



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

Re: RIN 1506–AB19—Imposition of Special Measure Against JSC CredexBank

Dear Sirs:

The Clearing House Association L.L.C. ("The Clearing House")[1] and the American Bankers Association ("ABA")[2] (jointly, "the Associations") are pleased to comment on FinCEN's proposal to impose special measures under section 311 of the USA PATRIOT Act[3] against JSC CredexBank ("Credex") as a financial institution of primary money-laundering concern.[4] The proposed special measure follows on the heels of FinCEN's designation of Credex as an institution of primary money-laundering concern, which was based on the grounds that Credex has engaged in transactions that are indicative of money-laundering activity, including high volumes of activity involving foreign shell corporations from high-risk jurisdictions, disproportionate and evasive transactional behavior, and "nested activity."[5]

[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.orgfor additional information.

[2] ABA represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than $165 million in assets.

[3] 31 U.S.C. § 5318A.

[4] 77 Fed. Reg. 31,794 (May 30, 2012).

[5] 77 Fed. Reg. 31,434, 31,436 (May 25, 2012). "Nested activity" refers to a foreign financial institution gaining "access to the U.S. financial system by operating through a U.S. correspondent account belonging to another foreign financial institution," effectively gaining "anonymous access to the U.S. financial system." *Id*. n. 28.

FinCEN proposes to impose two of the special measures available to it under section 311:

- Under the first special measure, require covered financial institutions to report certain information with respect to any transaction or attempted transaction related to Credex.
- Under the fifth special measure, require banks to terminate any accounts they hold for Credex and exercise special due diligence to prohibit "indirect use" of its correspondent accounts by Credex.

FinCEN notes that this is the first time that it has proposed use of reporting requirements authorized by the first special measure and that it is requesting comment on its proposed use of this special measure despite its ability under the statute to impose these reporting and recordkeeping requirements by order without a notice and comment period.[6]

SUMMARY

1. The Associations do not object to the imposition of the fifth special measure, but believes that FinCEN should move expeditiously to finalize its rule.

2. The Associations do not object in principle to the imposition of the first special measure and the filing of reports on Credex's transactions. There are, however, significant problems with the specifics of the proposed reporting requirements that must be corrected before the rule is finalized.

a. The rule must be crystal clear about which transactions (or attempted transactions) are covered. The proposed rule is not clear, and it is not clear what FinCEN means by "attempted transaction."

b. The identification of the parties does not appear limited to the information that is included in the payment order under FinCEN's travel rule.

c. FinCEN should clarify that the requirement to report "legal capacity" is limited to the parties that are listed on the transaction instruction.

d. The concept "beneficial owner of the funds" is highly problematic, and FinCEN's definition seems to be based on a fundamental misconception of how funds transfers actually work. In any event, U.S. banks are not likely to be able to obtain the identities of unnamed parties in interest in funds transfers or similar transactions.

[6] 77 Fed. Reg. at 31,796.

e. The 10-day reporting period is inadequate to obtain the kind of information that FinCEN appears to want.

f. Given the complexity of the issues surrounding the information reporting special measure, we urge FinCEN to seek public comment anytime it considers imposing the first special measure.

3. We recommend that the first special measure provide that: (i) covered financial institutions be required to report only those transactions in which Credex or an affiliate of Credex specifically identified by FinCEN appears in the transaction instruction as a party; and (ii) the report consist of a copy of the transaction instruction and a statement of how the institution disposed of the transaction.

## DETAILED COMMENTS

### 1. The Associations do not object to the imposition of the fifth special measure, but believe that FinCEN should move expeditiously to finalize its rule.

FinCEN has proposed imposing the fifth special measures against a number of foreign financial institutions over the past several years.[7] On other occasions, FinCEN has proposed to impose a special measure but has never finalized the regulation, even after several years.[8] In a few instances, FinCEN eventually rescinded its proposed imposition of a special measure, but only after leaving U.S. banks in limbo over what to do with the foreign bank for years.[9]

Based on the findings that these foreign institutions (including Credex) are of primary money-laundering concern and FinCEN's proposal to impose a special measure on them, most U.S. financial institutions take immediate action to ensure that transactions initiated by or for the benefit of the sanctioned institutions are not processed through accounts on their books. For example, U.S. financial institutions often add the sanctioned institution's name to their internal OFAC filters to ensure that transactions involving the sanctioned institution are not processed through their accounts. Some U.S. financial institutions also send notices to their correspondent-banking customers, informing them of FinCEN's actions and warning them not to send

[7] *See, e.g.*, 31 C.F.R. §§ 1010.652 (Myanmar Mayflower Bank and Asia Wealth Bank), § 1010.653 (Commercial Bank of Syria), and 1010.655 (Banco Delta Asia).

[8] *See, e.g.,* Lebanese Canadian Bank, 76 Fed. Reg. 9268 (Feb. 17, 2011); Infobank, 69 Fed. Reg. 51,973 (Aug. 24, 2004).

[9] *See, e.g.,* 69 Fed Reg. 51,979 (Aug. 24, 2004) (proposal to impose a special measure on First Merchant Bank OSH Ltd.); 73 Fed. Reg. 19,452 (Apr. 10, 2008) (withdrawal of proposal to impose a special measure against First Merchant Bank OSH Ltd.).

transactions involving the sanctioned institution through their correspondent account. However, in situations where the special measure is only proposed and not finalized, these actions are voluntary and taken as a good-faith, risked-based decision in response to the information provided by FinCEN in the notice of proposed rulemaking and FinCEN's finding that the institution is of primary money-laundering concern.

FinCEN, however, often does not move with the dispatch one would expect in these cases. For the five financial institutions[10] that have had final rules imposing special measures on them, the amount of time between the time of the finding that they were institutions of special money-laundering concern and the associated proposed imposition of a special measure and the time that the special measure was finalized ranged from 5 to 22 months, with the average being 13 months.[11] Lebanese Canadian Bank has been under threat of proposed a special measure for over a year, and Infobank (now PJSC Trustbank) has gone for over eight years without having its proposed special measure finalized or rescinded.[12]

These delays cause problems for the U.S. financial institutions. As time goes by with no final rule in sight, correspondent banking customers begin to wonder whether the prohibition on their using their correspondent accounts to provide services to the sanctioned party is still in effect, why—if the U.S. government has not taken the trouble to finalize its rule—they must still restrict their dealings with the sanctioned party, and what legal right their U.S. bank has to restrict their business dealings when there is no final rule in place.

The Associations strongly encourage FinCEN to act expeditiously. Nevertheless, it is critically important that FinCEN communicate with the industry and provide regular updates and information regarding the status of any pending sanctions under section 311.

**2. The Associations do not object in principle to the imposition of the first special measure and the filing of reports on Credex's transactions. There are, however, significant problems with the specifics of the proposed reporting requirements that must be corrected before the rule is finalized. It is also not clear that this special measure will be of much utility when combined with the fifth special measure.**

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[10] Asia Wealth Bank, Banco Delta Asia, Commercial Bank of Syria, Myanmar Mayflower Bank, and VEF Banka. *See* FinCEN, Special Measures for Jurisdictions Financial Institutions, or International Transactions of Primary Money Laundering Concern, available at http://www.fincen.gov/statutes_regs/patriot/section311.html.

[11] *Id*.

[12] *Id*.; *see also*, FinCEN, Guidance to Financial Institutions on the Provision of Financial Services to Belarusian Senior Regime Elements Engaged in Illicit Activities (Apr. 10, 2006), available at http://www.fincen.gov/statutes_regs/guidance/html/advisory_belarus040706.html.

If FinCEN finalizes the rule, the first special measure would require a U.S. financial institution to take reasonable steps to collect and report to FinCEN (over and above the requirement to report suspicious activity) specified information with respect to any transaction or attempted transaction related to Credex that the institution is requested to engage in. Covered transactions would include—but not be limited to—"those that are conducted or attempted by Credex itself."[13]

The institution would have to report (i) the identity and address of each party to the transaction, including the originator and beneficiary of a funds transfer; (ii) "the legal capacity in which Credex and any customer of Credex is acting with respect to the transaction";[14] (iii) the "beneficial owner of the funds involved" in the transaction; and (iv) a description of the transaction and its purpose. The covered institution would be required to file its report within 10 business days of its having engaged in the transaction or becoming aware of the attempted transaction.[15]

While the Associations and our members do not object to a requirement that banks report on transactions involving Credex that they perform or are asked to perform, there are a number of problems with this proposal. These issues are discussed below. In addition, however, we question the utility of the first special measure in a situation in which the fifth special measure is also being applied to a foreign institution.

As noted in the previous section, most large U.S. banks have already placed Credex and its known affiliates in their OFAC filters, and many others have notified their foreign correspondent-banking customers not to use the correspondent accounts to provide services to Credex. Because of this, very few Credex-related transactions will come through U.S. banks, and the few that do come will be rejected by the U.S. institution.

If a U.S. institution rejects a Credex-related transaction, it will not be in a good position to obtain information about the transaction, other than the information already present in the transaction instruction. If additional information is required to meet FinCEN's rule, the U.S. institution will have to turn to its customer, which may itself be an intermediary with no connection to Credex. In any event, the party with the information will have little or no incentive to expend the resources necessary to provide what it will likely regard as confidential information to the U.S. government, especially since the transaction has already been rejected.

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[13] 77 Fed. Reg. at 31,798.

[14] *Id*.

[15] *Id*. at 31,802.

**a. The rule must be crystal clear about what transactions (or attempted transactions) are covered. The proposed rule is not clear, and it is not clear what FinCEN means by "attempted transaction."**

FinCEN's proposed rule states that "[a] covered financial institution is required to take reasonable steps to collect and report to FinCEN . . . information with respect to any transaction or attempted transaction related to JSC CredexBank."[16] The section-by-section analysis elaborates by saying that "[t]ransactions related to Credex would include, but are not limited to, those that are conducted or are attempted by Credex itself."[17]

If banks are to be able to file the required reports, it must be absolutely clear to them which transactions are covered and which are not. Yet FinCEN's statement that transactions that are not conducted by Credex itself may be included muddies the waters. If there is no indication in the payment order or other transaction instruction that Credex is a party to the transaction, how is a bank to determine that Credex is "related" to the transaction? We do not suppose that FinCEN intends to include transactions entered by customers of Credex even if the customer does not use Credex to execute the transaction. What then is the meaning of this statement?

Fundamentally, to identify and report transactions, a domestic financial institution must be able to identify a covered transaction quickly based on readily available and easily accessible information.

It is also not clear what is the difference between a transaction and an attempted transaction.

We believe that these problems could be alleviated by clarifying the rule as follows:

1. Covered financial institutions would be required to report only those transactions in which Credex or an affiliate of Credex specifically identified by FinCEN appears in the transaction instruction as a party. This will allow banks to put the names of Credex and any of its FinCEN-identified affiliates in their OFAC filters so that they can be readily identified and reported.

2. FinCEN should eliminate the distinction between transactions and attempted transactions and focus instead on transaction instructions (e.g., a funds-transfer payment order) received by a covered financial

[16] *Id*., proposed 31 C.F.R. § 1010.658(b)(1).

[17] *Id*. at 31,798.

> institution in which Credex or a FinCEN-identified affiliate of Credex appears as any party to the transaction. A report would be required whether the bank accepted or rejected the instruction.

**b. The identification of the parties does not appear limited to the information that is included in the payment order under FinCEN's travel rule.**

The proposed rule states that the required report is to include "[t]he identity and address of the participants in a transaction or attempted transaction, including the identity of the originator and beneficiary of any funds transfer."[18] The section-by-section analysis states that the information to be reported

> 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 § 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.[19]

By stating that the reportable information would "include" information in the institution's possession, FinCEN implies that if an institution does not have the required information, it would be required to obtain it. This, however, would require U.S. banks to engage in a most likely futile quest.

For several years now, the Financial Action Task Force ("FATF") has encouraged transparency in financial transactions. Its current Recommendation 16 provides that "[c]ountries should ensure that financial institutions include required and accurate originator information, and required beneficiary information, on wire transfers and related messages throughout the payment chain."[20] Not every country, however, has adopted the FATF standards, and those that have not often have strict bank confidentiality requirements that would preclude their banks from providing information identifying a customer unless the customer agrees to the disclosure. Moreover, even if the U.S. bank's sender is located in a jurisdiction that has adopted the FATF standards, the sender itself is likely to be an intermediary and may not have any more information than it already has sent to the U.S. bank it its payment order.

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[18] *Id*. at 31,802, proposed 31 C.F.R. § 1010.658(b)(1)(i).

[19] *Id*. at 31,798.

[20] Financial Action Task Force, *The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* at 17 (Feb. 2012).

We believe that FinCEN should limit the reporting requirement to information that is included in the payment order or other transaction instruction and that there be no requirement for covered institutions to make inquiries of their senders for additional information. It would be reasonable to expect a reporting bank to forward that information it has in the transaction instructions, and this is information that can be transmitted to FinCEN relatively quickly. The more research and investigation that is needed, the longer it will take to report information to FinCEN, which in turn makes the timing for filing the report less reasonable.

**c. FinCEN should clarify that the requirement to report "legal capacity" is limited to the parties that are listed on the transaction instruction.**

The proposed rule provides that a covered financial institution must report on "[t]he legal capacity in which JSC CredexBank is acting with respect to the transaction or attempted transaction and, to the extent JSC CredexBank is not acting on its own behalf, then the customer or other person on whose behalf JSC CredexBank is acting."[21] As explained by FinCEN,

> [t]his 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 transmittor or recipient of a funds transfer or intermediary financial institutions involved in the payment chain associated with the transaction.[22]

As described, it is not clear what level of investigation a bank must perform in order to comply with this provision. Use of the phrase "would include any identifying information collected by the financial institution in the ordinary course of business" seems to indicate that the information requested is not limited to information that the bank obtains in the ordinary course and thus additional research will be required to obtain additional information. Moreover, FinCEN does not make clear whether legal capacity is different from the role that each of the parties play in the transaction as set out in the transaction instruction.

The role that each party plays in a transaction should be evident from the primary document. For example, an intermediary bank in a funds transfer will receive a payment order from a sender, and the payment order will consist of a computer message with fields for the identification of various parties to the funds transfer, typically the originator, originator's bank, instructing bank (i.e., the bank that sent a corresponding payment order to the sender), intermediary bank, beneficiary's bank, and

[21] Proposed 31 C.F.R. § 1010.658(b)(1)(i), 77 Fed. Reg. at 31,802.

[22] 77 Fed. Reg. at 31,798.

beneficiary. A letter of credit will identify an issuer, beneficiary, and account party and may also identify an advising bank or confirming bank. In each case the role assigned corresponds to its legal role. For example, the Uniform Commercial Code defines beneficiary's bank as "the bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order or which is otherwise to make payment to the beneficiary if the order does not provide for payment to an account."[23] There may be situations in which an originator or beneficiary is acting as agent of an undisclosed principal, but in most cases the payment order will not give any clue about whether this is in fact the case. If a principal is undisclosed, an intermediary bank, which may be removed from the agent by several other intermediaries, is unlikely to know of or suspect the relationship and will have little or no opportunity to obtain that knowledge so that it can report those facts to FinCEN.

We therefore recommend that FinCEN not require covered financial institutions report on the "legal capacity" of the parties. Rather, the rule should require the reporting institution to send a copy of the payment order or other transaction instruction or document. FinCEN will be able to obtain whatever information is needed from that.

**d. The concept "beneficial owner of the funds" is highly problematic, and FinCEN's definition seems to be based on a fundamental misconception of how funds transfers actually work. In any event, U.S. banks are not likely to be able to obtain the identities of unnamed parties in interest in funds transfers or similar transactions.**

The proposed rule also provides that the report include "[t]he identity of the beneficial owner of the funds involved in any transaction or attempted transaction."[24] *Beneficial owner* is defined to mean "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."[25] FinCEN relates this proposed requirement to the requirement to take reasonable steps to identify the beneficial owners of private banking accounts and the requirement to "take reasonable steps to obtain information from the foreign financial institution about the identity of any person with authority to direct transactions through any correspondent account that is a payable-through account, and the sources and beneficial owner of funds or other assets in the payable-through account."[26] FinCEN goes on to state that covered financial institutions could follow the same procedures used for identifying the beneficial owners of those private banking and payable-through accounts to identify the

[23] U.C.C. § 4A-103(a)(3).

[24] Proposed 31 C.F.R. § 1010.658(b)(1)(iii), 77 Fed. Reg. at 31,802.

[25] Proposed 31 C.F.R. § 1010.658(a)(4), 77 Fed. Reg. at 31,802.

[26] 77 Fed. Reg. at 31,799.

beneficial owner of funds in a transaction. FinCEN acknowledges that this could require a covered institution to contact its correspondent banking customer, and it goes on to state that if the institution is unable to identify the beneficial owner it should consider the transaction to be one of primary money laundering concern and determine whether or not it should process the transaction.[27]

While the concept of beneficial ownership might be a workable concept on a risk basis at the account-relationship level, it is not a good fit for individual transactions, especially where an account relationship does not exist. The idea that one can identify the "beneficial owner of the funds" involved in a funds transfer betrays a fundamental misconception of what funds transfers are and how they work. If this misconception is enshrined in FinCEN's regulations, it could work serious mischief in other areas of the law.

While it is common to speak of "funds" moving by wire from one place to another, this is merely a convenient metaphor and does not describe what actually happens. A funds transfer is actually a series of transactions involving instructions ("payment orders") from senders to receiving banks to pay or cause another bank to pay an amount of money to a beneficiary.[28] Acceptance of a payment order by the receiving bank obligates the sender to pay the amount of the order to the receiving bank,[29] something that is often accomplished by the receiving bank debiting the sender's account with the receiving bank.[30] The funds transfer is completed when the beneficiary's bank accepts a payment order for the beneficiary, most often by crediting the beneficiary's account.[31] This credit increases the balance in the beneficiary's account, thereby increasing the debt that the beneficiary's bank owes to the beneficiary, effectively substituting the bank's debt to the beneficiary for the originator's debt to the beneficiary, thus discharging the originator's debt.[32]

It is clear then that no money or "funds" belonging to a "beneficial owner" flow through the wires as part of a funds transfer; speaking of "funds transfers" or of "funds moving through the system" is merely a convenient shorthand for something that is much more complicated.

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[27] *Id*.

[28] U.C.C. § 4A-104(a).

[29] *Id*. § 4A-402.

[30] *Id*. § 4A-403(a)(3). Payment of the sender's obligation to the receiving bank may also occur by settlement through a funds-transfer system like CHIPS or through a Federal Reserve Bank, *id*. § 4A-402(a)(1), or by the sender crediting an account it holds for the receiving bank or by a separate funds transfer ("cover payment") from the sender to the receiving bank, *id*. § 4A-402(a)(2).

[31] *Id*. §§ 4A-104(a), 4A-209(b).

[32] U.C.C. § 4A-406.

> Just as we can speak of having money in the bank when all we have is the bank's obligation to pay, so we can speak of money flowing from Thailand to New York when what we really have is a series of debit and credit entries at various financial institutions. We can describe the transfer as if paper money was somehow flowing through those wires . . . . But it's one thing to indulge in a convenient fiction, and another to take it as the correct picture of the world. When we say the Sun rises, we don't mean that it revolves around the Earth.[33]

Government regulations must not indulge in this kind of shorthand, however, for two reasons. First, if an erroneous view of how the funds-transfer system works enshrined in regulations it can spread to other areas with significant adverse consequences. For example in 2002, the U.S. Court of Appeals for the Second Circuit erroneously held that the amount of a funds transfer at an intermediary bank was property of the originator of the funds transfer and subject to attachment under the Federal Rules of Civil Procedures' Supplemental Rules for Admiralty or Maritime Claims.[34] In short order, the U.S. District Court for the Southern District of New York was swamped with maritime writs of attachment—eventually fully one-third of all suits filed in the Southern District were maritime attachment claims—and the banks were faced with hundreds of writs filed or re-filed each day, causing them great expense until the Second Circuit finally reconsidered and corrected its error.[35] Treating the amount of a funds transfer at an intermediary bank as property of the originator or beneficiary could also have adverse effects on U.S. policy interests.[36] For this reason alone, FinCEN's rule must accurately describe the transactions it seeks to cover.

Second, use of the term "beneficial owner of the funds" is confusing and does not in fact allow covered financial institutions to determine what information must be reported to FinCEN. Consider the position of a U.S. intermediary bank holding accounts of the originator's bank and the beneficiary's bank. Each of these accounts represents a debt of the U.S. bank to these other two banks.[37] If the U.S. bank accepts a payment

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[33] Howard Darmstadter, *Dark Thoughts in a Winter Storm*, Comm. L. Newsl. Dec. 2003, at 8, 9.

[34] *Winter Storm Shipping v. TPI,* 310 F.3d 263 (2d Cir. 2002)

[35] *Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.,* 585 F.3d 58 (2d Cir. 2009).

[36] *See, e.g.,* Brief of the United States as *amicus curiae*, *JPMorgan Chase Bank, N.A. v. Hausler,* No. 12-1264(L) (2d Cir. Jul. 9, 2012) (The Justice Department, the State Department, and the Treasury Department's Office of Foreign Assets Control ("OFAC") take the position that the District Court erred when it held that funds transfers blocked under OFAC's Cuban Assets Control Regulations were subject to attachment under the Terrorism Risk Insurance Act without considering whether Cuba or a Cuban agency or instrumentality had any ownership interest in each blocked funds transfers.)

[37] *See, Citizens Bank of Maryland v. Strumpf,* 516 U.S. 16 (1995) (A bank account does not consist of "money belonging to the depositor and held by the bank. In fact . . . it consists of nothing more or less than a promise to pay, from the bank to the depositor.")

order from the originator's bank to pay the beneficiary's bank for further credit to the beneficiary, it will debit the account of the originator's bank and credit the account of the beneficiary's bank. No new funds have come into the U.S. bank, and the debts that the U.S. bank owes to the other two banks have increased and decreased by the amount of the payment order. No other party has any claim to the balance in those accounts.[38] Thus the only parties that actually exercise a level of control or ownership over the "funds" are the three banks, yet it seems that this is not the information that FinCEN is looking for.

We assume that FinCEN really wants to know who the real parties in interest are in any transaction involving Credex. In most transactions, the real parties in interest are listed in the transaction documents, for example the originator and beneficiary of a funds transfer[39] or the beneficiary and account party in a letter of credit. This information will be available to FinCEN if the covered institutions merely send copies of the transaction documents to FinCEN. If FinCEN wants to know if those parties are actually acting on behalf of some undisclosed party, then a covered institution will have to make inquiry of its customer, and if the customer is not the originator's bank or the beneficiary's bank, the customer will have to make inquiries of its own. Beyond the delay that such inquiries will cause for reporting information to FinCEN, we question the utility of such inquiries. An inquiry to the beneficiary or originator of a funds transfer will yield one of two possible responses: (i) the person listed is acting in its own behalf, (ii) the person is acting on behalf of someone else. But if the real party in interest wants to remain undisclosed, its agent may be unwilling or unable to disclose that information, and if the transaction is illicit the agent may lie about the involvement of any other person. In either case, the inquiry is unlikely to yield any useful information.

FinCEN's statement that a covered institution that is unable to identify the beneficial owner of the funds should regard the transaction as one of primary money-laundering concern and determine if it should process the transaction seems unnecessary in light of the imposition of the fifth special measure, which requires covered institutions to monitor transactions from their correspondent customers to ensure that those customers are not using their accounts to provide services to Credex. As noted earlier, most U.S. banks have put Credex in their OFAC filters and are unlikely to process any transactions in which Credex appears in any capacity. If the purpose of the first special measure is to keep Credex's transactions out of the U.S. financial

[38] The balance in an account may be subject to garnishment to satisfy the depositor's unpaid creditors, but not for the debts owed by the depositors' customers. The balance may also be subject to asset forfeiture, but asset forfeiture does not depend on ownership of the account. *See, e.g.,* 18 U.S.C. § 981(k).

[39] The definition of *beneficial owner of the funds* assumes a single person. But in the case of a funds transfer, is the beneficial owner the originator or the beneficiary?

system, that purpose has already more effectively been accomplished through the fifth special measure.

For these reasons, the Associations strongly recommend that the final rule not require covered financial institutions to obtain and report information on the beneficial owner of the funds involved in the transaction or attempted transaction.

**e. The 10-day reporting period is inadequate to obtain the kind of information that FinCEN appears to want.**

FinCEN proposes to require a covered financial institution to file its reports within 10 business days of the date on which it performed the transaction.[40] It has chosen this quick reporting period because "the contemplated time period will enable FinCEN to more effectively monitor the ongoing activities of Credex, thereby enhancing transparency. This time period was specifically chosen because it will provide FinCEN with reporting more quickly than that required for suspicious activity reporting."[41]

If FinCEN intends that a covered financial institution can fulfill its reporting requirement by simply sending FinCEN a copy of the transaction documents, 10 business days is perfectly adequate. If, however, FinCEN wants institutions to obtain additional information that is not apparent from the transaction documents, 10 days is completely inadequate, and we would recommend that if additional inquiry is required, the report be required within not less than 60 days.

Finally, FinCEN suggests that because Credex is not a major player in the international payment system, the burdens will be minimal. However, that overlooks that fact that the only way a financial institution can detect a possible transaction involving Credit requires monitoring each and every transaction that is processed to see if Credex is involved.

**f. Given the complexity of the issues surrounding the information reporting special measure, we urge FinCEN to seek public comment anytime it considers imposing the first special measure**.

FinCEN notes that under section 311 it may impose the first special measure by order prior to the implementation of a final rule provided that the order may not remain in effect for more than 120 days unless a final rule is issued within the 120-day period.[42] For this first use of the first special measure, FinCEN has given the public an opportunity

[40] Proposed C.F.R. § 1010.658(b)(2), 77 Fed. Reg. at 31,802..

[41] 77 Fed. Reg. at 31,31,799.

[42] *Id*. at 31,796.

to comment on the proposed imposition of the first special measure and has specifically requested comment on "the feasibility of implementing the first special measure by order prior to a final rule or in the absence" of a rule implementing the fifth special measure.[43]

The Associations recommend that FinCEN seek public comment any time it considers imposing the first special measure. Our experience of analyzing and commenting on this proposal has led us to the conclusion that there are a number of potential difficulties in drafting reporting requirements that can be avoided with direct input from experts who deal with banking transactions every day. Without direct, first-hand, day-to-day experience of managing banking transactions, it can be difficult to accurately describe the transactions involved or articulate precisely what is intended. Consultation with the industry—with the people who deal with these kinds of transactions day after day and who will be responsible for gathering the information and filing the reports—is crucial. The Associations believe that the industry can be very useful to FinCEN and the law-enforcement and regulatory communities in helping to explain the broader context in which the transactions appear, how they actually work, and how best to obtain the information that will be useful to the government.

**3. We recommend that the first special measure provide that: (i) covered financial institutions be required to report only those transactions in which Credex or an affiliate of Credex specifically identified by FinCEN appears in the transaction instruction as a party, and (ii) the report consist only of a copy of the transaction instruction and a statement of how the institution disposed of the transaction.**

We believe that the reporting requirement of the first special measure can be made simple, cost-effective, and informative for the government if the rule is simplified as follows:

1. Covered financial institutions are required to report only when they receive a transaction instruction (e.g., a funds-transfer payment order) or request (e.g., to issue, confirm, or advise a letter of credit) involving Credex or an affiliate of Credex that has been identified as such by FinCEN. The institution would be required to report regardless of the action it took in response to the instruction or request.

2. The report consist of two elements: (i) the transaction instruction or request and (ii) a statement of how the institution disposed of the request (i.e., whether the institution accepted or, more likely in light of the fifth special measure, rejected it).

[43] *Id*.

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We hope this comment is useful. If you have any questions, please contact Joe Alexander at 212-612-9234 or joe.alexander@theclearinghouse.org or Rob Rowe at 202-663-5029 or rrowe@aba.com.

Very truly yours,

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