

## Alert

### FinCEN Issues Proposed CISADA Reporting Requirements Under Section 104(e)

June 1, 2011

#### Background

On April 26, 2011, the U.S. Department of the Treasury's ("Treasury") Financial Crimes Enforcement Network ("FinCEN") issued a Notice of Proposed Rulemaking implementing Section 104(e) (the "Proposed Rule") of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, 124 Stat. 1312 (2010) ("CISADA"). The Proposed Rule would require a U.S. bank that maintains a correspondent account for a foreign bank to ask the foreign bank about, and report to FinCEN, certain information regarding whether the foreign bank maintains a correspondent account for an Iranian-linked financial institution designated under the International Emergency Economic Powers Act ("IEEPA") and whether the foreign bank has processed funds transfers, other than through a correspondent account, within the preceding 90 days related to either an Iranian-linked financial institution<sup>1</sup> or Iran's Islamic Revolutionary Guard Corp<sup>2</sup> ("IRGC")-linked person designated under IEEPA.

#### Prior Implementation of CISADA section 104(c) and (d)

As outlined in our prior *Alert*,<sup>3</sup> on July 1, 2010, President Obama signed CISADA into law in order to help "prevent Iran from developing nuclear weapons," thereby protecting "the essential security interests of the United States." Section 104(c) of CISADA requires the Secretary of the Treasury (the "Secretary") to promulgate regulations that will "prohibit, or impose strict conditions on" the opening or maintenance of correspondent or payable-through accounts in the United States by any foreign financial institution that the Secretary finds assists Iran's nuclear weapons program or its support for international terrorism. Section 104(d) calls for the Secretary to promulgate regulations prohibiting any entity owned or controlled by a domestic financial institution from "knowingly engaging in a transaction ... with or benefiting [IRGC] or any of its agents or affiliates whose property or interests in property are blocked pursuant to [IEEPA]."<sup>4</sup>

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<sup>1</sup> For purposes of the Proposed Rule, an "Iranian-linked financial institution designated under IEEPA" is a financial institution designated by the U.S. pursuant to IEEPA (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. 76 Fed. Reg. 24,410, 24,413 (May 2, 2011).

<sup>2</sup> For purposes of the Proposed Rule, an "IRGC-linked person designated under IEEPA" includes the IRGC and any of its agents or affiliates designated by the U.S. pursuant to IEEPA (or listed in an annex to an Executive Order issued pursuant to such Act). 76 Fed. Reg. at 24,413.

<sup>3</sup> See "The Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010: The Relevant Implementing Regulations, and the Resulting Impact on Financial Institutions," (Sept. 22, 2010), [http://www.srz.com/092210\\_CISADA\\_and\\_OFAC\\_Regs/](http://www.srz.com/092210_CISADA_and_OFAC_Regs/).

<sup>4</sup> CISADA Section 104(d)(2)(B).

On Aug. 16, 2010, the Office of Foreign Assets Control (“OFAC”) published the Iranian Financial Sanctions Regulations (the “IFSR”) implementing Sections 104(c) and (d) of CISADA.<sup>5</sup> As referenced in our prior *Alert*, the regulations provide that sanctions may be imposed on foreign financial institutions that engage in one or more of the five types of prohibited activities listed in Section 104(c) and that foreign financial institutions that engage in the sanctionable activities will be identified in a list that OFAC has yet to promulgate, which will be set forth in Appendix A to the IFSR.

#### **Proposed Rule Implementing CISADA Section 104(e)**

Section 104(e) of CISADA directs the Secretary to promulgate regulations requiring a domestic financial institution maintaining a correspondent or payable-through account in the U.S. for a foreign financial institution to do one or more of the following:

- A. Perform an audit to determine whether the foreign financial institution is engaged in any sanctionable activity;
- B. Report to the Treasury with respect to transactions or other financial services provided with respect to any sanctionable activity;
- C. Certify, to the best of the domestic financial institution’s knowledge, that the foreign financial institution is not knowingly engaged in sanctionable activity; and/or
- D. Establish due diligence policies, procedures, and controls, such as the due diligence policies under Section 312 of the USA PATRIOT Act of 2001, with respect to correspondent and payable-through accounts, reasonably designed to detect whether the Secretary has found the foreign financial institution to knowingly engage in sanctionable activity.

See CISADA sections 104(e)(1)(A)-(D).<sup>6</sup>

In connection with the Proposed Rule, FinCEN implemented CISADA 104(e)(1)(B) by proposing rules requiring only that U.S. banks maintaining a correspondent account in the U.S. for a foreign financial institution report to the Treasury certain transactions or other financial services provided in connection with sanctionable activities pursuant to Section 104(c)(2), including facilitating or supporting the efforts of the Government of Iran that may be carried out by the foreign financial institution. In the Preamble to the Proposed Rule, FinCEN expressed its view that Section 104(e)(1)(B) is the most useful vehicle for effecting the intent of Section 104(e).

#### **Duty to Inquire**

Upon receiving a written request from FinCEN, a bank<sup>7</sup> that maintains a correspondent account<sup>8</sup> (including a payable-through account) for a specified foreign bank<sup>9</sup> shall obtain certain information from the foreign bank for the purpose of having the foreign bank certify:

- Whether it maintains a correspondent account for an Iranian-linked financial institution designated under IEEPA;

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<sup>5</sup> 31 C.F.R. § 561 (2010).

<sup>6</sup> 76 Fed. Reg. at 24,411.

<sup>7</sup> For purposes of the Proposed Rule, a bank is defined to include commercial banks or trust companies, private banks, savings and loan associations, national banks, thrift institutions, credit unions, other organizations chartered under banking laws and supervised by banking supervisors of any State, and banks organized under foreign law. 31 C.F.R. § 1010.100(d).

<sup>8</sup> For purposes of the Proposed Rule, a correspondent account is defined to include 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).

<sup>9</sup> For purposes of the Proposed Rule, a foreign bank is defined to include a bank organized under foreign law, or an agency, branch, or office located outside the United States of a bank. The term does not include an agent, agency, branch, or office within the United States of a bank organized under foreign law. 31 C.F.R. § 1010.100(u).

- Whether it 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
- Whether it has processed one or more transfers of funds within the preceding 90 calendar days related to an IRGC-linked person designated under IEEPA.

FinCEN and the Treasury noted that they may consider expanding the reporting requirements to include reports to FinCEN involving other foreign financial institutions (*e.g.*, broker-dealers, futures commission merchants and mutual funds) but the Proposed Rule focuses on those foreign financial institutions (*i.e.*, foreign banks) deemed to receive the services most traditionally associated with correspondent banking.

### **Filing Procedures**

For purposes of reporting to FinCEN, banks must inquire of a specified foreign bank and obtain certain additional information depending on the type of certification made by the foreign bank. The type of information required to be provided to FinCEN includes the name of any specified foreign bank that certifies that it maintains a correspondent account for an Iranian-linked financial institution or IRGC-linked person designated under IEEPA, the full name of the correspondent account and account number, and information regarding whether the correspondent account has been blocked or otherwise restricted.

Banks must also report to FinCEN certain information when a foreign bank certifies that it does not maintain a correspondent account, or a bank cannot establish to its satisfaction that a foreign bank does not maintain an account for, an Iranian-linked financial institution or an IRGC-linked person.

### **Proposed Model Certification**

FinCEN has proposed a model certification format for banks to give a specified foreign bank for purposes of documenting the foreign bank's certifications and related information. The model certification identifies why banks are asking for certifications and defines key terms such as foreign bank, correspondent bank, Iranian-linked financial institution designated under IEEPA, and IRGC-linked person designated under IEEPA. The proposed model certification will not be published in the Code of Federal Regulations but will be made available on FinCEN's website. A bank need not use the proposed model certification format to report the information required by the Proposed Rule to FinCEN.

### **Filing Deadlines and Record Retention**

Within 30 days of FinCEN's written request, banks are required to report to FinCEN information required by the Proposed Rule. However, reports based on a subsequent notification by a foreign bank that it established a new correspondent account for an Iranian-linked financial institution designated under IEEPA must be filed within 10 days of receipt by the bank of the notification.

Banks must retain for five years a copy of any report filed together with the original business record equivalent of any supporting documentation.

### **Public Comment**

FinCEN is seeking public comment on several aspects of the Proposed Rule, including: (1) whether setting a minimum dollar threshold for a foreign bank to be required to report on transfers of funds processed within the preceding 90 calendar days related to an Iranian-linked financial institution or IRGC-linked person designated under IEEPA would lessen the reporting obligations, while still providing useful information; (2) whether the proposed 30 day filing period is appropriate; (3) the effectiveness of the proposed model certification; and (4) whether the Proposed Rule should be expanded to include other types of domestic and foreign financial institutions such as broker-dealers, futures commission merchants, and mutual funds.

Written comments are due on or before June 1, 2011.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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