



Invested in America

Via Electronic Mail

July 31, 2012

Financial Crimes Enforcement Network
Department of the Treasury
P.O. Box 39
Vienna, VA 22183

Re: Imposition of Special Measure against JSC
CredexBank as a Financial Institution of Primary
Money Laundering Concern
RIN 1506-AB19

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the proposal issued by the Financial Crimes Enforcement Network of the Department of the Treasury (“FinCEN”) designating JSC CredexBank (“Credex”) as a financial institution of primary money laundering concern and imposing two special measures against Credex pursuant to Section 311 of Title III of the USA PATRIOT Act of 2001.² SIFMA supports FinCEN’s determination to impose the special measures against Credex.

FinCEN’s proposed rule would impose both the first special measure and the fifth special measure against Credex.³ The first special measure imposes requirements with respect to recordkeeping and reporting of certain financial transactions. The fifth special measure prohibits or conditions the opening or maintaining of correspondent or payable-through accounts for the identified institution by U.S. financial institutions.

SIFMA appreciates FinCEN’s concerns regarding Credex, and we are committed to assist in the government’s efforts to detect and prevent money laundering and the financing of

¹ The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

² “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001” (“PATRIOT Act”), Pub. L. No. 107-56 (2001), signed into law by President Bush on October 26, 2001. 69 Fed. Reg. 28,098 (May 18, 2004).

³ 77 Fed. Reg. 31794 (May 30, 2012).

terrorist activity. However, we would like to make the following recommendations to the proposal, included below.

I. Requirements for Covered Financial Institutions With Regard to the First Special Measure

The proposed rule imposing the first special measure would require that covered financial institutions take reasonable steps to collect and report to FinCEN specified information regarding any transaction or attempted transaction related to Credex that the covered financial institution is requested to engage in after the imposition of the first special measure in order to increase the transparency regarding Credex's attempts to engage in transactions in or through the U.S. financial system.

(1) Reporting. A covered financial institution is required to take reasonable steps to collect and report to FinCEN the following information with respect to any transaction or attempted transaction related to Credex:

- (i) The identity and address of the participants in a transaction or attempted transaction, including the identity of the originator and beneficiary of any funds transfer;
- (ii) The legal capacity in which Credex is acting with respect to the transaction or attempted transaction and, to the extent Credex is not acting on its own behalf, then the customer or other person on whose behalf Credex is acting;
- (iii) The identity of the beneficial owner of the funds involved in any transaction or attempted transaction; and
- (iv) A description of the transaction or attempted transaction and its purpose.

(2) Filing Requirements. A report required by paragraph (a) of this section shall be filed by the reporting financial institution within ten business days following the day when the covered financial institution engaged in the transaction or became aware of the attempted transaction.

A. Participants in a Transaction

Section 1010.658(b)(1)(i) of the proposed rule imposing the first special measure would require covered financial institutions to report the identity and address of the participants in any transaction or attempted transaction related to Credex, including the identity of the originator and beneficiary of any funds transfer.

SIFMA recommends that FinCEN further clarify the term "participants in a transaction". Beyond the originator (or transmitter) and beneficiary (or recipient) of any funds transfer, we are not aware of the other participants this definition may include. For example, does FinCEN wish to include banks or other financial institutions in the chain of the funds transfer or transmittal of funds, such as originator's bank/transmittor's financial institution, intermediary bank/intermediary financial institution, and beneficiary's bank/recipient's financial institution?

FinCEN states that this would include any identifying information in the possession of the financial institution in the ordinary course of business, including the information required under 31 CFR Section 1010.410(f) (generally known as the “travel rule”), such as name, account number if used, address, the identity of the beneficiary’s financial institution, or any other specific identifier of the recipient received with the transmittal order. If FinCEN is assuming that BSA-covered financial institutions are already required to have some of this information in its possession pursuant to the “travel rule”, it is important to note that this information is only required for funds transfers or transmittals of funds for \$3,000 or more. Additionally, the name and address of the beneficiary/recipient are not strictly required – financial institutions are only required to retain and pass along this information in the payment order or transmittal order if received with the payment order or transmittal order. Finally, this requirement only applies to ***executed*** funds transfers/transmittals of funds – not ***attempted*** funds transfers/transmittals of funds.

B. Attempted Transaction

SIFMA recommends that FinCEN remove the term “attempted transaction related to Credex” from the proposal, as firms may not routinely gather this type of information. Alternatively, should FinCEN find the “attempted transaction” provision an essential part of the reporting requirement for covered financial institutions, SIFMA recommends that FinCEN provide a definition of the term “attempted transaction” so that going forward industry members can be appropriately guided as to their obligations under this rule. SIFMA also requests clarification of the term “related to Credex”. Aside from transactions conducted or attempted by Credex, we are not aware of any specific information that should be provided here that would be “related to Credex”.

C. Legal Capacity

Section 1010.658(b)(1)(ii) of the proposed rule imposing the first special measure would require covered financial institutions to report the legal capacity in which Credex and any customer of Credex is acting with respect to the transaction or attempted transaction.

SIFMA recommends that FinCEN further clarify the term “legal capacity”. FinCEN states that this information would include any identifying information collected by the financial institution in the ordinary course of business and may include identification of the roles of Credex or any of its customers in the transaction such as transmitter or recipient of a funds transfer or intermediary financial institutions involved in the payment chain associated with the transaction. However, given the high-risk nature of Credex, how can a BSA-covered financial institution trust the answer?

D. Beneficial Owner

Under the proposed rule, a covered financial institution is required to take reasonable steps to collect and report to FinCEN the identity of the beneficial owner of the funds involved in any transaction or attempted transaction. Section 1010.658(a)(4) of the proposed rule defines “beneficial owner” as an individual who has a level of control over, or entitlement to, the funds involved in the transaction that, as a practical matter, enables the individual, directly or

indirectly, to control, manage or direct the funds. FinCEN notes that this definition derives from the definition used in the final rule implementing section 312 of the USA PATRIOT Act.

However, financial institutions are not required under the BSA to obtain this information. Financial institutions are only required to obtain beneficial owners of **accounts** in the context of certain requirements under section 312. Therefore, this is a new requirement. In addition, this information will have to be gathered from other parties as the covered financial institutions will not have the ability to verify beneficial owner status themselves.

E. Filing Requirements

Section 1010.658(b)(2) of the proposed rule imposing the first special measure would require covered financial institutions to make the reports required by Section 1010.658(b)(1) within ten business days following the day when the covered financial institution engaged in the transaction or became aware of the attempted transaction.

This date may be challenging if covered financial institutions have to reach out to Credex, other relevant parties, and/or their own customers to manually gather some or all of the required information. The result is that covered financial institutions will usually not process the funds transfer until the information is collected. As a consequence of this delay, the funds transfer/transmittal of funds risks cancellation with no additional information received by the covered financial institution. The ultimate result is that reporting to FinCEN will be incomplete.

II. Requirements for Covered Financial Institutions With Regard to the Fifth Special Measure

FinCEN's proposed rule would prohibit a covered financial institution from establishing, maintaining, or managing in the United States any correspondent account for, or on behalf of, Credex.⁴ The proposal would also require covered financial institutions to: 1) provide notice to correspondent account holders that they may not provide Credex with access to the correspondent accounts maintained at the covered financial institution; and 2) take reasonable steps to identify any indirect use of their correspondent accounts by Credex to the extent that such use can be determined from transactional records maintained in the normal course of business.⁵ Beyond these steps, FinCEN also notes that covered institutions should take a risk-based approach to determine what, if any, additional due diligence measures should be implemented to guard against improper indirect use of its correspondent accounts by Credex.

A. One-time Notice Provision

Again, SIFMA appreciates FinCEN's concerns regarding Credex, and we are committed to assist in the government's efforts to detect and prevent money laundering and the financing of terrorist activity. However, we recommend that FinCEN reconsider the necessity of the notice provision or consider permitting other methods of providing notice, or allowing

⁴ *Id.*

⁵ *Id.*

sufficient flexibility so that firms can utilize systems already established under other provisions of the PATRIOT Act to provide the notice. If FinCEN finds the notice provision essential, we ask that FinCEN at a minimum provide clarification with regard to the timing of such notices. SIFMA member firms are requesting clarification as to the term “one-time notice” and whether the notice should be issued at the time of the final issuance of the rule by FinCEN, and circulated to all existing customers with whom a covered financial institution maintains correspondent relationships at that point in time, or at every new customer relationship or account opening, as subsequently established by a covered financial institution with a new correspondent customer. Based on prior practice, it is the industry’s view that the rule was only intended to require notice at one time when the rule is finalized. The fact that FinCEN is now considering “annual” notice supports that view.

The special measures require a covered financial institution to notify those correspondent account holders that the covered financial institution knows or has reason to know provide services to Credex that such correspondents may not provide Credex with access to the correspondent account maintained at the covered financial institution. We believe this provision may be unnecessarily burdensome, redundant, and not the most effective way of achieving the goals of the proposal. Given that many US financial institutions have thousands of correspondent accounts -- most of which have no dealings with Credex -- it would seem to be an extremely inefficient use of resources to provide notice to all such account holders.

As a result, many foreign banks will be inundated with the same notification from many different U.S. financial institutions that are required to send the notice because the foreign banks have correspondent relationships with them. Moreover, the notice would require in many cases a separate mailing, at considerable cost and expense with little, if any, added enforcement benefit, because firms do not regularly schedule mailings targeted solely to correspondent account holders.

We suggest that FinCEN reconsider the necessity of the notification provision or alternatively, consider permitting other methods by which institutions can comply with the notice requirement. SIFMA believes the goals of the notification provision could be achieved by FinCEN’s efforts to publicize the special measure worldwide. We respectfully submit that FinCEN could accomplish this goal by working with foreign governments and central banks to provide notice to their financial institutions. Alternatively, all U.S. financial institutions could be encouraged or required to post the notice on their website in order to help publicize the special measure.

Another alternative would be to permit firms to use other means of notification, including through mechanisms already in place under other provisions of the PATRIOT Act, such as the certificate pursuant to Sections 313 and 319 of the Act. This flexibility will allow firms to build on current systems, and provide notice efficiently and effectively.

As noted, SIFMA requests that FinCEN clarify the meaning of the term “one-time notice” so that going forward industry members can be appropriately guided as to their obligations under this rule. The requirement of an annual notice in addition to the “one-time notice” increases the burden even more and diverts valuable resources (*e.g.*, time and money) from being applied towards other efforts to detect and prevent money laundering and the financing of terrorist activity. Should FinCEN find the notice requirement to be essential,

SIFMA asks for clarification as to the timing of both the one-time notice and the annual notice and the expectations on covered financial institutions going forward. For example, the industry would like clarification as to whether FinCEN expects the annual notice to be timed once a year, or to be calculated from the last notice provided to the financial institution.

B. Indirect Use

The proposal would require covered financial institutions to take reasonable steps to identify any indirect use of their correspondent accounts by Credex to the extent that such use can be determined from transactional records maintained in the normal course of business. SIFMA requests that FinCEN clarify the meaning of “indirect use” or “indirect access” so that covered institutions can be appropriately guided as to their obligations under this rule.

C. Enhanced Due Diligence

FinCEN also notes that covered institutions should take a risk-based approach to determine what, if any, additional due diligence measures should be implemented to guard against improper indirect use of its correspondent accounts by Credex. SIFMA also asks FinCEN to clarify whether the reference to enhanced due diligence in any way enhances the obligations for such due diligence under Rule 312 or whether it is simply incorporating that rule into this special measure.

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We are committed to working with FinCEN to find alternative methods to achieve the goals of the notice provision, and the implementation of the special measures rule, and we stand ready to help FinCEN implement any of our suggestions. Please do not hesitate to contact Ryan Foster at 202-962-7388 or via email at rfoster@sifma.org if you would like to discuss these matters further.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'RDF', is positioned above the printed name and title of the signatory.

Ryan D. Foster
Vice President and Assistant General Counsel
SIFMA