

Uncovering Foreign Banks' Financial Ties to Iran: FinCEN Proposes Regulations to Implement CISADA Provision

On April 27, 2011, the Financial Crimes Enforcement Network ("FinCEN") proposed new regulations to implement statutory requirements under Section 104(e) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA").¹ The proposed regulations are designed to provide FinCEN with greater access to information about foreign banks' dealings with certain Iranian entities. Comments on the proposed regulations will be due 30 days after their publication in the Federal Register.

The proposed regulations would require a U.S. bank (including a U.S. branch of a foreign bank), upon written request from FinCEN, to query any foreign bank specified by FinCEN, if the U.S. bank maintains a correspondent account for the specified bank, to obtain the following information:

- (1) whether the foreign bank maintains a correspondent account for an Iranian-linked financial institution designated under the International Emergency Economic Powers Act ("IEEPA") (those carrying an [IFSR] designation on the list of Specially Designated Nationals ("SDNs"));²
- (2) whether the foreign bank has processed one or more transfers of funds within the preceding 90 calendar days related to an Iranian-linked financial institution designated under IEEPA, other than through a correspondent account; and
- (3) whether the foreign bank has processed one or more transfers of funds within the preceding 90 calendar days related to Iran's Islamic Revolutionary Guard Corps

¹ Official publication is still pending, but the notice of proposed rulemaking may be found at http://www.fincen.gov/statutes_regs/frn/pdf/CISADA_preamble.pdf.

² The list of IFSR-designated financial institutions currently includes: Ansar Bank, Arian Bank, Banco Internacional De Desarrollo, C.A., Bank Kargoshaee, Bank Mellat, Bank Melli Iran ZAO, Bank Saderat Iran, Bank Sepah, Bank Sepah International PLC, Bank Refah Kargaran, Export Development Bank of Iran, Europaisch-Iranische Handelsbank AG, First East Export Bank, P.L.C., Future Bank B.S.C., Mehr Bank, Mellat Bank SB CJSC, Melli Bank PLC, Moallem Insurance Company, Persia International Bank PLC, and Post Bank of Iran. This list is subject to change, however, and is updated periodically by the Office of Foreign Assets Control ("OFAC").

(“IRGC”) or any of its agents or affiliates designated under IEEPA (those carrying an [IRGC] designation on the SDN list).

A U.S. bank would be required to request the above information (including details about the foreign bank’s relationship with any IFSR- or IRGC-designated SDN) and report the results within 30 days of FinCEN’s written request. In addition, the U.S. bank would be required to request that the specified foreign bank agree to notify the U.S. bank if the foreign bank later establishes a new correspondent account with an Iranian-linked financial institution within one year after the date of the foreign bank’s initial response to the U.S. bank’s query. The U.S. bank would then have 10 days to report that information to FinCEN.

If the U.S. bank does not maintain a correspondent account for the foreign bank specified in FinCEN’s request, or if the specified foreign bank refuses to respond to the inquiry, the U.S. bank would be required to note that in its response. The U.S. bank would not be required by the proposed regulations to take any action on the basis of the information collected (*e.g.*, terminating the correspondent relationship), although the proposed regulations note that the U.S. bank may consider such an action as appropriate or required by other laws.

To assist U.S. banks in obtaining the above information from a specified foreign bank, FinCEN has proposed a model certification to be completed by the foreign bank. The proposed model certification will not appear in the Code of Federal Regulations but is attached to the notice of proposed rulemaking and is available on FinCEN’s website. If a U.S. bank uses the proposed model certification to query a specified foreign bank, it may simply pass along the foreign bank’s certification in lieu of creating a separate report containing the information requested by FinCEN.

As noted above, a U.S. bank would not be required to collect the requested information unless and until it receives a specific request from FinCEN to do so; the proposal does not contemplate a universal diligence and certification requirement for all correspondent banking relationships. The proposed regulations also indicate that FinCEN will be selective in specifying particular “foreign banks which are of interest to Treasury as they relate to CISADA.” Additionally, the information collected from foreign banks is targeted, restricted to transactions with specified categories of SDNs designated by OFAC.³ Finally, the proposed regulations note that the reports provided by a U.S. bank to FinCEN will not automatically lead to consequences under the CISADA sanctions but, instead, will provide information for further consideration by the U.S. Department of Treasury under CISADA.

³ OFAC provides a list of such persons and entities (updated from time to time) at http://www.treasury.gov/resource-center/sanctions/Programs/Documents/irgc_ifsr.pdf

Given the scope of information U.S. banks would be required to request from foreign banks, including detailed customer and transactional information, it is possible that foreign bank secrecy and privacy laws or blocking statutes will constrain foreign banks' ability to respond to these requests. While the proposed regulations impose no direct legal obligation on the foreign banks of which information is requested, any such constraint on their ability to respond could place the affected banks in a difficult position with respect to their relationship with U.S. authorities. While similar issues have arisen in the past, it is uncertain how these tensions would be resolved.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or Kenneth Bachman, Paul Marquardt, or Shawn Chen of our Washington office, listed on our website at <http://www.clearygottlieb.com>.

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