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Financial Crimes Enforcement Network
Department of the Treasury

P.O. Box 39
Vienna, VA 22183
Attn: CISADA Reporting Requirements Under Section 104(e)

Re: CISADA Reporting Requirements Under Section 104(e): RIN 1506-AB12

Ladies and Gentlemen:

The Institute of International Bankers appreciates the opportunity to comment on FinCEN's Reporting Regulations (the "Reporting Regulations") implementing the reporting requirements of Section 104(e) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA"). As we have expressed in prior comment letters to the Office of Foreign Assets Control regarding the Iranian Financial Sanctions Regulations, we are committed to respecting the international community's sanctions against Iran and to working with the United States authorities to find pragmatic and effective means of implementing the requirements of U.S. Iranian sanctions law as they apply to the international banking community.

We appreciate FinCEN's evident intention to take a pragmatic approach in the Reporting Regulations to implementing CISADA's requirements and obtaining information of value to FinCEN and other policymakers while minimizing unnecessary burdens on reporting institutions. We also note FinCEN's stated intention to use the Reporting Regulations in a targeted way to focus on foreign financial institutions of real interest under CISADA. We support the Reporting Regulations' request-driven model as an appropriate means of focusing industry and governmental resources on information of value. As we have noted in prior comments, we also agree that financial institutions providing correspondent relationships in the United States are not in a position to speak to the overall activities of their foreign counterparts, and so if those activities are at issue it is more appropriate to ask the U.S.-based institutions to transmit inquiries to their foreign correspondents than to ask them to conduct independent investigations for which they are ill-suited.

Nevertheless, we are concerned that the certification requirements included in the Reporting Regulations could result in unintended consequences, dramatically increasing the burden on U.S. reporting institutions for little additional benefit. While our primary focus is on the inquiring institutions operating in the United States, given FinCEN's stated intent to limit its inquiries to a relatively small number of foreign banks of particular interest under CISADA, we also wish to note a number of issues with the certifications requested of the responding institutions.

Certification requirements.

In proposed § 1060.300(c)(1)(v), the Reporting Regulations deviate subtly but significantly from the general architecture limiting the obligations of inquiring institutions under these regulations to transmitting inquiries from and responses to FinCEN (without prejudice to their general obligations under existing law). Specifically, this section requires that the reporting bank identify any specified foreign bank that the inquiring bank "has not been able to establish to its satisfaction" (emphasis added) that the foreign bank does not engage in the listed activities and, further, certify to FinCEN that it does not "know[], suspect[], or ha[ve] reason to suspect" that any certification provided by a foreign bank is incorrect. Although this language might be characterized as only "boilerplate" that is unobjectionable on its face, and indeed the Reporting Regulations contain no discussion of the rationale for these provisions, by its terms it imposes substantial obligations on the inquiring institution, noncompliance with which is subject to civil and criminal penalties under 31 U.S.C. 5321(a) and 5322, respectively. With these few words, the Reporting Regulations would appear to shift the burden on the inquiring institution from simply acting as a conduit for FinCEN's inquiries to independently investigating and evaluating the truthfulness of the foreign bank's response.

If an inquiring institution must not merely inquire, but "establish to its satisfaction" that a foreign institution does not engage in the specified activities, that requirement would go well beyond simply transmitting the inquiry and reporting faithfully as to the response (or lack thereof) received. It is difficult to see how an inquiring institution could be comfortable certifying that it had reached its own independent conclusion regarding the foreign bank's worldwide activities involving Iran without some factual basis for doing so. However, the inquiring institution has no visibility into the activities of the foreign bank unless those activities pass through the inquiring institution, nor does it have any means of gathering and verifying such information. Thus, the highlighted language adds no real value (because the inquiring institution's basis for concluding that the responding foreign bank does not engage in the specified activities is limited to the foreign bank's response, which is already being provided to FinCEN) and requires the inquiring bank to take responsibility for information it did not provide and cannot reliably verify.

Similarly, the certification that the inquiring bank does not "know, suspect, or have reason to suspect" that the foreign bank engages in transactions with the relevant designated entities, when carefully considered, creates significant difficulties for minimal benefit. At the outset, we should note that the inquiring bank's activities in operating the correspondent relationship in the United States – the focus of CISADA § 104(e)(1)(B) – are not at issue. It is already quite clear under

existing law that no financial institution may conduct any transaction in the United States in which an SDN has an interest, whether through a correspondent relationship or otherwise, and all institutions already have compliance policies and procedures designed to detect and prevent such transactions.

However, consider the example of the U.S. branch of a foreign bank that is required to certify that it does not "know, suspect, or have reason to suspect" that a responding foreign bank's certification is incorrect. First, a certification that the bank does not "know" that the certification is incorrect could be read to require the bank to conduct a worldwide audit of its operations outside the United States to examine all transactions involving the responding foreign bank (and the breadth of the certification requested of the responding foreign bank, discussed below, would equally present problems for the inquiring bank). Second, to certify that the inquiring bank does not "suspect" that the responding foreign bank may be engaged in the specified transactions, could require a similar global survey of press reports, rumors, and similar information of questionable reliability that may nevertheless be grounds for suspicion somewhere within the institution. Finally, and even more broadly, the certification that there is no "reason to suspect" that the responding bank's certification may be incorrect is an objective standard that does not depend on the inquiring institution's actual or subjective knowledge and thus again appears to call for independent investigation and evaluation. It bears re-emphasis that all of this relates to all activities by the specified foreign bank, into which the inquiring bank will have only very limited visibility.

We feel certain that this is not what the Reporting Regulations intend; otherwise, the reporting burden estimate associated with the required certifications of one hour per bank contained in the Reporting Regulations is too low by multiple orders of magnitude. Nevertheless, the inquiring financial institutions in the United States cannot simply ignore the required certifications or make them without regard for whether they in fact have an adequate basis for doing so. Any responsible bank officer must carefully consider exactly what he or she is being asked to certify before providing such a certification[1] Furthermore, while the certifications as drafted impose significant burdens and uncertainties on the inquiring banks, they provide little value to FinCEN, as the inquiring banks are being forced into an investigative and evaluative role, for which they are ill-equipped, regarding transactions of which they have no first-hand knowledge.

We suggest that the certification instead focus on the role actually intended for the inquiring U.S. bank under the Reporting Regulations. The architecture of the Reporting Regulations suggests that that role is as an honest intermediary transmitting inquiries from FinCEN and responses by specified foreign banks, which we believe is appropriate. Therefore, the inquiring bank should

[1] For the avoidance of doubt regarding the potential liability of individuals signing the certifications, the forms of certification should be revised to clarify that the individual is signing only on behalf of the relevant bank in his or her capacity as a duly authorized officer of the bank and not in his or her personal capacity.

certify only that it has provided FinCEN's inquiry to the foreign bank in the form requested and that it has provided FinCEN with all information received from the specified foreign bank in response. This form of certification aligns with the tasks expected of inquiring institutions under the Reporting Regulations, with FinCEN's stated understanding of the burden to be imposed, and with the information inquiring institutions may reasonably be expected to determine with any accuracy.

Certifications by Responding Foreign Banks

We also wish to note three issues with the certifications requested of responding foreign banks: the breadth of the certification, potential conflicts with foreign law, and the time provided for response.

First, we have concerns regarding the breadth of the certification by the responding foreign bank. Under proposed § 1060.300(b), the responding foreign bank is requested to certify that it has not "processed one or more transfers of funds within the preceding 90 calendar days related to an Iranian-linked financial institution designated under IEEPA" or "related to an IRGC-linked person designated under IEEPA" (emphasis added). This certification, which is not qualified in any way, is broader than can reasonably be expected. While the foreign bank could reasonably determine whether such entities were parties to a transaction, it has no reliable way of ascertaining that no transaction with a third party has a relationship to such entities. To take a simple example, if the head office of a non-U.S. bank processes a non-USD-denominated payment from its customer in another country outside the United States to a Middle Eastern trading company, it would have no way of knowing whether the trading company may in turn be acting on behalf of a designated person.

We suggest that the requested certification relate to payments "to or from" the specified entities or some similar, more specific formulation. We also note that § 104 of CISADA only applies to a "significant transaction or transactions" or "significant financial services," but there is no such limitation in the reporting requirement. We recommend that FinCEN adopt a reporting threshold to reduce the burden on responding institutions with respect to reviewing and reporting non-significant transactions.

Second, while the Reporting Regulations provide no explicit consequences for a specified foreign bank's failure to provide the requested information, they do hint strongly that the inquiring institution may be required to take additional actions on the basis of existing law or prudential considerations if a full response is not received. In evaluating the information received from responding foreign banks, and any subsequent actions taken by the relevant inquiring bank, FinCEN should take into consideration the fact that in many cases applicable privacy legislation will prohibit the responding foreign bank from providing the requested information with respect to individual customer transactions, particularly as it is technically under no legal compulsion to do so (and therefore cannot take advantage of any related exemption in the applicable privacy legislation). Even responsible institutions with no activities

implicating substantive CISADA concerns may be prohibited by law from responding to the proposed inquiries.

Finally, it is our view that the proposed 30-day period for response to an inquiry from a U.S. correspondent is unrealistically short, even if the certification is narrowed as we suggest in the first paragraph above. A foreign bank receiving such an inquiry must evaluate it, conduct an institution-wide audit of transactions, gather details on all relevant transactions, convert each transaction to USD, assess any relevant home-country constraints on the response, and transmit the response to the U.S. correspondent. For those banks reliant in whole or in part on manual processes, the response time will be further delayed. It is our view that the current timetable is likely to produce a significant number of "no response" reports to FinCEN simply as a result of timing, which provides no value to FinCEN and creates a burden on the inquiring institutions to process the valueless reports and assess what (if any) further action is warranted. We suggest that 90 days, at a minimum, would be a more appropriate timeframe.

Again, we appreciate the opportunity to comment on the Reporting Regulations. We would be delighted to discuss these matters further at your convenience should you have any question, comment, or concern.

Very truly yours,

INSTITUTE OF INTERNATIONAL BANKERS

By: _____
Richard Coffman
General Counsel