April 18, 2011

Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: Proposed Special Measure Against Lebanese Canadian Bank SAL
RIN 1506—AB11

Dear Sirs:

The Clearing House Association L.L.C.[1] ("The Clearing House") is pleased to comment on the proposal of the Financial Crimes Enforcement Network ("FinCEN") to impose a special measure against Lebanese Canadian Bank SAL ("LCB") and its subsidiaries under section 311 of the USA PATRIOT Act.[2] The Director of FinCEN has found that LCB is

> a financial institution of primary money laundering concern" under section 311 based on FinCEN's belief "that LCB has been routinely used by drug traffickers and money launderers operating in various countries in Central and South America, Europe, Africa, and the Middle East; that Hizballah derived financial support from the criminal activities of this network; and that LCB managers are complicit in the network's money laundering activities.[3]

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[1] Established in 1853, The Clearing House is the nation's oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Clearing House Association is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs, and white papers—the interests of its owner banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the United States. See The Clearing House's web page at www.theclearinghouse.org for additional information.

[2] 76 Fed. Reg. 9268 (Feb. 17, 2011).

[3] 76 Fed. Reg. 9403, 9404 (Feb. 17, 2011).

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FinCEN proposes to (i) prohibit covered financial institutions from opening, maintaining, administering, or managing a correspondent or payable-through account for LCB in the United States, and (ii) require covered financial institutions to apply "special due diligence" to its correspondent accounts in a manner that is "reasonably designed to guard against" the indirect use of those accounts by LCB.[4]

The Clearing House believes that the special measure that FinCEN has proposed is appropriate given the nature of its involvement in money laundering and the support that this money-laundering activity has given to a major terrorist network. Nonetheless, we believe that the proposed special measures raise a few issues that should be clarified so that banks and other covered financial institutions are sure of their responsibilities under this rule.

SUMMARY

1. FinCEN should allow banks to provide the required notice to correspondents in a more efficient manner. Covered financial institutions would include in the terms and conditions governing correspondent relationships a prohibition on their correspondent customers using their accounts to provide services to entities that are subject to special measures under section 311 and imposing on the customers a requirement to check FinCEN's web page to determine which foreign financial institutions have been designated under section 311.

2. FinCEN should monitor banks that have been designated as financial institutions of primary money-laundering concern for any significant changes in organization, ownership, or control and promptly inform the banking community whether these changes have any effect on the designation.

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[4] *Id*. at 9271.

COMMENTS

1. FinCEN should allow banks to provide the required notice to correspondents in a more efficient manner. Covered financial institutions would include in the terms and conditions governing correspondent relationships a prohibition on their correspondent customers using their accounts to provide services to entities that are subject to special measures under section 311 and imposing on the customers a requirement to check FinCEN's web page to determine which foreign financial institutions have been designated under section 311.

Proposed 31 C.F.R. § 103.194 (b)(2)(A) would require financial institutions to notify "those correspondent account holders that the covered financial institution *knows or has reason to know* provide services to the Lebanese Canadian Bank SAL, that such correspondents may not provide the Lebanese Canadian Bank SAL with access to the correspondent account maintained at the covered financial institution" (emphasis added). FinCEN requests comment on the form and scope of this notice.

"Knows" usually denotes actual knowledge.[5] "Reason to know" is much vaguer concept; usually it denotes possession of facts that would lead a reasonable person to conclude that a given proposition is true or prompt a reasonable person to perform such investigation as needed to determine whether or not the proposition is true. FinCEN's discussion of when the notice would be required and to whom it should be addresses is somewhat confusing because it combines the discussion of when the notice would be required with its discussion of the due diligence required to ensure that correspondents do not use their accounts to provide services to LCB. For example, the notice states that "[a] covered financial institution would, for example, have knowledge that the

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[5] *See, e.g.,* U.C.C. § 1-202(b).

correspondents provide access to LCB through transaction screening software."[6] The notice then goes on to say that "a covered financial institution would be expected to apply an appropriate screening mechanism to be able to identify a funds transfer order that on its face listed LCB as the originator's or beneficiary's financial institution, or otherwise referenced LCB in a manner detectable under the financial institution's normal screening processes,"[7] and that "[a] covered financial institution that obtains knowledge that a correspondent account is being used by a foreign bank to provide indirect access to LCB must take all appropriate steps to prevent such indirect access, including the notification of its correspondent account holder per section 103.194(b)(2)(i)(A)."[8] The Federal Register notice also makes no distinction between current and prospective correspondent-banking customers.

This uncertainty will almost certainly prompt all covered financial institutions to send a notice to all of their foreign correspondent banking customers except their own branches and affiliates. And, since many foreign banks have multiple correspondent relationships, these banks will each receive multiple, redundant notices.

Designations of primary money laundering concern attract significant press coverage throughout the world, as well as get the attention of vendors who provide banks services for customer-screening purposes (e.g., economic sanctions, PEPs). As an example, the Association of Banks in Lebanon issued a statement of support for LCB, despite the allegations behind the designation as a

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[6] 76 Fed. Reg. at 9271.
[7] *Id*.
[8] *Id.*

financial institution of primary money laundering concern. As a result, most foreign banks are aware of the designations by FinCEN.[9]

The Clearing House believes that an effective, less burdensome way of ensuring compliance would be for banks to insert in the terms and conditions governing their correspondent relationships that their correspondent customers not use their correspondent accounts to provide services to any entity that has been designated as a financial institution of primary money-laundering concern by FinCEN and imposes on the customer a requirement to check FinCEN's web page to determine which institutions FinCEN has designated. Banks would then be required to use due diligence, such as using an OFAC-type filter to screen transactions for evidence that their customers are not abiding by these terms.

Those customers engaging in transactions with designated entities would be notified by covered financial institutions as part of their due diligence to prevent indirect access to their accounts. Thus, all foreign bank customers could be afforded general knowledge of the designations and those who a covered institution knows or have reason to know are engaging in transactions with a designated entity would get a specific notice, as envisioned by the proposal.

2. FinCEN should monitor banks that have been designated as financial institutions of primary money-laundering concern for any significant changes in organization, ownership, or control and promptly inform the banking community whether these changes have any effect on the designation.

Banks frequently undergo changes of organization, ownership, or control, and these changes may have a significant effect on their operations. If for

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[9] *See e.g.*, *Banks Association Throws Weight Behind Lebanese-Canadian Bank*, Daily Star (Feb. 17, 2011), http://www.dailystar.com.lb/Business/Lebanon/Feb/17/Banks-Association-throws-weight-behind-Lebanese-Canadian-Bank.ashx#axzz1Jtm5XHBT.

example, an institution has been designated as of primary money-laundering concern is taken over by a major financial institution with solid anti-money-laundering policies and procedures, this could radically change the designated institution's posture. In these cases, FinCEN should move promptly to remove the institution from the designated list. If FinCEN has lingering concerns about the designated institution that persuade it not to remove the designation, it should promptly inform the banking community that the institution remains an institution of primary money-laundering concern, subject to whatever special measures are in place. Failure to do so will cause a great deal of uncertainty among banks about what the law requires them to do under these circumstances.

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We hope these comment have been helpful. If you have any questions about any of the issues raised in this letter, please contact me at joe.alexander@theclearinghouse.org or 212-612-9234.

Very truly yours,

Joseph R. Alexander
Senior Vice President, Deputy
General Counsel, and Secretary