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March 6, 2006

Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
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Re: Proposed Regulations under Section 312 of the USA PATRIOT Act on Special Due Diligence Programs for Certain Foreign Accounts (Regulatory Information Number 1506-AA29)

Ladies and Gentlemen:

The Institute of International Bankers appreciates this opportunity to comment on the proposed regulation published by the Financial Crimes Enforcement Network ("FinCEN") under Section 312 of the USA PATRIOT Act of 2001 (the "Proposed Rule").[1] The Institute and its member organizations are committed to supporting international efforts to combat money laundering and terrorist financing, and we welcome the opportunity to submit comments on the Proposed Rule.

The Institute has joined leading U.S. trade organizations in a joint comment letter regarding the Proposed Rule dated March 6, 2006. This separate letter focuses on an issue of particular importance to international banking organizations—the due diligence required for correspondent accounts maintained for offshore booking locations of international banks.

The "CCS Exception"

As recited in the preamble to the Proposed Rule, FinCEN previously proposed to exempt from Section 312's enhanced due diligence requirements correspondent accounts maintained for offshore booking locations of international banks headquartered in jurisdictions where one or more banks have been determined by the Federal Reserve Board to be subject to comprehensive

[1] 71 Fed. Reg. 516 (Jan. 4, 2006).

The Institute's mission is to help resolve the many special legislative, regulatory and tax issues confronting **internationally headquartered** financial institutions that engage in banking, securities and/or insurance activities in the United States.

consolidated supervision ("CCS").[2] The Institute continues to strongly support FinCEN's proposal in this regard (the "CCS Exception"), and urges FinCEN to incorporate it into the final rule.

The Institute continues to believe that the CCS Exception, especially if broadened as suggested in our earlier submissions to FinCEN,[3] would reflect an appropriate recognition of the lowered risks of money laundering posed by offshore booking locations of international banks whose operations are subject to CCS by their home country regulatory authorities. The CCS Exception expressly acknowledged the importance of an international bank's home country anti-money laundering regulation in assessing the risks posed by correspondent accounts.

We also continue to believe that the CCS Exception would provide an important accommodation for international banks in view of the fact that Section 312 specifically targets non-U.S. banks for enhanced scrutiny, an approach that creates potential inconsistencies with the long-standing U.S. policy of national treatment for international banks. In this regard, the CCS Exception would minimize the extent to which Section 312 discriminates against international banks by more narrowly tailoring its enhanced due diligence requirements.

The Risk-Based Approach

As an alternative to the CCS Exception, FinCEN has articulated in the Proposed Rule a risk-based approach to determinations of the extent to which enhanced due diligence is warranted for particular correspondent accounts.

As a general matter, the Institute strongly supports a risk-based approach to implementing the enhanced due diligence requirements of Section 312, as reflected in the Proposed Rule. We welcome FinCEN's explicit recognition that enhanced due diligence will be most effective if it is targeted and tailored based on an institution's risk assessments. In this context, while the Institute believes the CCS Exception would be more effective and more easily administered by banking organizations and their supervisors, the Institute supports the Proposed Rule's preservation of the risk-based principle underlying the CCS Exception by providing flexibility for financial institutions in their application of specific suggested elements of enhanced due diligence. The Preamble recognizes that:

> *to impose an obligation of applying the same enhanced due diligence procedures in every case would require covered financial institutions to allocate limited resources inefficiently, thereby undermining the effectiveness of their anti-money laundering programs and the objectives of this statutory provision. . . . Under [the Proposed Rule's] risk-based approach, covered financial institutions would determine the nature and extent of the risks posed by the correspondent accounts . . . and the corresponding extent of the enhanced due diligence that is necessary and appropriate to apply to control those risks.*[4]

2 See 67 Fed. Reg. 37,736, 37,743 (May 30, 2002).

3 See Letter from the Institute to FinCEN, dated July 1, 2002.

4 71 Fed. Reg. at 517.

Reflecting this risk-based approach, the language of the Proposed Rule was revised to provide covered financial institutions flexibility to tailor their application of the enhanced due diligence requirements on the basis of their risk assessment of a particular account. For example, the first requirement, enhanced scrutiny, "shall *reflect the risk assessment of the account* and shall include, *as appropriate*" a list of specified measures, including obtaining and reviewing documentation related to a correspondent bank's anti-money laundering program.[5] With respect to that specific measure, the preamble helpfully makes explicit that it may not be necessary in some cases for a financial institution to actually obtain and analyze a non-U.S. respondent bank's anti-money laundering program.

The Institute believes that such guidance clarifying the extent to which a financial institution must implement specific enhanced scrutiny measures—or may choose not to implement a specific measure—is essential to the success of the Proposed Rule's risk-based approach. Absent clear language in the text of the final rule itself or in the preamble that particular specified measures for implementing enhanced scrutiny might not be required in certain circumstances based on an institution's risk assessment, there is a danger that in practice institutions will be required to show that they have applied every suggested element of enhanced diligence to every account. We therefore respectfully urge FinCEN to make clear in the final rule that with respect to a particular account, a financial institution may determine which, if any, of the specified measures for enhanced scrutiny should be applied based on appropriate risk assessment factors.

This is an especially important consideration in the context of offshore booking locations of international banks that are subject to CCS in their home countries. The Institute believes that an important factor in determining the extent of enhanced scrutiny appropriately relates to whether the non-U.S. respondent is subject to a robust anti-money laundering program of its head office or parent company, and whether that head office or parent company is subject to rigorous anti-money laundering supervision in its home jurisdiction.[6] The preamble to the Proposed Rule specifically highlights "whether . . . banks are branches or affiliates of financial institutions that are subject to supervision in their home jurisdiction" as a potential factor for financial institutions to consider in determining the risk level and the extent to which enhanced scrutiny might be appropriate.[7] In addition, FinCEN's final rule implementing the general due diligence requirements of Section 312 provides that risk assessments should take into account, as appropriate, the anti-money laundering regime of a parent company's home jurisdiction and information about the foreign institution's anti-money laundering record, which according to the preamble to the final rule would include CCS determinations by the Federal Reserve Board.[8]

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5 Id. at 520 (proposed 31 C.F.R. § 103.176 (b)(1))(emphasis added).

6 We note in this respect that Article 34 of the recently adopted 3rd European Union Anti-Money Laundering Directive requires banks based in the European Union to communicate their anti-money laundering policies and procedures to all of their branches and subsidiaries outside of the European Union, including offshore booking centers.

7 71 Fed. Reg. at 518.

8 71 Fed. Reg. 496, 503 (Jan. 4, 2006) (final rule 31 C.F.R. 103.176(a)(2)(iv) and (v)).

Consideration of these factors is particularly relevant when determining what additional scrutiny should be applied to offshore booking centers of major international banking organizations that are subject to a robust, group-wide anti-money laundering program. Thus, we believe, for example, that it should be consistent with the risk-based approach articulated by FinCEN in the Proposed Rule for a U.S. correspondent bank to determine based on the CCS status of an offshore booking location's head office or its parent bank that it is unnecessary to obtain and review documentation or information regarding the non-U.S. respondent's anti-money laundering program, so long as the U.S. correspondent bank can determine that the offshore booking location is subject to the anti-money laundering program of its head office or parent bank.

Similarly, the Institute believes these principles should be applied with respect to the Proposed Rule's second enhanced due diligence requirement—determining whether a non-U.S. respondent in turn maintains correspondent accounts for other non-U.S. banks that use the U.S. correspondent account, and, if so, taking "reasonable steps to obtain information relevant to assess and minimize money laundering risks associated with . . . [such] accounts . . . including, as appropriate, the identity of those foreign banks."[9] The preamble to the Proposed Rule clarifies that pursuant to this requirement, covered financial institutions would be expected to obtain information about a foreign correspondent bank's "customer base", and that such information should enable the institution "to determine whether it is necessary to take the additional steps of identifying and conducting due diligence with regard to individual nested banks."[10] Relevant factors cited in the preamble for determining whether a covered financial institution would need to identify "nested" banks include "the extent to which the foreign correspondent bank's anti-money laundering program appears adequate to prevent the nested bank account from being used for money laundering."[11]

The preamble discussion and the language of the Proposed Rule itself suggest that based on its risk assessment, a covered financial institution would be permitted to determine that the appropriate level of enhanced diligence with respect to nested accounts consisted of (i) determining whether a foreign correspondent bank is providing access to the U.S. correspondent account to "nested" foreign bank customers, (ii) obtaining general information about the types of foreign banks that make up the foreign correspondent's customer base, and (iii) assessing the associated risks. As applied to offshore booking locations of international banks, however, we believe it should be consistent with this approach for a U.S. correspondent bank to ascertain that the offshore booking location is subject to its head office's or parent bank's anti-money laundering program and on that basis conclude that no further investigation of individual foreign bank customers is necessary. (Such a correspondent account would, of course, still be subject to monitoring for suspicious activity and any indication of suspicious activity would warrant additional investigation.)

In this regard, the Institute would respectfully urge FinCEN to make clear in the final rule that U.S. correspondents will have the flexibility to determine which, if any, of the specific

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9 Id. at 520 (proposed 31 C.F.R. § 103.176 (b)(2)).

10 Id. at 518.

11 Id. at 518-519

measures mentioned by FinCEN to implement the enhanced due diligence requirements should be applied to nested accounts based on appropriate risk assessment criteria. Offshore booking locations of international banks that are subject to CCS are perhaps the best illustration of the importance of this flexibility, insofar as mandatory requirements—without appropriate risk-based adjustments—risk diverting anti-money laundering due diligence resources that would be better devoted to other types of higher-risk accounts.

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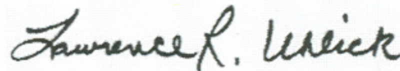
As discussed above, the Institute believes that the CCS Exception offers the most effective and appropriate means of focusing anti-money laundering resources on those accounts that present heightened risks. We therefore respectfully request that FinCEN adopt the CCS Exception in its final rule. In the absence of such an exception, we believe that clarity regarding the flexibility that U.S. correspondents have under Section 312 to define appropriate minimum enhanced due diligence measures will be especially important as FinCEN's regulations under Section 312 are implemented and applied in the context of the bank examination process. Without such clarity, there exists the possibility that banks will be expected to apply particular enhanced due diligence measures without regard to whether such measures are warranted by the bank's risk assessment. As applied to offshore booking locations, this creates a serious risk that the otherwise commendable objectives of a risk-based approach to correspondent account due diligence will be undermined. It would be both inefficient and ineffective to require U.S. correspondents to take specific enhanced due diligence measures with respect to offshore booking locations of international banks that apply robust anti-money laundering programs on a global basis under the supervision of their home country supervisors.

The Institute appreciates the opportunity to comment on the Proposed Rule. Please contact us if we can provide any additional information or assistance.

Very truly yours,



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