

# Reporting Responsibilities on U.S. Holdings of Foreign Securities and U.S. Issuances to Foreign Persons

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## I. Introduction

Since September 30, 2011, all U.S. custodians, issuers and end-investors (including investment advisers on behalf of themselves and their clients) must consider on an ongoing basis whether they are required to report to the Federal Reserve Bank of New York ("FRBNY") monthly "snapshot" information on a new Treasury reporting form, "Aggregate Holdings of Long-Term Securities by U.S. and Foreign Residents" ("TIC SLT").

TIC SLT is a new part of the Treasury International Capital mandatory reporting system, which allows the U.S. government to gather information on cross-border holdings and cross-border transactions in order to formulate the U.S. international fiscal and monetary policy and prepare U.S. Balance of Payments accounts and the U.S. international investment position.<sup>1</sup> TIC SLT gathers information on U.S. residents' holdings of long-term foreign securities and foreign residents' holdings of U.S. securities.

Many participants in the U.S. securities industry are required to submit this new monthly report. However, identifying whether a particular industry participant is required to report may necessitate a number of challenging determinations.

This article provides an overview of the new reporting requirement under TIC SLT and how the new form applies to various participants in the U.S. securities industry, with a particular focus on the situation of U.S. investment advisers. In light of the potential challenges industry participants may face in assessing their TIC SLT reporting requirements, the article also seeks to set forth principles that potential reporters can use in making an initial and ongoing determination about whether they must submit reports on TIC SLT.

## II. TIC SLT Reporting Requirement

TIC SLT is one of a number of mandatory surveys that U.S. governmental agencies conduct in order to study transactions and economic relationships of U.S. residents with foreign parties. TIC

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SLT is a monthly report required by the U.S. Department of the Treasury, which is being assisted by the FRBNY, to gather information (i) on U.S.-resident holdings of certain foreign securities and (ii) on foreign-resident holdings of certain U.S. securities. TIC SLT must be filed if, as of the last business day of the calendar month (“Reporting Day”), the aggregate value of (i) and (ii) attributed to a U.S. person or entity is above \$1 billion (“Reporting Threshold”). For example, a U.S. investment manager of U.S. investment funds would generally be responsible to report shares of the U.S. funds that are held by foreign persons (*i.e.*, category (ii) above) and non-U.S. portfolio holdings of the U.S. funds (*i.e.*, category (i) above), unless these foreign holdings are held through a U.S. custodian.

The TIC SLT report is organized in two parts: Part A, which is completed by “custodians,” and Part B, which is completed by issuers and end-investors.<sup>2</sup> TIC SLT provides information on the fair value of a reporting entity’s aggregate holdings of foreign securities and the fair value of its issuances of securities that are held by foreign residents as of the Reporting Day. The report must list the fair value (based on ASC 820 – formerly FAS 157) of such holdings and issuances categorized separately by (1) type of holding (*e.g.*, bonds or equity securities) and (2) the country (a) where the (known) foreign holding’s issuer is organized or (b) in which the foreign holder of an issuance is organized or domiciled.<sup>3</sup> The report must also summarize all reportable holdings and issuances in certain broader categories such as type of issuer.

The TIC SLT Instructions, along with a set of explanatory FAQs and flow charts published by Treasury, provide specific guidance for various categories of potential reporters.<sup>4</sup> These materials explain certain nuances inherent to the determinations U.S. persons and entities will need to make to decide whether and how they must report on TIC SLT. For example, large groups need to consider how to consolidate aggregate positions on a complex-wide basis among various different types of affiliates (*e.g.*, proprietary assets and assets of an investment adviser’s clients). However, many issues are not comprehensively addressed or even identified in the TIC SLT Instructions and related guidance, and institutions potentially subject to

reporting on TIC SLT will be forced to consider unanticipated questions as they assess their TIC SLT reporting obligations.

### III. Reportable Securities and Required Reporters on TIC SLT

#### A. Reportable Securities

As noted above, TIC SLT generally requires reporting (i) on U.S.-resident holdings of certain foreign securities and (ii) on foreign-resident holdings of certain U.S. securities if, as of the Reporting Day, the aggregate value of (i) and (ii) is above the Reporting Threshold (*i.e.*, \$1 billion).

Most “long-term” debt and equity securities, meaning securities with no contractual maturity or an original maturity of greater than one year, must be reported on TIC SLT.<sup>5</sup> For purposes of TIC SLT, “foreign securities” include most securities (equity and debt) issued by entities established under the laws of a foreign country and all securities issued by international and regional organizations (even if these organizations are located in the United States).<sup>6</sup> “U.S. securities” for purposes of TIC SLT include any such securities issued by U.S. residents. A security is considered to be held by a foreign resident if the holder of record is not a resident of the United States according to the reporter’s records.<sup>7</sup>

Holdings of short-term securities (*i.e.*, with a maturity of a year or less) and CDs, among other things, are not reportable on TIC SLT.<sup>8</sup> In addition, “direct investments” (as opposed to “portfolio investments”) must be reported as part of a different reporting system administered by the U.S. Department of Commerce and its Bureau of Economic Analysis (“BEA”).<sup>9</sup> These direct investments include U.S.-resident ownership of 10% or more in a foreign company (and vice versa).

#### B. Required Reporters

TIC SLT is intended to be filed by U.S.-resident<sup>10</sup> custodian banks, broker-dealers (which are often deemed to be in custody of their clients’ foreign holdings), securities depositories, issuers of securities, and end-investors (including investment advisers). These entities fall into the following categories:

**U.S.-Resident End-Investors.** A U.S.-resident end-investor that invests for its own account or

on behalf of others in foreign securities that are held directly by the end-investor must report the foreign securities unless those securities are held with a U.S. custodian. For example, an investment adviser is an end-investor that may both invest for its own accounts and on behalf of others (*i.e.*, its advisory clients). As such, an investment adviser is expected to include in its TIC SLT aggregate reportable data about (i) its proprietary reportable assets, (ii) reportable portfolio investments of its managed account clients (unless the adviser knows that the client is itself filing TIC SLT) and (iii) the reportable portfolio holdings of the investment vehicles for which it serves as investment adviser. In particular, U.S. investment funds that own shares of foreign investment funds without a U.S. custodian to hold those shares may have positions to report as a U.S. end-investor. An investment adviser to such a U.S. investment fund (or other client) needs to include the value of those foreign fund shares in its consolidated SLT data.

An end-investor is not required to report its foreign securities holdings on TIC SLT where the same data is being reported by a U.S. bank custodian, U.S. broker-dealer acting as custodian or a U.S. securities depository. End-investors (including investment advisers) can assume that U.S. banks, broker-dealers, securities depositories and other intermediaries will report U.S. person ownership of foreign securities if they know that they are held cross-border. Accordingly, end-investors should count as reportable securities covered by TIC SLT only foreign securities that they or their clients hold directly or through purely foreign custody arrangements (*i.e.*, not involving an intermediary U.S. custodian bank or U.S. broker-dealer).

**U.S. Custodian for U.S. Residents.** A U.S.-resident custodian that holds foreign securities for the account of U.S.-resident end investors is responsible to report the foreign securities if they have sufficient knowledge about the investors to know that they are U.S. residents.<sup>11</sup> If a U.S. custodian holds a U.S. end-investor's foreign securities either directly or

*TIC SLT gathers information on U.S. residents' holdings of long-term foreign securities and foreign residents' holdings of U.S. securities.*

through a foreign sub-custody network, the end-investor may assume the custodian is making the appropriate TIC SLT filings and need not include those foreign securities on a TIC SLT report. The U.S. custodian will include in its report positions held through foreign sub-custodians.

**U.S. Custodian for Foreign Residents.** A U.S.-resident custodian or a U.S.-resident central securities depository that holds U.S. securities on behalf of a foreign resident and knows the identity of the foreign resident must report those U.S. securities on TIC SLT.<sup>12</sup> A U.S. investment adviser to a foreign resident may be deemed to be a U.S. custodian and must report U.S. securities owned by its non-U.S. client if the U.S. securities are held in the name of the U.S. manager.<sup>13</sup> However, a U.S. investment adviser to a foreign investment fund does not report on TIC SLT the shares of the foreign investment fund held by any U.S. investors in the foreign vehicle.<sup>14</sup>

## Reporting Obligations

	End-Investor	Custodian, Depository or Intermediary	Issuer
U.S. Resident	<ul style="list-style-type: none"> <li>■ Report any foreign security held for portfolio investment purposes unless a U.S. custodian reports</li> <li>■ Consider whether the end-investor is also an issuer (because it issued securities held by foreign persons)</li> </ul>	<ul style="list-style-type: none"> <li>■ Report foreign securities held on behalf of U.S. residents</li> <li>■ Report U.S. securities held on behalf of non-U.S. persons</li> </ul>	<ul style="list-style-type: none"> <li>■ Report known foreign owners of U.S. issuances where no U.S. custodian</li> </ul>
Foreign Resident	<ul style="list-style-type: none"> <li>■ No reporting obligations</li> <li>■ A U.S. advisor may need to report foreign clients' U.S. holdings (if adviser deemed to be custodian)</li> </ul>	<ul style="list-style-type: none"> <li>■ No reporting obligations</li> </ul>	<ul style="list-style-type: none"> <li>■ No reporting obligations</li> </ul>

**U.S.-Resident Issuers.** A U.S. resident that issues a security that is then held directly by a foreign resident (*i.e.*, not through a U.S. custodian that knows the identity of the foreign investor) must report the issuances. Such a potential reporter could include, for example, a manager of a U.S. mutual fund or private fund that has shares held by foreign investors.

As noted above, investment advisers are responsible to report for any U.S. investment vehicle issuers that they manage. Accordingly, investment advisers report on TIC SLT interests

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issued by U.S. investment funds they manage (*e.g.*, registered investment companies, private funds and other pooled vehicles) if they know that these interests are held by foreign parties. Investment advisers report such information as known by the U.S. funds' transfer agents, if any.

If the issuers do not have sufficient knowledge regarding a foreign resident security holder's identity, the data should be reported by the U.S. intermediaries (*i.e.*, U.S. securities depositories, U.S. broker-dealers and U.S. banks) that have such knowledge.

#### IV. Other Considerations

**Consolidation.** The reporting entity is the ultimate U.S. parent of a corporate group, which must consolidate the reportable data in the possession of all U.S. subsidiaries within the group on a single TIC SLT report. A reporting entity only need file a TIC SLT report if the consolidated total value of all reportable holdings and issuances across its organization is equal to or exceeds the Reporting Threshold on the Reporting Day. The consolidated total includes reportable holdings held by all U.S.-resident parts of the reporting entity for their respective accounts and for customers and reportable issuances for all U.S.-resident parts of the reporting entity and "investment companies, trusts, and other legal entities created by the reporting entity."

**Reporting Schedule.** The Reporting Days are September 30 and December 31 for 2011 and the last business day of each month thereafter. Once the consolidated total of reportable holdings and issuances of a reporting entity is equal to or greater than the Reporting Threshold on a Reporting Day, the reporting entity must submit a TIC SLT report for that Reporting Day by the 23rd calendar day of the following month ("Due Date") (or the next business day of that month if the Due Date falls on a weekend or holiday) to the FRBNY. Once a reporting entity has had to submit a TIC SLT for a specific month, the entity must submit a report for each remaining Reporting Day in that calendar year regardless of whether the entity still has consolidated total reportable holdings and issuances equal to or in excess of the Reporting Threshold.<sup>15</sup>

**Penalties for Failure to File.** The TIC SLT reports are authorized and required by an Act of Congress.<sup>16</sup> There is potential civil and criminal liability for failure to file required reports. Any person that fails to file a required report may be subject to a civil penalty of between \$2,500 and \$25,000. Any person that willfully fails to file a required report may be subject to criminal prosecution, up to a \$10,000 fine and imprisonment for up to one year. In addition, the requirement subjects officers, directors, employees and agents of any entity with filing obligations to the same penalties.

#### V. Conclusion

Members of the U.S. securities industry that have not already done so need to consider their obligations under the TIC SLT reporting requirement. Determining whether an entity is required to file reports on TIC SLT or a specific holding or issuance must be included on a TIC SLT report generally is not a simple exercise. End-investors (and investment advisers in particular) need to consider whether they or their custodians are required to fulfill the new reporting obligations regarding their holdings and issuances. Therefore, securities industry participants should take care to begin an assessment / re-assessment of their TIC SLT reporting obligations early enough and to conduct a thorough assessment of their reporting obligations to ensure compliance.

## ENDNOTES

- <sup>1</sup> For an overview of certain other parts of the TIC reporting system, and other related reporting regimes that may also apply to certain industry participants or their affiliates, see Julien Bourgeois and Philip Hinkle, *Foreign Holdings and Transactions with Foreign Persons: Reporting Responsibilities of U.S. Investment Managers*, THE INVESTMENT LAWYER, Vol. 15, No. 9 (Sept. 2008).
- <sup>2</sup> The notion of "custody" for purposes of TIC SLT has little in common with the notion of "custody" for federal securities laws purposes. Broker-dealers can be deemed to be in "custody" of their clients' holdings. Under certain circumstances, an investment adviser can also be deemed to be "custodian" for purposes of TIC SLT only, and thus may have to provide data for Part A of TIC SLT. For example, a trading account opened in the name of the adviser on behalf of (*i.e.*, "FBO of \_\_\_") a foreign client should be deemed to be "custodied" by the investment adviser. Potential reporters should refer to the instructions to TIC SLT and related guidance materials for additional guidance. See Instructions for the Monthly Treasury International Capital (TIC) Form SLT, June 30, 2011, available at <http://www.treasury.gov/resource-center/data-chart-center/tic/Pages/forms-slt.aspx> (hereinafter, "TIC SLT Instructions").
- <sup>3</sup> If denominated in a foreign currency, the fair value should be converted to U.S. dollars using the spot exchange rate as of the close of business on that day. See TIC SLT Instructions, Instruction II.D.
- <sup>4</sup> See Frequently Asked Questions For Aggregate Holdings of Long-Term Securities by U.S. and Foreign Residents (TIC SLT), August 2011 ("TIC SLT FAQs"), and its related Appendix A, Reporting Responsibilities Flowcharts, both currently available at the same website as the TIC SLT Instructions.
- <sup>5</sup> Securities are "long-term" securities if they have an original maturity of more than one year or no contractual maturity.
- <sup>6</sup> Common stock, interests in funds and asset backed securities issued by a foreign entity, for example, are "foreign securities" for purposes of TIC SLT.
- <sup>7</sup> TIC SLT Instructions, Instruction II.F.1.
- <sup>8</sup> The following securities are specifically excluded from reporting on TIC SLT: (i) short-term securities with an original maturity of one calendar year or less; (ii) CDs; (iii) bankers' acceptances and trade acceptances; (iv) derivative contracts; (v) loans and loan participation certificates; (vi) letters of credit; (vii) precious metals and currencies held in the potential reporters' vaults for foreign residents; (viii) bank deposits; (ix) annuities, including variable rate annuities; and (x) securities taken as collateral or received in repurchase/resale agreements and securities lending arrangements. See TIC SLT Instructions, Instruction II.F.
- <sup>9</sup> U.S. direct investments in foreign companies are reported by the U.S. companies on forms BE-577 (quarterly survey), BE-11 (annual survey), and BE-10 (benchmark survey once every 5 years). Foreign direct investments in U.S. companies are reported by the U.S. companies on forms BE-605, BE-15 and BE-12 for the same periods.
- <sup>10</sup> A "U.S. resident" is any "individual, corporation or other entity that is incorporated or otherwise legally established in the United States, including branches, subsidiaries and affiliates of foreign entities located in the United States." A "foreign resident" is any "individual, corporation or other entity legally established outside of the United States, regardless of the actual center of economic activity of the entity." See TIC SLT Instructions, Instruction V.
- <sup>11</sup> See TIC SLT FAQs, Section II.A.1. It is our understanding that many intermediaries are notifying their clients of the types of securities the intermediaries will be reporting.
- <sup>12</sup> See TIC SLT FAQs, Section II.A.1.
- <sup>13</sup> See TIC SLT FAQs, Sections II.G.5 and 6.
- <sup>14</sup> TIC SLT Instructions, Instruction II.G.7.
- <sup>15</sup> The report may be filed with the FRBNY (or other applicable branch of the Federal Reserve Bank) electronically or via post or fax. See TIC SLT Instructions, Instruction II.H.
- <sup>16</sup> See 22 U.S.C. 286f; 22 U.S.C. 3103; E.O. 10033, as amended.

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