



1120 Connecticut Avenue, NW
Washington, DC 20036

1-800-BANKERS
www.aba.com

World-Class Solutions,
Leadership & Advocacy
Since 1875

Cristeena G. Naser
Senior Counsel
Center for Securities,
Trust & Investments
Phone: 202-663-5332
Fax: 202-828-4548
Email: cnaser@aba.com

VIA ELECTRONIC MAIL

June 11, 2009

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090

Re: Proposed Rule Changes Relating to OFAC Programs and Sanctions
Release No. 34-59917, 74 *Federal Register* 23907, May 21, 2009
File Nos. SR DTC-200-9-07, SR-FICC-2009-06, SR-NSCC-20009-03

Dear Ms. Murphy:

The American Bankers Association (ABA) is responding to the request of the Securities and Exchange Commission (Commission) for comments on the above proposed rules of the Fixed Income Clearing Corporation, the National Securities Clearing Corporation and the Depository Trust Company (collectively, the Clearing Agencies) relating to economic sanctions and embargo programs administered and enforced by the Officer of Foreign Assets Control (OFAC).¹ Many of ABA's members are participants in or members of the Clearing Agencies in a variety of capacities. The proposed rules would add language to the rules of the Clearing Agencies to require that their participants, members and pledgees (collectively, Members) must (1) comply with OFAC's programs, and (2) agree not to conduct any transaction or activity through the Clearing Agencies that violates OFAC regulations.

ABA has always been supportive of efforts of our government to thwart money laundering and terrorist financing and has worked with OFAC, the Commission, and the federal banking agencies to further those goals. Nonetheless, ABA opposes the proposed rules of the Clearing Agencies because, as discussed more fully below, we believe the proposed rules are duplicative of current requirements, are contrary to current OFAC guidance, and would add significant burden to the Clearing Agencies members without any concomitant benefit.

¹ The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than \$125 million in assets – represent over 95 percent of the industry's \$14 trillion in assets and employ over 2 million men and women.

Background

As regulated bank holding companies and depository institutions ABA members are subject to all of the economic sanctions and embargo programs of OFAC, and are not only well aware of their OFAC obligations but, in fact, are examined regularly for compliance with those obligations. In addition, ABA members that are Members of the Clearing Agencies currently provide to the Depository Trust & Clearing Corporation (DTCC) a letter, certifying that, among other things, the Members are subject to the regulations administered by OFAC and have policies and procedures designed to comply with the prohibitions and restrictions mandated by OFAC.² In addition, Members that are domestic participants are required to provide an OFAC certification³ for each deposit to their securities account.³

The proposed rules would require Clearing Agency Members to provide an additional separate "OFAC Confirmation Letter" (attached hereto) that would require Members to certify, among other things, that:

- They are subject to, and have implemented, a risk-based program reasonably designed to comply with applicable OFAC sanctions regulations;
- They have excluded from any business introduced to the Clearing Agencies *all* persons or entities on the SDN List and all persons with whom it is otherwise impermissible for DTCC to engage in transactions under applicable OFAC sanctions regulations;
- They screen customers and, *where applicable based on identified risk factors, direct and indirect owners, controlling parties or other third-parties*, against the most recent version of OFAC's SDN List; and
- A new certification must be filed in the event of a merger and, in any event, every two years.

The Clearing Agencies did not solicit formal written comments prior to the publication of the proposed rules. Nor did they seek input from ABA members or, to our knowledge, other industry groups when developing the proposed rules. Neither did they provide any support demonstrating why an additional certification is warranted.

Discussion

The proposed rules state that Members "must agree not to conduct **any** transaction or activity through [the Clearing Agencies] that violates sanctions administered and enforced by OFAC"⁴ (emphasis added). Similarly, paragraph 3 of the OFAC Confirmation Letter provides, "Unless otherwise authorized by OFAC, [User name] has excluded from any

² This letter was specifically requested by DTCC in 2008, and contained language agreed upon between DTCC and the Anti-Money Laundering Committee of the Securities Industry and Financial Markets Association.

³ To receive credit for a deposit, a Domestic Participant must place a "Y" in the OFAC certification field to certify that each certificate attached to the deposit has been screened against OFAC's list of Specially Designated Nationals and Blocked Persons and that there were no valid matches.

⁴ 74 Fed. Reg. at 23907.

Business it introduces to the Clearing Agencies all persons or entities on the SDN List and all persons with whom it is otherwise impermissible for DTCC to engage in transactions under applicable OFAC sanctions regulations.”⁵

Notwithstanding the fact that OFAC regulations impose a form of strict liability, it is impossible for Members to make the kind of categorical statement asked for in the document, given that there is always the possibility of actions taken in good faith but subject to incomplete or inaccurate information, including actions that could be technically inconsistent with an OFAC sanction. Indeed, OFAC recognizes that despite Member vigilance with respect to customer due diligence and OFAC screening, violations may occur inadvertently. Guidance published by OFAC⁶ recognizes this fact and recommends that firms establish risk-based policies and procedures to monitor and mitigate sanctions risk, and OFAC’s enforcement guidelines make it clear that the presence of a robust, risk-based OFAC compliance program is a significant factor that OFAC considers in determining the appropriate response to an OFAC violation.⁷

Accordingly, a Member using a risk-based approach should not be required to certify that it will not conduct any transaction or activity through the Clearing Agencies that violates OFAC regulations, because such a certification is impossible. Moreover, compliance with the screening process is inherent in the current letter that Members provide certifying that they have policies and procedures in place to comply with OFAC’s requirements.

In addition, paragraph 2 of the OFAC Letter requires a Member to certify that it “screens customers and, where applicable based on identified risk factors, direct and indirect owners, controlling parties or other third-parties.”⁸ Our Members report that OFAC screening is generally performed via software that matches account names in the Member firms’ systems against the SDN List. Because third-party names, if available, are not generally added to account names, Member systems do not allow them to screen third-parties. Indeed, to screen third-parties Members would need to undertake time consuming and expensive system modifications or conduct OFAC screening manually, which considering the number of transactions, accountholders, and third-parties to be screened, would unduly slow the processing of transactions, if not bring the process to a standstill.

Recent OFAC guidance on opening securities and futures accounts clearly states that decisions about whether to screen third-parties is a risk-based decision left to the informed discretion of the securities firm. It provides: “In *some* cases, it may be prudent for a firm to obtain beneficial ownership information for certain types of accounts. Some accounts, such as those opened by non-U.S. persons or entities located in high-risk jurisdictions, *may* present a higher risk of sanctions violations.” (emphasis added)⁹ Thus, informed risk-based decisions to screen only account names would not be subject to criticism by the federal regulatory agencies charged with examining Members for OFAC compliance, and as previously explained, such risk-based policies and procedures would be accorded deference by OFAC in an enforcement action.

⁵ See attachment.

⁶ See *Opening Securities and Futures Accounts from an OFAC Perspective*, (Nov. 5, 2008) available at www.treas.gov/offices/enforcement/ofac/articles/securities_future_accounts_11052008.pdf; See also *Bank Secrecy Act/Anti-Money Laundering Examination Manual* (“FFIEC Manual”) 137–145, last published in August 2007 by the Federal Financial Institutions Examination Council, available at http://www.ffiec.gov/bsa_aml_infobase/documents/BSA_AML_Man_2007.pdf. The FFIEC Manual provides guidance, developed with OFAC’s assistance, for establishing an OFAC compliance program that is commensurate with the financial institution’s specific OFAC risk profile, based on a risk assessment of the relevant products, services, customers, and geographic locations.

⁷ See Economic Sanctions Enforcement Guidelines, 73 Fed.Reg. 51933, 51938 (Sept. 8, 2008).

⁸ OFAC Letter, ¶ 2, *supra* note 5.

⁹ See OFAC, *Opening Securities and Futures Accounts from an OFAC Perspective*, available at http://www.treasury.gov/offices/enforcement/ofac/articles/securities_future_accounts_11052008.pdf.

Conclusion

As discussed above, ABA believes that the Clearing Agencies have presented no evidence warranting an additional certification beyond what is already provided by their Members. ABA members are directly subject to OFAC regulations and compliance, and the additional certification simply adds burden to Members without ensuring increased compliance with OFAC regulations. Accordingly, we oppose the adoption of the proposed rules.

If you have any questions on any of the issues raised in this letter, please do not hesitate to contact the undersigned.

Sincerely,

A handwritten signature in cursive script, reading "Cristeena G. Naser".

Cristeena G. Naser