P.O. Box 39
Vienna, VA 22183

RE: Request for Confirmation of the Treatment of Persons with Signature or Other Authority Over, but No Financial Interest in, a Foreign Bank or Financial Account for FBARs Relating to Pre-2010 Calendar Years

Dear Sir or Madam:

The American Institute of Certified Public Accountants (AICPA) requests guidance regarding the Report of Foreign Bank and Financial Account (FBAR), Form TD F 90-22.1, which is required under Title 31 of the U.S. Code (the Bank Secrecy Act, or BSA). Our comments focus on the need for immediate guidance associated with whether a select group of United States persons will not be required to prepare and file FBARs that otherwise would be required to be filed (i.e., received) by November 1, 2011 pursuant to Internal Revenue Service (IRS) Notice 2011-54. This letter supplements a separate letter that the AICPA submitted on May 31, 2011.[1]

These comments were developed by the Foreign Bank and Financial Account Reporting Task Force (FBAR Task Force) of the AICPA's International Taxation Technical Resource Panel, and approved by the Tax Executive Committee.

The AICPA is the national professional organization of certified public accountants comprised of approximately 370,000 members. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

Request for Immediate Guidance Regarding Certain Officers and Employees

The purpose of this letter is to request confirmation that, under the circumstances described below, it is not necessary for (i) the officers or employees of a domestic corporation listed on a U.S. national securities exchange (or the officers or employees of its more than 50-percent

[1]http://www.aicpa.org/InterestAreas/Tax/Resources/International/Advocacy/DownloadableDocuments/AICPA05.31.2011SignAuthCL.pdf.

owned domestic and foreign subsidiaries), or (ii) the officers or employees of a corporation with over $10 million in assets and 500 or more shareholders (or the officers or employees of its more than 50-percent owned domestic and foreign subsidiaries) to file an FBAR for pre-2010 calendar years.

For purposes of the discussion below relating to pre-2010 calendar years, a domestic corporation listed on a U.S. national securities exchange and a domestic corporation with over $10 million in assets and 500 or more shareholders shall sometimes be referred to herein as the "widely held domestic parent."

We are requesting this clarification because of concerns as to the applicability and clarity of previously issued guidance. On March 10, 1988, the Financial Crimes Enforcement Network (FinCEN) bureau of the Department of the Treasury (Treasury) issued an administrative letter ruling under the BSA. This 1988 letter ruling (attached), which expanded upon prior interpretive guidance issued by FinCEN relating to FBAR filing obligations,[2] addressed the FBAR filing requirements of officers and employees of (i) a domestic corporation ("X") whose securities were listed on national securities exchanges, (ii) certain domestic subsidiaries of X, and (iii) certain foreign subsidiaries of X. FinCEN issued two rulings relating to the FBAR filing requirements:

1. X may file a consolidated Treasury Form TD F 90-22.1 to report all foreign financial accounts on behalf of itself and any domestic or foreign corporation in which X owns, directly or indirectly, more than a 50-percent interest.

2. Any officer or employee of X, or of any domestic or foreign corporation in which X owns (directly or indirectly) more than a 50-percent interest, need not report on Form TD F 90-22.1 that he or she has signature authority over any foreign financial account of X or of those corporations in which X owns more than a 50-percent interest, provided that he or she has no personal financial interest in that account and has been advised in writing by the chief financial officer of X that X or a subsidiary thereof has filed a current Form TD F 90-22.1 which includes that account.

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[2] The letter ruling included the following passage discussing this prior interpretative guidance:

> "With respect to officers or employees of a domestic subsidiary of a domestic corporation, Treasury has already published the following interpretation:
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> > '. . . an officer or employee of a domestic subsidiary of a domestic corporation which has securities listed on national securities exchanges or which has assets exceeding $1 million and 500 or more shareholders of record, need not report that he has signature authority over a foreign financial account of the subsidiary, if he has no personal financial interest in the account and has been advised in writing by the chief financial officer of the parent corporation that the subsidiary corporation has filed a current report which includes that account. 31 CFR 103 Appendix (1987) at 365."

In response to a Freedom of Information Act request, FinCEN provided a letter on May 16, 2005 (attached) stating that the above letter ruling was based on guidance in an Appendix to regulations under the BSA, but that Treasury revised the Appendix in 1988 and the guidance no longer appears readily available to the public beginning in 1989. Nevertheless, FinCEN concluded in the 2005 letter that the guidance "is valid unless subsequently revoked or altered by Treasury."

The instructions to the October 2008 version of the FBAR (the "2008 FBAR instructions") provide certain exceptions to filing FBARs for officers and employees of a widely held domestic parent and its domestic and foreign subsidiaries when certain conditions are satisfied. Included in these exceptions is an exception that provides that an officer or employee of a domestic corporation whose equity securities are listed upon any U.S. national securities exchange or which has assets exceeding $10 million and has 500 or more shareholders of record need not file such a report concerning signature or other authority over a foreign financial account of the corporation, if the officer or employee has no personal financial interest in the account and he has been advised in writing by the chief financial officer or similar responsible officer of the corporation that the corporation has filed a current report, which includes that account. Additionally, the 2008 FBAR instructions also provide that an officer or employee of a domestic subsidiary of such a domestic corporation need not file this report concerning signature or other authority over the foreign financial account if the domestic parent meets the above requirements, the officer or employee has no personal financial interest in the account and the officer or employee has been advised in writing by the responsible officer of the parent that the subsidiary has filed a current report that includes the account. If a domestic subsidiary is named in a consolidated FBAR of the parent,[3] the subsidiary will be deemed to have filed a report for purposes of this exception. Moreover, an officer or employee of a foreign subsidiary more than 50-percent owned by such a domestic corporation need not file this report concerning signature or other authority over the foreign financial account if the officer or employee has no personal financial interest in the account, and the officer or employee has been advised in writing by the responsible officer of the parent that the parent has filed a current report that includes the account.[4]

Some U.S. persons who are officers or employees of a widely held domestic parent (and U.S. persons who are officers and employees of its more than 50-percent owned domestic and foreign subsidiaries) have been relying upon the 1988 letter ruling, in conjunction with a reasonable interpretation of the 2008 FBAR instructions, in determining their responsibilities to file FBARs under the BSA. Specifically, such officers and employees have interpreted the 1988 letter ruling in conjunction with the 2008 FBAR instructions to mean that they are not required to file an FBAR for calendar years prior to 2010 for: a) foreign financial accounts in the widely held domestic parent; and b) foreign financial accounts of the applicable domestic or foreign subsidiaries of the widely held domestic parent, where certain requirements are met. For example, some officers and employees of a widely held domestic parent who had signatory

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[3] For when a consolidated FBAR could be filed under the 2008 FBAR Form, see the 2008 FBAR Form and the 2008 FBAR instructions.
[4] For additional details, see the 2008 FBAR instructions.

authority over an applicable subsidiary's foreign financial account have taken the position that they were exempt from the FBAR filing requirement, provided the requisite requirements were satisfied, even though they were not an officer or employee of the subsidiary that directly owned the foreign financial account.

We wish to confirm that, prior to the modifications made by the final 2011 FBAR regulations relating to exceptions for officers and employees (discussed below), the interpretation discussed above relating to the filing requirements for officers and employees was and is an appropriate interpretation of the FBAR fling requirements for pre-2010 calendar years (i.e., 2009 and earlier FBARs).

On February 24, 2011, FinCEN published the 2011 final FBAR regulations which became effective on March 28, 2011. The IRS published on March 26, 2011, a revised FBAR form with accompanying instructions that reflect the amendments made by the final FBAR regulations.

The 2011 final FBAR regulations and the 2011 FBAR instructions modified the exceptions relating to officers and employees who have signature authority but no financial interest in foreign financial accounts. For instance, the 2011 final FBAR regulations provide that U.S. persons who are officers and employees of an entity that has a class of equity securities listed (or American depository receipts listed) on any U.S. national securities exchange is not required to report his or her signature authority over a foreign financial account of such entity, assuming such person does not have a financial interest in such account. In addition, an officer or employee of a domestic subsidiary is not required to report signature authority over a foreign financial account of the subsidiary if its U.S. parent has a class of equity securities listed on any U.S. national securities exchange, assuming such person does not have a financial interest in such account and the subsidiary is included in a consolidated FBAR report of the U.S. parent. Moreover, an officer or employee of an entity that has a class of equity securities registered (or American depository receipts in respect of equity securities registered) under section 12(g) of the Securities Exchange Act is not required to report signature authority over a foreign financial account of such entity, assuming such person does not have a financial interest in such account.[5]

Under the 2011 final FBAR regulations, the exceptions discussed above for officers and employees is limited only to the accounts of the particular entity by which such person is employed. Thus, for example, an officer or employee of a domestic corporation that has a class of equity securities listed on a U.S. national securities exchange who has signature authority over, but no financial interest in, a foreign financial account of a domestic subsidiary that is included in a consolidated FBAR report would not qualify for an exemption from filing an FBAR relating to the foreign financial account of the domestic subsidiary if such person was not an officer or employee of the subsidiary. Further, there is no exception under the 2011 final FBAR regulations similar to the exception contained in the 2008 FBAR instructions, discussed above, for officers and employees of a foreign subsidiary who have signature authority over, but no financial interest in, a foreign subsidiary's foreign financial accounts. Thus, for example, for

[5] For the complete list of exceptions, see the 2011 final FBAR regulations and 2011 FBAR instructions. This comment letter focuses solely on the exceptions discussed herein.

the 2010 calendar year (and future FBARs) for which the 2011 final FBAR regulations apply,[6] there is no longer an exception for U.S. persons who are officers or employees of any entity with signature authority over, but no personal financial interest in, foreign financial accounts owned by applicable foreign subsidiaries of a domestic corporation that has a class of equity securities listed on a U.S. national securities exchange, and, with respect to domestic subsidiaries, the exceptions discussed above that are available only apply with respect to foreign financial accounts of a company in which the person is an officer or employee.

In discussing some of these exceptions in the preamble to the 2011 final FBAR regulations, FinCEN included the following language:

> FinCEN received two comments seeking an expansion of the exception when an employee of a U.S. parent also has signature authority over the foreign accounts of a U.S. parent's subsidiary which have been included in the consolidated FBAR report. These commenters noted that under the proposed exception, officers or employees of the parent who have signature authority over the foreign accounts of the subsidiary would not benefit from the exception, which is limited to the accounts of the employer. The commenter further noted that in this situation, officers or employees of the subsidiary would benefit from the exception with respect to the subsidiary's foreign accounts. Likewise, one of the commenters asked for similar treatment when the officers and employees of the subsidiary have signature authority over the accounts of the listed parent.
>
> FinCEN has considered these comments and has decided not to revise the exception as recommended. Given the revision in the final rule to the signature authority definition, the clarifications provided regarding the scope of the signature authority filing requirement and the recordkeeping rules, FinCEN does not believe that a further relaxation of the rule is appropriate.

In some respects, the exceptions provided in the 2011 final FBAR regulations and the 2011 FBAR instructions are narrower than those provided under former guidance. The language included in the preamble to the 2011 regulations has caused some companies to re-examine their interpretation of the FBAR exceptions prior to the publication of the 2011 FBAR final regulations. This has raised a question as to whether the broader interpretation of the exceptions for officers and employees discussed above that companies followed prior to issuance of the 2011 final FBAR regulations was intended. Clarity is needed.

If FinCEN were to adopt a narrow interpretation of the exceptions for officers and employees for pre-2010 calendar years, it would impose an undue hardship on many officers and employees who would be impacted by such an interpretation without advancing compliance or achieving the purposes of the BSA. Given that officers and employees of widely held domestic parents and officers and employees of their applicable subsidiaries have previously relied on a reasonable

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[6] See Notice 2011-1, issued by FinCEN on May 31, 2011, and revised on June 6, 2011, for an extension of the FBAR filing deadline for certain individuals.

interpretation of the prior exceptions contained in the 2008 FBAR instructions, including taking into account the 1988 letter ruling, we request that FinCEN confirm that the interpretation discussed above relating to the filing requirements for officers and employees was an appropriate interpretation of the FBAR filing requirements for pre-2010 calendar years (i.e., 2009 and earlier FBARs).

* * * * *

We appreciate your timely consideration of our recommendations, and we welcome further discussion. If you have any questions, please contact Neil A.J. Sullivan, Chair, AICPA FBAR Task Force at (914) 713-0503, or neilsullivan@att.net; Joseph M. Calianno, Chair, AICPA International Taxation Technical Resource Panel at (202) 521-1505, or joe.calianno@us.gt.com; or Michelle R. Koroghlanian, AICPA Technical Manager at (202) 434-9268, or mkoroghlanian@aicpa.org.

Sincerely,

Patricia A. Thompson

Patricia A. Thompson, CPA
Chair, Tax Executive Committee

Attachments: FinCEN Ruling dated March 10, 1988
FinCEN Letter dated May 16, 2005

cc: Bill S. Bradley, FinCEN
Jamal El-Hindi, FinCEN
Samuel Berman, IRS
Rodney A. Lundquist, IRS

MAR 10 1988

Dear :

This is in response to your letter, dated January 8, 1988, in which you requested an administrative ruling under the Bank Secrecy Act regulations, 31 CFR Part 103. Your letter requested the following ruling:

> "An officer or employee of Company X or of any domestic or foreign corporation in which Company X owns directly or indirectly more than 50 percent of the total value of shares of stock need not file Department of the Treasury Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts, concerning his signature authority over a foreign financial account of Company X, if he has no personal financial interest in the account and has been advised in writing by the chief financial officer of Company X that Company X. has filed a current report which includes that account."

With respect to officers or employees of a domestic subsidiary of a domestic corporation, Treasury has already published the following interpretation:

> "... an officer or employee of a domestic subsidiary of a domestic corporation which has securities listed on national securities exchanges or which has assets exceeding $1 million and 500 or more shareholders of record, need not report that he has signature authority over a foreign financial account of the subsidiary, if he has no personal financial interest in the account and has been advised in writing by the chief financial officer of the parent corporation that the subsidiary corporation has filed a current report which includes that account."

31 CFR Part 103 Appendix (1987) at 365. Treasury has reviewed this interpretation in light of your letter, and has determined that it would be appropriate to grant an exemption to officers and employees of foreign subsidiaries of domestic corporations. Foreign subsidiaries of large domestic corporations are no less likely than domestic subsidiaries to have a legitimate need for financial accounts in foreign countries. So long as the parent corporation or its subsidiary is reporting the existence of such an account on Form TD F 90-22.1, it does not appear necessary to require duplicative reporting by officers or employees who have only signature authority over (but no personal financial interest in) that account.

Your letter indicated that Company X ("X") is a domestic corporation whose securities are listed on national securities exchanges, and which has assets exceeding $1 million and more than 500 shareholders of record. On the basis of those representations, this office has concluded:

1. X may file a consolidated Treasury Form TD F 90-22.1 to report all foreign financial accounts on behalf of itself and any domestic or foreign corporation in which X owns, directly or indirectly, more than a 50 percent interest.

2. Any officer or employee of X, or of any domestic or foreign corporation in which X owns (directly or indirectly) more than a 50 percent interest, need not report on Form TD F 90-22.1 that he or she has signature authority over any foreign financial account of X or of those corporations in which X owns more than a 50 percent interest, provided that he or she has no personal financial interest in that account and has been advised in writing by the chief financial officer of X that X or a subsidiary thereof has filed a current Form TD F 90-22.1 which includes that account.

Your letter requested that Treasury issue an administrative ruling on the issue you presented. This office has determined that it would be appropriate to issue such a ruling, in conformity with the reasoning of this letter. Because that ruling is now in preparation, this office has provided you with this letter for your guidance. As soon as the ruling has been signed by the Assistant Secretary, you will be provided with a copy. The ruling may also be published in the <u>Federal Register</u> at a later date. The ruling will not refer to X by name.

If you have further questions concerning this matter, please contact Amy G. Rudnick of this office at (202) 566-8022.

Sincerely,

/s/ Gerald L. Hilsher

Gerald L. Hilsher
Deputy Assistant Secretary
(Law Enforcement)

DEPARTMENT OF THE TREASURY
FINANCIAL CRIMES ENFORCEMENT NETWORK

May 16, 2005

Mr. Kevin Curran
PricewaterhouseCoopers LLP
Suite 800W
1301 K St., N.W.
Washington, D.C. 20005-3333

Re: FinCEN/2005-062

Dear Mr. Curran:

This letter responds on behalf of the Financial Crimes Enforcement Network (FinCEN) to your faxed Freedom of Information Act (FOIA) request received on May 11, 2005, for a copy of Treasury News Release B-797 from 1978, and any subsequent guidance issued that modified B-797 after 1978 and after 1988.

While the guidance you seek used to be published in the Appendix to the portion of the Code of Federal Regulations dealing with Bank Secrecy Act requirements from 1981 through 1988, Treasury revised the Appendix in 1988 and the guidance does not appear there beginning in 1989. Please be advised that we conducted a search for responsive records in the Office of Chief Counsel and did not locate a copy of the original letter ruling from which this guidance derives, however, we have located and enclosed the following documents.

1) The 1988 version of the Appendix before revision (totaling five pages).
2) The Federal Register notice announcing the revision of the Appendix (totaling nine pages).
3) A 1988 letter ruling that extends the guidance to employees of foreign subsidiaries of domestic corporations (totaling two pages).

Christine Del Toro of the Office of Chief Counsel tabbed the first document to pinpoint the specific guidance you are seeking. Mrs. Del Toro also tabbed language in the second document that states that the interpretation you are seeking, although no longer in our Appendix, is valid until subsequently revoked or altered by Treasury. To date, no other material has been located to suggest that Treasury has revoked or altered the guidance.

I hope this information is of assistance to you, however, in the event that you are not satisfied with the attached documents and still desire to have the original letter ruling, you may contact me at 703-905-5016.

Sincerely,

Gregory Anton Smith
Disclosure Officer

Enclosures (16 pages)