May 26, 2011

Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

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

Ladies and Gentlemen:

The Clearing House Association L.L.C.[1] is pleased to comment on the proposal of the Financial Crimes Enforcement Network ("FinCEN") to implement section 104(e) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act ("CISADA"),[2] which requires the Treasury Department to impose certain restrictions on domestic financial institutions to ensure that the foreign financial institutions for which they hold correspondent accounts do not use those accounts to provide services to sanctioned Iranian entities.

FinCEN proposes to implement section 104(e) by instituting a procedure under which FinCEN would send a written request to a U.S. bank that holds a correspondent account for a foreign bank specified in the request. The U.S. bank would then be required to request the foreign bank to respond to the FinCEN request and, within 30 days of FinCEN's request, file a report with FinCEN regarding (i) whether the foreign bank holds any correspondent accounts for an Iranian-linked financial institution designated under the International Emergency Economic Powers Act ("IEEPA"), and (ii) whether the foreign bank has processed a transaction

[1] Established in 1853, The Clearing House is the nation's oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House Association is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs, and white papers—the interests of its owner banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C. provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the funds transfer, automated clearing house, and check image payments made in the United States. For additional information, see The Clearing House's web page at www.theclearinghouse.org.

[2] 22 U.S.C. § 8513(e).

other than through a correspondent account for a Iranian-linked financial institution designated under IEEPA or a person designated under IEEPA who is linked to Iran's Revolutionary Guards Corps. If the answer to either question is yes, certain additional information will be required, such as the name of the Iranian person or entity with the account or transaction and the value of the transaction or account.[3]

The foreign bank would have to agree to notify the U.S. bank if it opens an account for a designated Iranian financial institution within 365 days of the report and would also be required to sign a declaration that it understands that the information would be provided to the U.S. Department of the Treasury and could be shared with other U.S. agencies or departments, and the person signing the report would have to certify the statements made in the report are complete and correct. An employee of the U.S. bank would, in turn, have to certify that he or she had read the report and that the statements in it are, to the best of the U.S. bank's knowledge, complete and correct and that the U.S. bank does not know, suspect, or have reason to suspect that the certification made by the foreign bank is not correct or is incomplete.[4]

SUMMARY

1. The Clearing House supports FinCEN's proposal to require U.S. banks to make inquiries of their foreign correspondent banking customers regarding the customers' relationships with entities subject to sanctions under CISADA.

2. While The Clearing House supports the overall proposal, there are a number of points on which the proposal could be improved or unnecessary burdens reduced. These include the following:

   2.1. The requirement for U.S. bank certification should be eliminated or clarified.

   2.2. The time for response should be increased to 90 days from the proposed 30 days, and U.S. banks should be given additional time to complete their own certifications.

   2.3. FinCEN should clarify that a foreign bank's failure to respond to an inquiry will not, by itself, require a U.S. bank to close the correspondent account.

---

[3] 78 Fed. Reg. 24,410 (May 2, 2011).

[4] *Id.*

DETAILED COMMENTS

1. The Clearing House supports FinCEN's proposal to require U.S. banks to make inquiries of their foreign correspondent banking customers regarding the customers' relationships with entities subject to sanctions under CISADA.

Section 104(e) of CISADA requires the Secretary of the Treasury to impose certain requirements on U.S. banks holding correspondent accounts for foreign banks, including one or more of the following: auditing the activities of their foreign correspondent customers; certifying that, to the best of the U.S. bank's knowledge, the foreign correspondent customer is not knowingly engaged in activity listed in section 104(c)(2) of CISADA; and establishing due diligence requirements on U.S. banks designed to detect whether the Secretary of the Treasury has identified a foreign bank as knowingly engaging in such activities. Some of these requirements are potentially very burdensome, especially the requirement for an audit of a correspondent customers' activities. The Clearing House believes that in proposing the reporting requirement that would be imposed only when specifically requested, FinCEN has struck an appropriate balance between the needs of the United States to isolate the instrumentalities of a rogue state from the global financial system and the need to maintain an effectively functioning correspondent banking system.

FinCEN estimates that in any given year it will request reports under this provision from fewer than 50 U.S banks and that only 18 of them will actually be required to file reports.[5] If correct, this is a modest burden that should not cause any disruption of correspondent banking relationships. Moreover, the procedure—having U.S. banks forward to their foreign correspondents requests for information from the U.S. Government regarding the correspondents' relationships with Iranian entities—may give the correspondents second thoughts about dealing with those entities, thereby helping to achieve the Government's goal of isolating those instrumentalities that Iran is most likely to use to further its goal of building nuclear weapons.

Base on these considerations, The Clearing House supports the general proposal to implement section 104(e) of CISADA by requiring U.S. banks to make inquiry of their correspondent banking customers regarding their relationships with sanctioned entities.

---

[5] 76 Fed. Reg. at 24,417.

2. While The Clearing House supports the overall proposal, there are a number of points on which the proposal could be improved or unnecessary burdens reduced. These include the following:

2.1. The requirement for U.S. bank certification should be eliminated or clarified.

The proposed rule would require the U.S. bank forwarding its foreign correspondent's response to the inquiry to attach a formal certification. The person signing would state that he has read and understood the foreign bank's certification, that the statements made in the foreign bank's certification are complete and correct, and that the U.S. bank does not know, suspect, or have reason to suspect that the foreign bank's certification is incorrect.[6] It would be very difficult for any bank officer to make such a declaration.

A statement that the foreign bank's response is "complete and correct" would require the certifying officer to have an intimate knowledge of the foreign bank's customers and activities that a U.S. bank will never have. This part of the certification should be dropped.

The statement that "the Bank does not know, suspect, or have reason to suspect that the Certification made by Foreign Bank is incorrect," also presents difficulties as use of the terms "know," "suspect," and "reason to suspect" raise questions about the level of due diligence FinCEN expects U.S. banks to perform before being able to make this statement.

"Knows" usually denotes actual knowledge,[7] and knowledge is imputed to an organization only if an individual charged by the organization to be responsible for a particular transaction has actual knowledge of the fact in question.[8] Knowledge may also be imputed to the organization if a fact would have been brought to the individual's attention if the organization exercised due diligence, with due diligence being defined as compliance with reasonable routines for bringing information to the attention of a responsible individual, but due diligence does not require a person to communicate information unless it is part of his regular duties.[9] "Reason to know" is a much vaguer concept, usually denoting possession of facts that would lead a reasonable person to conclude that a given proposition is true or prompt a reasonable person to perform such investigation as needed to determine whether or

---

[6] *See* certification in Appendix A, 76 Fed. Reg. at 24,421.

[7] *See, e.g.,* U.C.C. § 1-202(b).

[8] *See, e.g.,* U.C.C. § 1-202(f).

[9] *Id.*

not the proposition is true. "Suspects" normally means having a slight or vague idea concerning something, not necessarily involving knowledge, belief, or likelihood.[10]

Given the vagueness of the concepts of knowledge, suspicion, and their related terms in the context of these certifications, it is doubtful that the proposed U.S. bank certification would provide FinCEN with any real value. Our preference would be to drop it completely. If FinCEN wishes to retain the U.S. bank certification, it should be revised to make the requirement conform to what a U.S. bank could actually certify. We recommend making the following changes:

1. The proposed certification is currently set up as a statement of an individual bank employee, raising the question of whether the individual would be personally liable for mistakes in the foreign bank's response. We do not believe that any bank employee should be personally liable under these circumstances; therefore, the bank employee should sign only in a representative capacity.

2. FinCEN is vague about the level of due diligence that a U.S. bank must do to ensure that the foreign bank's certification is "complete and correct." The phrase "to the best knowledge of the Bank" implies that the U.S. bank is under no obligation to independently verify the facts in the certification, and we agree that this is the proper interpretation. We do believe, however, that this point should be made more explicit and recommend that the U.S. bank's certification be revised to indicate that the foreign bank's certification appears on its face to be accurate and that the U.S. bank has no knowledge, without any independent investigation, that the certification is incomplete or incorrect. U.S. banks should be able to rely on the certifications received from their foreign correspondents.

3. The Federal Register notice accompanying the final rule should also make it clear that a U.S. bank will be in compliance with this certification if no person responsible for the bank's relationship with the foreign correspondent bank making the declaration or for its compliance with CISADA is in possession of any fact that contradicts the statements made in the declaration.

---

[10] *See, Black's Law Dictionary* 1615 (4th ed. 1968).

Based on these principles, we recommend that the U.S. bank's certification be revised to read as follows:

> The Bank hereby certifies, to the best of its knowledge, after a review of its due diligence files and without further investigation or review of transactions, that
>
> (1) it does not know that the Certification made by Foreign Bank is incorrect; and
>
> (2) the information in the Certification appears accurate on its face and that nothing in the Bank's due diligence files indicates any missing information.
>
> [*Name of U.S. Bank*]
>
> by: _____
> [*Signature*]
>
> [*Name of U.S. bank employee*]
> [*Title*]
> [*Date*]

2.2. The time for response by the foreign bank should be increased to 90 days from the proposed 30 days, and U.S. banks should be given additional time to complete their own certifications.

The Clearing House believes that it is unrealistic to expect foreign banks to respond to the proposed inquiries within 30 days. In the first place, many foreign banks do not have central customer-information databases, and these banks will have to survey their branches in order to respond to the inquiries. This process is difficult enough for correspondent accounts; it will be much more difficult regarding transactions that are not processed through correspondent accounts—something that may require extensive research through 90 days of transactions, which may not be preserved in a searchable medium. These efforts may include enlisting the assistance of internal technology staff, external vendors, or significant staff review of transactions and reports, all of which require time to deploy properly to satisfactorily address FinCEN's research request. In the case of many foreign correspondents, the U.S bank will have to arrange for the translation of FinCEN's request and the certification form into the local language. Depending on local laws regarding the confidentiality of customer records, the correspondent's response may be subject to legal review or clearance by local regulators.

This 90-day time frame is consistent with the requirement under 31 C.F.R. § 1010.630 to verify if information previously provided by a foreign bank on a certification or recertification form is no longer correct. This existing regulatory framework provides sufficient time for the U.S. bank to contact the foreign bank to resolve inconsistencies on relatively uncomplicated information such as the location of the bank, its ownership, and its agent for service of process. A request under the CISADA regulations will be much more involved, as detailed above. Ninety days would be a minimum to enable proper time for a U.S. bank to obtain the information requested of a foreign bank.

Because of these facts, we believe that the final rule should provide that the foreign bank's response will be due 90 days from the date of the inquiry.

Once the response has been received, the U.S. bank will have to do some amount of due diligence in order to be able to certify that it does not know that the foreign bank's certification is incorrect or incomplete, and, depending on the bank's internal procedures for clearing certifications, there may be a requirement for review by the compliance or legal departments. We therefore recommend that the U.S. bank be given an additional 30 days from the time it receives the foreign bank's certification to forward it to FinCEN.

The same consideration leads us to recommend that the 10 days that a U.S. bank is given to forward an updated foreign bank certification to FinCEN stating that it has opened a new correspondent account with an Iranian-linked financial institution also be expanded to 30 days.

2.3. FinCEN should clarify that a foreign bank's failure to respond to an inquiry will not, by itself require U.S. bank to close the correspondent account.

The proposed rule sets up an expectation that foreign banks will send to their U.S. correspondents confidential banking information regarding their own correspondent customers, including name, account number, value of the account, as well as similar information on certain individual banking transactions. Moreover, this information will be collected for further transmission to an agency of the U.S. Government for possible further distribution to other U.S. agencies for potential action against those customers. Releasing such information in these circumstances is likely to be illegal in a number of jurisdictions.[11] Because of this, foreign banks may be forced to respond that they cannot provided the information requested.

[11] One of our member banks informs us that it would be illegal under Japanese law.

The final rule should make clear that if a U.S. bank does receive such a response, it is merely required to forward the response to FinCEN and is not required to take any other action with respect to its customer. In particular, such a response should not force the U.S. bank to close the correspondent account or otherwise refuse to deal with the foreign bank.[12]

* * * * *

We hope these comments are useful. If you have any questions, please contact me at joe.alexander@theclearinghouse.org or 212-612-9234.

Very truly yours,

Joseph R. Alexander
Senior Vice President, Deputy General Counsel, and Secretary

cc: James H. Freis
Financial Crimes Enforcement Network

Robert Rowe
American Bankers Association

Joseph S. Pawelczyk
BAFT-IFSA

Richard Coffman
Institute of International Bankers

[12] We understand that FinCEN intends to coordinate the responses received with actions, if any, to be taken under section 104(c) and that it is therefore appropriate for U.S. banks to await any inclusion of a foreign bank under section 104(c).