

CISADA Update: Proposed Reporting Requirements

On May 2, 2011, the US Treasury Department ("US Treasury") published a proposal for implementing the US correspondent account provision of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA"). The proposal would substantially increase US Treasury's extraterritorial ability to access and respond to information regarding the Iran-related activity of non-US banks that maintain US correspondent accounts.

Proposed CISADA Reporting Requirements

Under the proposal, US Treasury can direct US banks to request certifications ("Certifications") from specified non-US banks for whom they maintain correspondent accounts. In response to a Certification request, the non-US bank would have to indicate whether it:

- (1) Maintains any correspondent accounts in any currency with Iranian-linked financial institutions designated by OFAC under its counter-proliferation and anti-terrorism sanctions (i.e., financial institutions designated under OFAC's Iranian Financial Sanctions Regulations or "IFSR");
- (2) Processed any funds transfers in any currency within the preceding 90 calendar days related to an IFSR designated financial institution, whether or not such funds transfer involved a correspondent account;
or
- (3) Processed any transfers of funds in any currency within the preceding 90 calendar days related to a person or entity designated by OFAC as linked to Iran's Islamic Revolutionary Guard Corps ("IRGC").

US banks would then have to submit a report to US Treasury regarding the information obtained from the non-US correspondent banks in response to the Certification request. The proposal includes a "model certification", similar in concept to a USA PATRIOT Act shell bank certification, but focused on the above-specified Iran-related information.

Non-US correspondent banks that respond to Certifications would also have to update their US correspondent banks (and indirectly US Treasury) in the event they subsequently establish any new correspondent accounts for IFSR-designated financial institutions within a year of the non-US bank's initial response.

The proposal does not indicate the number or range of non-US banks from which US Treasury might ask US correspondent banks to obtain Certifications. Rather, it merely states that: "The specific foreign banks about which [the US Treasury] will be requesting information will be those foreign banks which are of interest to Treasury as they relate to CISADA."

If you would like to know more about the subjects covered in this publication or our services, please contact:

[David DiBari](#) +1 202 912 5098

[George Kleinfeld](#) +1 202 912 5126

[Megan Gordon](#) +1 202 912 5021

[Jacqueline Landells](#) +1 202 912 5061

To email one of the above, please use
firstname.lastname@cliffordchance.com

Clifford Chance, 2001 K Street NW,
Washington, DC 20006-1001, USA
www.cliffordchance.com

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Implications

The proposal would provide US Treasury, through US correspondent banks, with information about entirely non-US banking and payments activity involving non-US correspondent banks and their IFSR and IRGC clients and counterparties, if any. OFAC would then have a mandate to investigate the activities of non-US banks that have disclosed such transactions, or that have refused to respond to the Certification request from their US correspondent bank. In addition, the US correspondent bank, upon reviewing the contents of a Certification, may decide to take various actions in accordance with its anti-money laundering and sanctions compliance programs. The proposal indicates that such actions may include, for instance, "restricting or terminating a correspondent account relationship with a foreign bank, or filing a suspicious activity report, based on the bank's risk-based assessment of the facts and bank policy." Moreover, any non-US bank that intentionally submits misleading or incorrect Certifications to their US correspondent banks for onward transmission to US Treasury risks liability under US criminal law.

Under the IFSR, OFAC can impose a range of retaliatory sanctions against any non-US bank that it determines knowingly engaged in one or more proscribed activities, including facilitating a significant transaction or providing significant financial services for IFSR or IRGC designated entities. These sanctions can include directing US banks to prohibit direct or indirect US correspondent banking activity by such non-US bank. Typically, OFAC would not have access to data regarding entirely non-US transaction activity by non-US banks and therefore would not know which non-US banks to target for sanctions under the IFSR. The proposed Certification procedure would enable US Treasury and OFAC to overcome this information gap and easily identify non-US banks that have US correspondent accounts and that also engage in IFSR-proscribed conduct, even if such conduct does not involve use of the US correspondent accounts. Presumably, US Treasury intends this procedure to motivate such non-US banks to exit any remaining account relationships or payment processing activity, in any currency, for IFSR or IRGC designated entities.

The US Treasury proposal contains no reference to bank secrecy, data privacy and other local law requirements that might prevent or restrict the disclosure by non-US banks of data involving entirely non-US account and banking activity. Rather, the proposal contemplates that any non-US bank that refuses to provide a Certification upon request of its US correspondent bank would attract a follow-up inquiry from OFAC. The fact that such information need not have a connection of any kind to the US correspondent account will add further to the impression that the US Treasury proposal disregards local law obligations of non-US banks and ignores the concerns that regulatory authorities in many countries might have about extra-territorial overreaching by US Treasury.

Comment Period

Comments on the proposal are due by June 1, 2011. We anticipate that a number of organizations will want to submit comments opposing the proposal due to its extraordinary reach beyond the US financial system and associated conflict of law concerns. The proposal does not provide a deadline for US Treasury to issue a final rule in response to the comments received.

This client memorandum does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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