

E-ALERT | International Trade Controls & Financial Institutions

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FINCEN ISSUES PROPOSED REGULATIONS IMPLEMENTING IRAN SANCTIONS LEGISLATION

On April 27, 2011, the Treasury Department's Financial Crimes Enforcement Network ("FinCEN") issued a [notice of proposed rulemaking](#) implementing provisions in the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA").¹ CISADA expands existing sanctions against Iran established by the Iran Sanctions Act and also adds new unilateral sanctions. Among the new sanctions, CISADA Section 104(c) requires the Secretary of the Treasury to prohibit or impose strict conditions on the opening or maintaining in the United States of correspondent and payable-through accounts by foreign financial institutions that knowingly engage in certain activities believed to facilitate Iran's weapons proliferation program or support for terrorism. To aid in the identification of such foreign financial institutions, CISADA Section 104(e) requires the Treasury Secretary to promulgate regulations requiring US financial institutions to undertake one or more of four activities to determine whether the foreign financial institutions for which they maintain such correspondent or payable-through accounts are engaged in sanctionable activities. The proposed regulations require US banks to undertake one of those activities, namely the reporting to FinCEN of certain Iran-related activities by such financial institutions. Comments on the proposed rule must be received by FinCEN on or before June 1, 2011.

FinCEN's proposed regulations would require a US bank that maintains a correspondent account for a foreign bank, upon receiving a request from FinCEN, to inquire of the foreign bank and report to FinCEN (1) any correspondent accounts maintained by such foreign bank for an Iranian-linked financial institution designated under the International Emergency Economic Powers Act ("IEEPA") in connection with Iran's proliferation activities or support for terrorism, (2) any transfer of funds related to an Iranian-linked financial institution designated under IEEPA processed by the foreign bank within the preceding 90 calendar days, other than through a correspondent account, and (3) any transfer of funds related to an Islamic Revolutionary Guard Corps ("IRGC")-linked person designated under IEEPA processed by the foreign bank within the preceding 90 calendar days.

The following outline summarizes FinCEN's proposed regulations.

APPLICABILITY

The proposed rule would impose reporting obligations only on "US banks" that maintain a "correspondent account" for a "foreign bank." For these purposes:

- the term "US banks" includes offices, agency offices, and branches within the United States of federal- and state-chartered banks, foreign-chartered banks, and other types of banking organizations (31 C.F.R. § 1010.100(d));

¹ For additional information on CISADA, please see our previous client alert, [Congress Passes Comprehensive, Unilateral Sanctions Against Iran](#) (June 25, 2010).

- a “correspondent account” is an account “established for a foreign bank to receive deposits from, or to make payments or other disbursements on behalf of, the foreign bank, or to handle other financial transactions related to such foreign bank” (31 C.F.R. § 1010.605(c)(1)(ii)); and
- a “foreign bank” is a “bank organized under foreign law, or an agency, branch or office located outside the United States of a [US] bank” (31 C.F.R. § 1010.100(u)).

Certain US Senators have already expressed their displeasure, in a May 3, 2011 [letter](#) to the Treasury Department’s Under Secretary for Terrorism and Financial Intelligence, with FinCEN’s proposal to limit the reporting obligation to US banks. The Senators note that CISADA Section 104(e) requires the Treasury Secretary to impose requirements on all “domestic financial institutions,” a broadly defined term that potentially includes broker-dealers, futures commission merchants, and mutual funds. FinCEN requested comment on whether the proposed regulations should be expanded to all domestic financial institutions. (76 Fed. Reg. 24413 (May 2, 2011)).

REPORTING REQUIREMENTS

Required Information

Upon receiving a written request from FinCEN, a US bank that maintains a correspondent account for a foreign bank must inquire of the foreign bank whether (1) it maintains a correspondent account for an Iranian-linked financial institution designated under IEEPA; (2) it has processed one or more funds transfers in the preceding 90 calendar days related to an Iranian-linked financial institution designated under IEEPA, other than through a correspondent account; or (3) it has processed one or more funds transfers in the preceding 90 calendar days related to an IRGC-linked person designated under IEEPA. (31 C.F.R. § 1060.300(b) (Proposed)).

For purposes of the reporting requirements:

- an “Iranian-linked financial institution designated under IEEPA” is a “financial institution designated by the United States Government pursuant to the International Emergency Economic Powers Act (or listed in an annex to an Executive order issued pursuant to such Act) in connection with Iran’s proliferation of weapons of mass destruction or delivery systems for weapons of mass destruction, or in connection with Iran’s support for international terrorism” (31 C.F.R. § 1060.300(a)(2) (Proposed)); and
- the term “IRGC-linked person designated under IEEPA” means “Iran’s Islamic Revolutionary Guard Corps or any of its agents or affiliates designated by the United States Government pursuant to the International Emergency Economic Powers Act (or listed in an annex to an Executive order issued pursuant to such Act)” (31 C.F.R. § 1060.300(a)(2) (Proposed)).

To comply with the reporting requirement, the US bank may require the foreign bank to complete the model certification provided in FinCEN’s proposed regulations (Appendix A) or the US bank may collect all of the information required in the proposed regulations. If the foreign bank refuses to complete the certification or otherwise provide the required information, the US bank satisfies its reporting obligations by informing FinCEN of the foreign bank’s refusal and the US bank’s inability to collect the information.

The information that must be reported to FinCEN depends on whether the foreign bank conducts or has conducted any of the three activities that require reporting.

- If the foreign bank maintains a correspondent account for an Iranian-linked financial institution designated under IEEPA, the report must include (a) the name of the Iranian-linked institution, (b) the full name on the correspondent account and the correspondent account number, (c)

information regarding whether the correspondent account has been blocked or otherwise restricted, (d) other identifying information about the account, and (e) the approximate value in US dollars of transactions processed through the account within the preceding 90 calendar days. (31 C.F.R. § 1060.300(c)(1)(i) (Proposed)).

- If the foreign bank has processed a funds transfer for an Iranian-linked financial institution designated under IEEPA, the report must include (a) the name of the Iranian-linked institution, (b) the identity of the system or means by which the transfer was processed, (c) the full name on the account and account number, if applicable, (d) other applicable identifying information for the funds transfer, and (e) the approximate value in US dollars of the funds transfer. (31 C.F.R. § 1060.300(c)(1)(ii) (Proposed)).
- If the foreign bank has processed a funds transfer for an IRGC-linked person designated under IEEPA, the report must include (a) the name of the IRGC-linked institution, (b) the identity of the system or means by which the transfer was processed, (c) the full name on the account and account number, if applicable, (d) other applicable identifying information for the funds transfer, and (e) the approximate value in US dollars of the funds transfer. (31 C.F.R. § 1060.300(c)(1)(iii) (Proposed)).

The US bank is required to request that the foreign bank notify the US bank going forward if the foreign bank, within 365 days of the foreign bank's initial response, establishes a new correspondent account for an Iranian-linked financial institution designated under IEEPA. (31 C.F.R. § 1060.300(b) (Proposed)).

In their May 3 letter, the US Senators also objected to FinCEN's proposal that banks only provide information about foreign banks for which they maintain correspondent accounts *upon the request of FinCEN*. They found it "inexplicable" that the Treasury Department "has interpreted section 104(e) to be a discretionary provision." The Senators also sought an explanation of why FinCEN believes reporting is the "most useful vehicle for effecting the intent of [CISADA] section 104(e)," as opposed to the other options authorized under CISADA Section 104(e), which include audits of foreign financial institutions and the establishment by US financial institutions of due diligence policies and procedures.

Timing

The US bank must report to FinCEN within 30 days of the date of FinCEN's request. (31 C.F.R. § 1060.300(c)(2)(i) (Proposed)).

A follow-up report based on a foreign bank's establishment of a new correspondent account for an Iranian-linked financial institution must be submitted to FinCEN within 10 days of the US bank's receipt of the notification. (31 C.F.R. § 1060.300(c)(2)(ii) (Proposed)).

Recordkeeping

The US bank must maintain a copy of any report filed and the original record of any supporting documentation for the report for at least five years. (31 C.F.R. § 1060.300(d) (Proposed)).

Penalties for Violations

A person violating the proposed regulations can be subject to a civil penalty of not more than (i) the amount of the transaction (up to \$100,000) or (ii) \$25,000, for each day of the violation. (31 U.S.C. § 5321(a)). Violations also can be subject to criminal penalties. (31 U.S.C. § 5322).

OTHER ASPECTS OF THE PROPOSED REGULATIONS

The proposed regulations make clear that a US bank is not required to take any action, or to decline to take any action, other than the requirements in the proposed regulations. However, the regulations also reiterate that a US bank is not relieved of any of its existing regulatory obligations, such as taking appropriate actions with respect to suspicious activity, because of the proposed regulations.

We would be happy to assist our clients in preparing comments on the proposed regulations.

If you have any questions concerning the material discussed in this client alert, or desire our assistance in preparing comments on the proposed regulations, please contact any of the following members of our international trade controls and financial institutions practice groups:

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