European Banking Federation

Chief Executive

EBF ref 840C-2011

Brussels, 31 May 2011

Department of the Treasury
Financial Crimes Enforcement Network

Subject: EBF comments on the FinCEN Notice of Proposed Rulemaking (NPR) implementing the reporting requirements under Section 104 (c) of the Comprehensive Iran Sanctions, Accountability and Divestment Act (CISADA)

Dear Sir/Madam,

Set up in 1960, the European Banking Federation (EBF) is the voice of the European banking sector (European Union & European Free Trade Association countries). The EBF represents the interests of some 5000 European banks: large and small, wholesale and retail, local and cross-border financial institutions. The EBF is committed to supporting EU policies to promote the single market in financial services in general and in banking activities in particular. It advocates free and fair competition in the EU and world markets and supports the banks' efforts to increase their efficiency and competitiveness.

The European Banking Federation welcomes the opportunity to comment on the FinCen Notice of Proposed Rulemaking implementing the reporting requirements under Section 104(c) of the Comprehensive Iran Sanctions Accountability and Divestment Act (CISADA).

As a general comment, we would like to stress that we believe that the FinCEN proposal highlights the deeply questionable extraterritorial character of CISADA under, and beyond, international law. This Act violates fundamental principles of political and legal relations between friendly nations.

More specifically, the EBF would like to point out the following issues:

1. We have a concern that there will be a significant compliance burden especially re:

   "(ii) *any transfer of funds related to an Iranian-linked financial institution designated under IEEPA processed by that foreign bank within the preceding 90 calendar days other than through a correspondent account*"

   This does not take into account that the foreign financial institution may conduct legitimate business with an Iranian linked financial institution, through licensed transactions and clearing (e.g. HM Treasury providing a UK bank with a license to process transactions as part of the Dubai Clearing system if they have a branch in the UAE).

a.i.s.b.l
10, rue Montoyer B-1000 Brussels
+32 (0)2 508 37 11 Phone
+32 (0)2 511 23 28 Fax
www.ebf-fbe.eu

Therefore it would be possible for the US authority to impose a penalty (under CISADA) on a foreign bank for undertaking transactions which had been licensed by its own Competent Authority.

2. For non-US banks approached by US banks under the FinCEN rule, the required certifications would need to include business without jurisdictional link to the US (e.g., in non-US currencies). This will create conflicts with national bank privacy law as well as EU and national data protection rules.

3. Certifications by non-US banks according to which no transactions have been conducted with specific OFAC sanctioned persons may be perceived by non-US authorities as breaches of EU and national anti-boycott rules.

4. The FinCEN Notice of Proposed Rulemaking uses the term "*correspondent accounts*", which is very far-reaching. It would include not only accounts typically used for purposes of correspondent banking, but also other accounts opened solely in the interest of a foreign bank "*to make payments for other disbursements on behalf of the foreign bank, or to handle other financial transactions related to such foreign bank*" (p. 24413, left column, of the NPR). Accordingly, the certification form in Appendix A of the NPR itself only poses the question whether amounts in such accounts are blocked or "*otherwise restricted*". Preferable to this would be a clear-cut distinction between accounts used for correspondent banking purposes and other accounts. The certification form should at least contain an entry allowing the conclusion that an account relationship no longer serves ongoing business. Indeed, quite a number of accounts at non-US banks which were formerly held as correspondent accounts have today been made dormant.

5. The very broad definition of the term "*Processed One or More Transfers of Funds*" also appears problematic. According to the definition on p. 24413, middle column, this term would include each and every transactions, in particular those that do not require using a correspondent account. On the other hand, the certification form seems to imply that only "*correspondent accounts detailed above*" are concerned, i.e. correspondent accounts which have been explicitly mentioned before. It is thus conceivable that transactions can be conducted that are settled through correspondent accounts held for other credit institutions where the non-US bank does not or cannot recognise that the relevant transaction is conducted on behalf of or in the interest of an Iranian bank. The confirmation by the non-US bank, therefore, must at least contain the qualification that it is not aware of, or should not necessarily have been aware of, such a circumstance.

6. Providing details of all transactions within 30 days (or less) would be extremely burdensome for any large banking group with a number of cross-jurisdictional operations. The 30-day period that US banks have to reply to a request for information by FinCEN appears to be very short indeed. While a US bank may experience no difficulty forwarding such a request to a non-US bank, the scope of the requested information may not allow the latter bank to report the relevant facts to the US bank within a 30-day period in a form that would allow the former bank to report them back to FinCEN. Against this background, it appears especially unfortunate that the US bank would in such a case have to inform FinCEN that the non-US bank has not replied (in time), which can easily cast the latter bank in a bad and perhaps false light.

7. Threshold amounts for other "*transfers*" should definitely be set. This should apply not only to other "*transfers*", but also to those transactions for which reporting is requested under the "*correspondent account*" classification. Firstly, many transactions, such as recurring debiting of guarantee bond fees, stem from old contracts. These should not be required to be always explicitly listed. Secondly, CISADA itself states that only "*significant*" transactions are relevant. As a result, it does not appear appropriate that FinCEN should be empowered to ask about any and all transactions without allowing for the criteria of significance. Setting a clear-cut and transparent threshold amount would thus be preferable, as the bank answering the catalogue of questions then would not have to decide at its own risk what is meant by "*significant*".

8. It is noticeable that US banks are to confirm the "*completeness and correctness*" of the certification, albeit "*to the best of the knowledge of the bank*". This would also go for US branches and subsidiaries of non-US banks. The requirement for such a statement should be dropped and it should be deemed sufficient if the US bank makes a statement no broader than what is required for certifications under Sections 313 and 319(b) of the USA PATRIOT Act.

9. Finally, the non-US bank's certification should not be required to be stated by a single person but by the bank as such, as in other cases declarations by a bank are always given under the bank's name. Otherwise there is the risk of individual liability, which should not be accepted by any person working in a bank.

We hope that you will find these remarks helpful and thank you in advance for taking them into consideration.

Yours sincerely,

Guido RAVOET