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## DEPARTMENT OF THE TREASURY

### 31 CFR Chapter X

#### RIN 1506-AB19

#### **Financial Crimes Enforcement Network; Imposition of Special Measure against JSC CredexBank as a Financial Institution of Primary Money Laundering Concern**

**AGENCY:** Financial Crimes Enforcement Network, Treasury (“FinCEN”), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** In a finding published elsewhere in this issue of the Federal Register, the Secretary of the Treasury, through his delegate, the Director of FinCEN, found that reasonable grounds exist for concluding that JSC CredexBank is a financial institution of primary money laundering concern pursuant to 31 U.S.C. 5318A. FinCEN is issuing this notice of proposed rulemaking to propose the imposition of two special measures against JSC CredexBank.

**DATES:** Written comments on the notice of proposed rulemaking must be submitted on or before [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by RIN 1506-AB19 by any of the following methods:

- *Federal E-rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Include 1506-AB19 in the submission. Refer to Docket Number FINCEN-2012-0003.

- *Mail:* The Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Include RIN 1506-AB19 in the body of the text. Please submit comments by one method only.
- Comments submitted in response to this NPRM will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

*Inspection of comments:* Public comments received electronically or through the U. S. Postal Service sent in response to a notice and request for comment will be made available for public review as soon as possible on <http://www.regulations.gov>. Comments received may be physically inspected in the FinCEN reading room located in Vienna, Virginia. Reading room appointments are available weekdays (excluding holidays) between 10 a.m. and 3 p.m., by calling the Disclosure Officer at (703) 905–5034 (not a toll-free call).

**FOR FUTHER INFORMATION CONTACT:** The FinCEN regulatory helpline at (800) 949–2732 and select Option 6.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

A. Statutory Provisions

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the USA PATRIOT Act), Public Law 107-56. Title III of the USA PATRIOT Act amends the anti-money laundering provisions of the Bank Secrecy Act (BSA), codified at 12 U.S.C. 1829b, 12 U.S.C 1951-1959, and 31 U.S.C. 5311-5314,

5316-5332, to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism. Regulations implementing the BSA appear at 31 CFR Chapter X. The authority of the Secretary of the Treasury (“the Secretary”) to administer the BSA and its implementing regulations has been delegated to the Director of FinCEN.<sup>1</sup>

Section 311 of the USA PATRIOT Act (“section 311”) added section 5318A to the BSA, granting the Secretary the authority, upon finding that reasonable grounds exist for concluding that a foreign jurisdiction, institution, class of transaction, or type of account is of “primary money laundering concern,” to require domestic financial institutions and financial agencies to take certain “special measures” against the entity of primary money laundering concern. Section 311 identifies factors for the Secretary to consider and Federal agencies to consult before the Secretary may conclude that a jurisdiction, institution, class of transaction, or type of account is of primary money laundering concern. The statute also provides similar procedures, *i.e.*, factors and consultation requirements, for selecting the specific special measures to be imposed against the primary money laundering concern.

Taken as a whole, section 311 provides the Secretary with a range of options that can be adapted to target specific money laundering and terrorist financing concerns most effectively. These options give the Secretary the authority to control and limit access to the U.S. financial system to any jurisdictions and institutions that pose money laundering threats. Through the imposition of various special measures, the Secretary can gain more information about the jurisdictions, institutions, transactions, or accounts of concern; can

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<sup>1</sup> Therefore, references to the authority of the Secretary of the Treasury under section 311 of the USA PATRIOT Act apply equally to the Director of FinCEN.

more effectively monitor the respective jurisdictions, institutions, transactions, or accounts; and can protect U.S. financial institutions from involvement with jurisdictions, institutions, transactions, or accounts that are of money laundering concern.

Before making a finding that reasonable grounds exist for concluding that a financial institution operating outside the United States is of primary money laundering concern, the Secretary is required to consult with both the Secretary of State and the Attorney General. The Secretary is also required by section 311 to consider “such information as the Secretary determines to be relevant, including the following potentially relevant factors<sup>2</sup>:

- The extent to which such financial institution is used to facilitate or promote money laundering in or through the jurisdiction;
- The extent to which such financial institution is used for legitimate business purposes in the jurisdiction; and
- The extent to which the finding that the institution is of primary money laundering concern is sufficient to ensure, with respect to transactions involving the institution operating in the jurisdiction, that the purposes of the BSA continue to be fulfilled, and to guard against international money laundering and other financial crimes.

If the Secretary determines that reasonable grounds exist for concluding that a financial institution operating outside the United States is of primary money laundering concern, the Secretary must determine the appropriate special measure(s) to address the specific money laundering risks. Section 311 provides a range of special measures that

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<sup>2</sup> 31 U.S.C. 5318A(c)(2).

can be imposed individually, jointly, in any combination, and in any sequence.<sup>3</sup> The Secretary's imposition of special measures requires additional consultations to be made and factors to be considered. The statute requires the Secretary to consult with appropriate Federal agencies and other interested parties<sup>4</sup> and to consider the following specific factors:

- Whether similar action has been or is being taken by other nations or multilateral groups;
- Whether the imposition of any particular special measures would create a significant competitive disadvantage, including any undue cost or burden associated with compliance, for financial institutions organized or licensed in the United States;
- The extent to which the action or the timing of the action would have a significant adverse systemic impact on the international payment, clearance, and settlement system, or on legitimate business activities involving the particular jurisdiction; and

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<sup>3</sup> Available special measures include requiring: (1) recordkeeping and reporting of certain financial transactions; (2) collection of information relating to beneficial ownership; (3) collection of information relating to certain payable-through accounts; (4) collection of information relating to certain correspondent accounts; and (5) prohibition or conditions on the opening or maintaining of correspondent or payable through accounts. 31 U.S.C. 5318A(b)(1)-(5). For a complete discussion of the range of possible countermeasures, *see* 68 FR 18917 (April 17, 2003) (proposing special measures against Nauru).

<sup>4</sup> Section 5318A(a)(4)(A) requires the Secretary to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Secretary of State, the Securities and Exchange Commission ("SEC"), the Commodity Futures Trading Commission ("CFTC"), the National Credit Union Administration ("NCUA"), and, in the sole discretion of the Secretary, "such other agencies and interested parties as the Secretary may find to be appropriate." The consultation process must also include the Attorney General, if the Secretary is considering prohibiting or imposing conditions on domestic financial institutions opening or maintaining correspondent account relationships with the designated jurisdiction.

- The effect of the action on the United States national security and foreign policy.<sup>5</sup>

B. JSC CredexBank

In this rulemaking, FinCEN proposes to impose both the first special measure (31 U.S.C. 5318A(b)(1)) and the fifth special measure (31 U.S.C. 5318A(b)(5)) against JSC CredexBank (“Credex”). The first special measure imposes requirements with respect to recordkeeping and reporting of certain financial transactions and may be imposed by order prior to finalization of this proposed regulation, as explained in more detail below. 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 and may be imposed only through the finalization of this proposed regulation.

Credex is a depository institution that is located and licensed in the Republic of Belarus and primarily services corporate entities.<sup>6</sup> Originally established on September 27, 2001, as Nordic Investment Bank Corporation by Ximex Executive Limited (“Ximex”),<sup>78</sup> the bank changed its name to Northern Investment Bank on April 5, 2006, and then to the current name of Credex on February 12, 2007. Credex is 96.82% owned by Vicpart Holding SA, based in Fribourg City, Switzerland.<sup>9</sup> With 169 employees<sup>10</sup> and a total capitalization of approximately \$19 million,<sup>11</sup> the bank currently ranks as the 22nd

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<sup>5</sup> Classified information used in support of a section 311 finding and measure(s) may be submitted by Treasury to a reviewing court ex parte and in camera. See section 376 of the Intelligence Authorization Act for fiscal year 2004, Pub. L. 108–177 (amending 31 U.S.C. 5318A by adding new paragraph (f)).

<sup>6</sup> Bankers Almanac (2012).

<sup>7</sup> “Belarus on a Roll,” Business New Europe, July 22, 2009 ([http://www.businessneweurope.eu/story1701/Belarus\\_on\\_a\\_roll](http://www.businessneweurope.eu/story1701/Belarus_on_a_roll)).

<sup>8</sup> Bankers Almanac (2012).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

largest among 31 commercial banks in Belarus in total assets.<sup>12</sup> Credex has six domestic branches and one representative office in the Czech Republic.<sup>13</sup> While the majority of its correspondent banking relationships are with domestic banks, Credex maintains correspondent relationships with Russian, Latvian, German, and Austrian banks.<sup>14</sup> According to available public information, Credex does not appear to have any direct U.S. correspondent relationship.<sup>15</sup>

## **II. Imposition of Special Measures against JSC CredexBank as a financial institution of Primary Money Laundering Concern**

As a result of the finding on [INSERT DATE OF TREASURY FINDING], the Secretary, through his delegate, the Director of FinCEN, found that reasonable grounds exist for concluding that Credex is a financial institution of primary money laundering concern. Based upon that finding, the Director of FinCEN is authorized to impose one or more special measures. Following the required consultations and the consideration of all relevant factors discussed in the finding and in this notice of proposed rulemaking, the Secretary, through the Director of FinCEN, is proposing to impose the first and fifth special measures authorized by section 5318A(b).<sup>16</sup>

The first special measure authorizes the Secretary, through the Director of FinCEN, to require any domestic financial institution “to maintain records, file reports, or both, concerning the aggregate amount of transactions, or concerning each transaction, with respect to” a financial institution operating outside of the United States found to be of primary money laundering concern. The fifth special measure authorizes a prohibition

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<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup> In connection with this action, FinCEN consulted with staff of the Federal functional regulators, the Department of Justice, and the Department of State, among others.

against the opening or maintaining of correspondent accounts<sup>17</sup> by any domestic financial institution or agency for or on behalf of a financial institution found to be a primary money laundering concern.

FinCEN is imposing the first special measure in addition to the fifth special measure in this case because of the special circumstances and concerns raised by the activities of Credex. Specifically, the pervasive lack of transparency surrounding Credex – including its engagement in a disproportionately large volume of transactions for a bank of its size and its ownership and use by shell companies in a manner that obscures the purpose and ownership of funds moving through the United States – indicates a high degree of money laundering risk and vulnerability to other financial crimes. This lack of transparency and use of the bank by shell corporations is the reason why FinCEN proposes to employ the first special measure in this case. The imposition of the first special measure in this case will serve a number of functions. Information gathered through reports submitted by financial institutions pursuant to the first special measure will provide FinCEN and law enforcement with greater insight into transactions or attempted transactions related to Credex, including details regarding the underlying beneficial owners. This knowledge, in turn, could help FinCEN and law enforcement pierce the veil of the shell corporations behind which the true owners of the funds involved hide.

Under Section 311, FinCEN may impose the first special measure by order prior to the implementation of any finalized rule,<sup>18</sup> provided that any such order be issued with

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<sup>17</sup> For purposes of the proposed rule, a correspondent account is defined as an account established to receive deposits from, or make payments or other disbursements on behalf of, a foreign bank, or handle other financial transactions related to the foreign bank.

<sup>18</sup> 31 U.S.C. 5318A(a)(2)(B).

a NPRM relating to the imposition of the special measure and that such order may not remain in effect for more than 120 days absent the promulgation of a rule on or before the end of the 120-day period beginning on the date the order was issued.<sup>19</sup> The authority to issue such an order immediately upon finding that an institution is of primary money laundering concern is particularly important in addressing illicit finance risks associated with the identified financial institution that could continue posing a threat to the U.S. financial system while a proposed rule is under consideration.

Although the factual circumstances surrounding Credex could merit an immediate imposition of the first special measure, FinCEN has elected not to issue an order to this effect in this case. Taking into account the fact that this NPRM marks the inaugural use of the first special measure in a Section 311 action, FinCEN has decided not to implement the first special measure prior to the finalization of the proposed rule in order to provide financial institutions and other interested parties with an opportunity to comment on how the first special measure could be implemented in a manner that most effectively mitigates the risk posed by the identified institution to the U.S. financial system and enables the collection of useful information while minimizing the overall burden on U.S. financial institutions.

As such, FinCEN requests comment on the scope and practicability of the potential obligations under the first special measure, and in particular, any input on the feasibility of implementing the first special measure by order prior to a final rule or in the absence of a prohibition on opening or maintaining correspondent accounts with an identified institution as proposed under fifth special measure. FinCEN will consider such input not only in the context of assessing whether to finalize the proposed rule, but also in

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<sup>19</sup> 31 U.S.C. 5318A(a)(3).

the event that it determines that it is necessary in a future Section 311 action to issue an order imposing the first special measure prior to the finalization of a rule.

A. Form of Records and Reports Under the First Special Measure

As to the form of records and reports required by the first special measure, Section 5318A(b)(1)(B) provides:

Such records and reports shall be made and retained at such time, in such manner, and for such period of time, as the Secretary shall determine, and shall include such information as the Secretary may determine, including—

- (i) the identity and address of the participants in a transaction or relationship, including the identity of the originator of any funds transfer;
- (ii) the legal capacity in which a participant in any transaction is acting;
- (iii) the identity of the beneficial owner of the funds involved in any transaction, in accordance with such procedures as the Secretary determines to be reasonable and practicable to obtain and retain the information; and
- (iv) a description of any transaction.

The Director of FinCEN determines that records and reports under the first special measure, if imposed, shall be made and retained as follows. The 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.

This information shall be reported to FinCEN within ten business days following the day when the covered financial institution engaged in the transaction or became aware of the attempted transaction.

B. Discussion of Section 311 Factors

A discussion of the section 311 factors relevant to imposing the first and fifth special measures follows.

1. Whether Similar Actions Have Been or Will Be Taken by Other Nations or Multilateral Groups against Credex

Other countries or multilateral groups have not yet taken action similar to those proposed in this rulemaking that would: 1) require domestic financial institutions and agencies to file reports concerning any transactions or attempted transactions related to Credex; and 2) prohibit domestic financial institutions and agencies from opening or maintaining a correspondent account for or on behalf of Credex, and to require those domestic financial institutions and agencies to screen their correspondents in a manner that is reasonably designed to guard against indirect use by Credex, including access through the use of nested correspondent accounts held by Credex. FinCEN encourages other countries to take similar action based on the findings contained in this rulemaking.

2. Whether the Imposition of the First or Fifth Special Measure Would Create a Significant Competitive Disadvantage, Including Any Undue Cost or Burden Associated with Compliance, for Financial Institutions Organized or Licensed in the United States

The first special measure sought to be imposed by this rulemaking would require domestic financial institutions and agencies to file reports concerning any transactions or attempted transactions related to Credex. Given the general recordkeeping and reporting obligations already in place, FinCEN does not expect incremental increase in the burden associated with these requirements to be significant. U.S. financial institutions generally apply some level of screening and (when required) reporting of their transactions and accounts, often through the use of commercially available software such as that used for compliance with the economic sanctions programs administered by the Office of Foreign Assets Control (OFAC) of the Department of the Treasury. They are also required to have enhanced due diligence policies and procedures, which involve the collection of beneficial ownership information for certain types of correspondent accounts with certain foreign financial institutions. As explained in more detail in the section-by-section analysis below, financial institutions should be able to easily adapt these current screening and reporting procedures to comply with this special measure. Moreover, the number of transactions or attempted transactions for which the recordkeeping and reporting obligations apply is expected to be relatively limited because, according to available public information, Credex does not appear to have any direct U.S. correspondent relationships. Thus, the additional reporting and recordkeeping requirements that would be required by this rulemaking are not expected to create a significant competitive disadvantage for U.S. financial institutions.

The fifth special measure sought to be imposed by this rulemaking would prohibit covered financial institutions from opening and maintaining correspondent accounts for, or on behalf of, Credex. As a corollary to this measure, covered financial institutions also would be required to take reasonable steps to apply special due diligence, as set forth below, to all of their correspondent accounts to help ensure that no such account is being used indirectly to provide services to Credex. FinCEN does not expect the burden associated with these requirements to be significant, given its understanding that, according to available public information, no U.S. financial institutions currently maintain a correspondent account for Credex. There is a minimal burden involved in transmitting a one-time notice to all correspondent account holders concerning the prohibition on indirectly providing services to Credex. As noted above, U.S. financial institutions generally apply some level of transaction and account screening, often through the use of commercially available software. As explained in more detail in the section-by-section analysis below, financial institutions should, if necessary, be able to easily adapt their current screening procedures to support compliance with this special measure. Thus, the special due diligence that would be required by this rulemaking is not expected to impose a significant additional burden upon U.S. financial institutions.

3. The Extent to Which the Proposed Action or Timing of the Action Will Have a Significant Adverse Systemic Impact on the International Payment, Clearance, and Settlement System, or on Legitimate Business Activities of Credex

This proposed rulemaking targets Credex specifically; it does not target a class of financial transactions (such as wire transfers) or a particular jurisdiction. Credex is not a major participant in the international payment system and is not relied upon by the international banking community for clearance or settlement services. Thus, the

imposition of the first and fifth special measures against Credex will not have a significant adverse systemic impact on the international payment, clearance, and settlement system. In light of the reasons for imposing these special measures, FinCEN does not believe that it will impose an undue burden on legitimate business activities, and notes that the presence of many larger banks in Belarus will alleviate the burden on legitimate business activities within that jurisdiction.

4. The Effect of the Proposed Action on United States National Security and Foreign Policy

The additional recordkeeping and reporting requirements required by the first special measure would enhance the U.S. Government's understanding of the transactions engaged in by Credex and enhance transparency into Credex's activities of money laundering concern, which in turn would be utilized in efforts to detect and deter significant money laundering activity and other financial crimes. Such efforts would enhance national security, making it more difficult for terrorists and money launderers to access the substantial resources of the U.S. financial system.

The exclusion from the U.S. financial system of banks that serve as conduits for significant money laundering activity and other financial crimes required by the fifth special measure would similarly enhance national security by making it more difficult for terrorists and money launderers to access the substantial resources of the U.S. financial system.

More generally, the imposition of the first and fifth special measures would complement the U.S. Government's worldwide efforts to expose and disrupt international money laundering.

Therefore, pursuant to the finding that Credex is an institution of primary money laundering concern, and after conducting the required consultations and weighing the relevant factors, the Director of FinCEN is proposing to impose the first and fifth special measures.

## **II. Section-by-Section Analysis for Imposition of First and Fifth Special Measures**

### **A. 1010.658(a) – Definitions**

#### **1. JSC CredexBank**

Section 1010.658(a)(1) of the proposed rule defines Credex to include all branches, offices, and subsidiaries of Credex operating in Belarus or in any jurisdiction. FinCEN will provide updated information, as it is available; however, covered financial institutions should take commercially reasonable measures to determine whether a customer is a branch, office, or subsidiary of Credex. FinCEN is not aware of any subsidiaries of Credex.

#### **2. Correspondent account**

Section 1010.658(a)(2) of the proposed rule defines the term “correspondent account” by reference to the definition contained in 31 CFR 1010.605(c)(1)(ii). Section 1010.605(c)(1)(ii) defines a correspondent account to mean an account established to receive deposits from, or make payments or other disbursements on behalf of, a foreign bank, or handle other financial transactions related to the foreign bank.

In the case of a U.S. depository institution, this broad definition includes most types of banking relationships between a U.S. depository institution and a foreign bank that are established to provide regular services, dealings, and other financial transactions including a demand deposit, savings deposit, or other transaction or asset account, and a

credit account or other extension of credit. We are using the same definition of “account” for purposes of this rule as was established for depository institutions in the final rule implementing section 312 of the USA PATRIOT Act.<sup>20</sup>

In the case of securities broker-dealers, futures commission merchants, introducing brokers-commodities, and investment companies that are open-end companies (mutual funds), we are also using the same definition of “account” for purposes of this rule as was established for these entities in the final rule implementing section 312 of the USA PATRIOT Act.<sup>21</sup>

### 3. Covered financial institution

Section 1010.658(a)(3) of the proposed rule defines “covered financial institution” with the same definition used in the final rule implementing section 312 of the USA PATRIOT Act,<sup>22</sup> which in general includes the following:

- An insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h));
- a commercial bank;
- an agency or branch of a foreign bank in the United States;
- a Federally insured credit union;
- a savings association;
- a corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611);
- a trust bank or trust company;

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<sup>20</sup> See 31 CFR 1010.605(c)(2)(i).

<sup>21</sup> See 31 CFR 1010.605(c)(2)(ii)-(iv).

<sup>22</sup> See 31 CFR 1010.605(e)(1).

- a broker or dealer in securities;
- a futures commission merchant or an introducing broker-commodities; and a mutual fund.

#### 4. Beneficial Owner

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. This definition derives from the definition used in the final rule implementing section 312 of the USA PATRIOT Act.<sup>23</sup>

#### 5. Subsidiary

Section 1010.658(a)(5) of the proposed rule defines “subsidiary” as a company of which more than 50 percent of the voting stock or analogous equity interest is owned by another company. This definition means that the subsidiary is under the control of the owner of the majority interest.

#### B. 1010.658(b) – 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. Transactions related to Credex would include, but are not limited to, those that are conducted or are attempted by

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<sup>23</sup> See 31 CFR 1010.605(a).

Credex itself. This proposed rule would not alter or otherwise impact other regulatory obligations of the covered financial institution requiring the reporting of suspicious activity.

1. Reporting

(a) Identity of the Participants in a Transaction or Attempted 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. This information 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.

(b) 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. 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.

(c) Beneficial Owner of the Funds

Section 1010.658(b)(1)(ii) of the proposed rule imposing the first special measure would require covered financial institutions to report the identity of the beneficial owner of the funds involved in any transaction or attempted transaction related to Credex. Under existing FinCEN regulations, there are two limited situations where financial institutions are expressly obligated to obtain beneficial ownership information. Specifically, under the rules implementing Section 312 of the USA PATRIOT Act, certain “covered financial institutions,”<sup>24</sup> which include the same institutions covered by the scope of this proposed regulation, must implement enhanced due diligence programs, including obtaining beneficial ownership information, in two situations: (i) covered financial institutions that offer private banking accounts are required to take reasonable steps to identify the nominal and beneficial owners of such accounts;<sup>25</sup> and (ii) covered financial institutions that offer correspondent accounts for certain foreign financial institutions<sup>26</sup> are required 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.<sup>27</sup> The requirement to report beneficial ownership of funds information about transactions or attempted transactions related to Credex can be satisfied by employing the same policies and procedures as are used for the regulatory obligations mentioned in (ii) above

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<sup>24</sup> 31 CFR § 1010.605(e)(1).

<sup>25</sup> 31 CFR § 1010.620(b)(1).

<sup>26</sup> These foreign financial institutions include foreign banks that operate under an offshore banking license; operate under a banking license issued by a country named as non-cooperative by an international body (such as the Financial Action Task Force (FATF)) of which the United States is a member; or operate under a banking license issued by country designated by the Treasury Secretary as warranting special measures. See 31 CFR § 1010.610(c).

<sup>27</sup> 31 CFR § 1010.610(b)(1)(iii)(A).

promulgated under Section 312 of the USA PATRIOT Act, and covered financial institutions should follow the same procedures for obtaining such beneficial ownership information as they would for those obligations. Collecting such information may require personal contact with the correspondent. Where the covered financial institution is unable to identify the beneficial owner of funds associated with a Credex-related transaction, it should consider the transaction to be one of primary money laundering concern and determine, based on identified risks, whether or not it should process the transaction.

(d) Description of the transaction or attempted transaction and its purpose

Section 1010.658(b)(1)(iii) of the proposed rule imposing the first special measure would require covered financial institutions to report a description of the transaction or attempted transaction and its purpose. The description would include additional details of the transaction, including amounts, and in particular, a general description of any underlying reason for the transaction or obligation which the financial transaction supports, such as the purchase of specific goods or services, initiation or repayment of a loan or other debt, settlement of a trade, transaction in foreign exchange, or other type of financial obligation, or other relevant information the covered financial institution may have available. To the extent a covered financial institution finds that it does not have sufficient information to enable it to report a description of the transaction and its purpose, it would be reasonable for the covered financial institution to inquire further (for example, with any applicable customer, respondent bank, or correspondent bank) to obtain additional information. In so doing, a covered financial institution should consider analogizing to procedures it would follow in fulfilling its obligation to determine

whether a transaction should be reported as suspicious. Specifically, it should consider “examining the available facts, including the background and possible purpose of the transaction” in order to determine whether it is consistent with the type of transaction in which a particular customer would normally be expected to engage.<sup>28</sup>

## 2. 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. By ensuring that FinCEN receives information shortly after a transaction is executed, 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. FinCEN requests comment on whether ten days is sufficient time for covered financial institutions to obtain the required information or whether some other period of time, still less than that allowed for the filing of suspicious activity reports, is more appropriate.

A covered financial institution would additionally be required to take reasonable steps to identify any reportable transaction or attempted transaction, direct or indirect, related to Credex, to the extent that such use can be determined from transactional records maintained by the covered financial institution in the normal course of business. For example, 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

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<sup>28</sup> See, e.g., 31 CFR § 1020.320(a)(2)(iii).

Credex as the originator's or beneficiary's financial institution, or otherwise referenced Credex in a manner detectable under the financial institution's normal screening processes. An appropriate screening mechanism could be the mechanism used by a covered financial institution to comply with various legal requirements, such as the commercially available software programs used to comply with the economic sanctions programs administered by OFAC. Willful failure to provide timely, accurate, and complete information in such reporting may constitute a violation of these requirements subject to civil and criminal penalties under 31 U.S.C. 5321 and 5322.

FinCEN specifically solicits comments on the requirement under the proposed rule that covered financial institutions take reasonable steps to screen their transactions in order to identify any transaction or attempted transaction related to Credex.

C. 1010.658(c) – Requirements for Covered Financial Institutions with regard to the Fifth Special Measure

The proposed imposition of the fifth special measure would prohibit covered financial institutions from establishing, maintaining, or managing in the United States any correspondent account for, or on behalf of, Credex. As a corollary to this prohibition, covered financial institutions would be required to apply special due diligence to their correspondent accounts to guard against their indirect use by Credex. At a minimum, that special due diligence must include two elements. First, a covered financial institution must 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. Second, a covered financial institution must take reasonable steps to identify any indirect use of its correspondent accounts by

Credex, to the extent that such indirect use can be determined from transactional records maintained by the covered financial institution in the normal course of business. A covered financial institution should take a risk-based approach when deciding what, if any, additional due diligence measures it should adopt to guard against the indirect use of its correspondent accounts by Credex, based on risk factors such as the type of services it offers and geographic locations of its correspondents.

1. Prohibition on Direct Use of Correspondent Accounts

Section 1010.658(c)(1) of the proposed rule imposing the fifth special measure prohibits all covered financial institutions from establishing, maintaining, administering, or managing a correspondent account in the United States for, or on behalf of, Credex. The prohibition would require all covered financial institutions to review their account records to ensure that they maintain no accounts directly for, or on behalf of, Credex.

2. Special Due Diligence of Correspondent Accounts to Prohibit Indirect Use

As a corollary to the prohibition on maintaining correspondent accounts directly for Credex, section 1010.658(c)(2) of the proposed rule imposing the fifth special measure requires a covered financial institution to apply special due diligence to its correspondent accounts<sup>29</sup> that is reasonably designed to guard against their indirect use by Credex. At a minimum, that special due diligence must include notifying 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.

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<sup>29</sup> Again, for purposes of the proposed rule, a correspondent account is defined as an account established to receive deposits from, or make payments or other disbursements on behalf of, a foreign bank, or handle other financial transactions related to the foreign bank.

A covered financial institution would, for example, have knowledge that the correspondents provide access to Credex through transaction screening software. A covered financial institution may satisfy this requirement by transmitting the following notice to its correspondent account holders that it knows or has reason to know provide services to Credex:

Notice: Pursuant to U.S. regulations issued under section 311 of the USA PATRIOT Act, 31 CFR 1010.658, we are prohibited from establishing, maintaining, administering or managing a correspondent account for, or on behalf of, JSC CredexBank or any of its subsidiaries. The regulations also require us to notify you that you may not provide JSC CredexBank or any of its subsidiaries with access to the correspondent account you hold at our financial institution. If we become aware that JSC CredexBank or any of its subsidiaries is indirectly using the correspondent account you hold at our financial institution for transactions, we will be required to take appropriate steps to prevent such access, including terminating your account.

The purpose of the notice requirement is to help ensure cooperation from correspondent account holders in denying Credex access to the U.S. financial system. However, FinCEN does not require or expect a covered financial institution to obtain a certification from any of its correspondent account holders that indirect access will not be provided in order to comply with this notice requirement. Instead, methods of compliance with the notice requirement could include, for example, transmitting a one-time notice by mail, fax, or e-mail to certain of the covered financial institution's correspondent account customers, informing them that they may not provide Credex with access to the covered financial institution's correspondent account, or including such information in the next regularly occurring transmittal from the covered financial institution to those correspondent account holders. FinCEN specifically solicits comments on the form and scope of the notice that would be required under the rule.

A covered financial institution also would be required to take reasonable steps to identify any indirect use of its correspondent accounts by Credex, to the extent that such indirect use can be determined from transactional records maintained by the covered financial institution in the normal course of business. For example, 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 Credex as the financial institution of the originator or beneficiary, or otherwise referenced Credex in a manner detectable under the financial institution's normal screening processes. An appropriate screening mechanism could be the mechanism used by a covered financial institution to comply with various legal requirements, such as the commercially available software programs used to comply with the economic sanctions programs administered by OFAC. FinCEN specifically solicits comments on the requirement under the proposed rule that covered financial institutions take reasonable steps to screen their correspondent accounts in order to identify any indirect use of such accounts by Credex.

Notifying certain correspondent account holders and taking reasonable steps to identify any indirect use of its correspondent accounts by Credex in the manner discussed above are the minimum due diligence requirements under the proposed rule imposing the fifth special measure. Beyond these minimum steps, a covered financial institution should adopt a risk-based approach for determining what, if any, additional due diligence measures it should implement to guard against the indirect use of its correspondent accounts by Credex, based on risk factors such as the type of services it offers and the geographic locations of its correspondent account holders.

Under the proposed rule imposing the fifth special measure, a covered financial institution that obtains knowledge that a correspondent account is being used by a foreign bank to provide indirect access to Credex must take all appropriate steps to prevent such indirect access, including the notification of its correspondent account holder per section 1010.658(c)(2)(i)(A) and, where necessary, terminating the correspondent account. A covered financial institution may afford the foreign bank a reasonable opportunity to take corrective action prior to terminating the correspondent account. Should the foreign bank refuse to comply, or if the covered financial institution cannot obtain adequate assurances that the account will no longer be available to Credex, the covered financial institution must terminate the account within a commercially reasonable time. This means that the covered financial institution should not permit the foreign bank to establish any new positions or execute any transactions through the account, other than those necessary to close the account. A covered financial institution may reestablish an account closed under the proposed rule if it determines that the account will not be used to provide banking services indirectly to Credex. FinCEN specifically solicits comments on the requirement under the proposed rule that covered financial institutions prevent indirect access to Credex, once such indirect access is identified.

### 3. Reporting Not Required

Section 1010.658(c)(3) of the proposed rule imposing the fifth special measure clarifies that the rule does not impose any reporting requirement upon any covered financial institution that is not otherwise required by applicable law or regulation. A covered financial institution must, however, document its compliance with the requirement that it notify those correspondent account holders that the covered financial

institution knows or has reason to know provide services to Credex, such correspondents may not provide Credex with access to the correspondent account maintained at the covered financial institution.

### **III. Request for Comments**

FinCEN invites comments on all aspects of the proposals to impose the first and fifth special measures against Credex and specifically invites comments on the following matters:

1. The impact of the proposed special measures upon legitimate transactions with Credex involving, in particular, U.S. persons and entities; foreign persons, entities, and governments; and multilateral organizations doing legitimate business with persons or entities operating in Belarus.

#### *First Special Measure*

2. The form and scope of the reports to FinCEN required under the proposed rule to impose the first special measure;
3. The appropriate time within which a covered institution would be required to report to FinCEN;
4. The appropriate scope of the proposed requirement for a covered financial institution to take reasonable steps to identify any reportable transactions by Credex;
5. The appropriate steps a covered financial institution should take once it identifies a transaction related to Credex; and
6. Whether a definition of “attempted transaction” needs to be included and what that definition should be.

#### *Fifth Special Measure*

7. The form and scope of the notice to certain correspondent account holders that would be required under the rule;

8. The appropriate scope of the proposed requirement for a covered financial institution to take reasonable steps to identify any indirect use of its correspondent accounts by Credex; and

9. The appropriate steps a covered financial institution should take once it identifies an indirect use of one of its correspondent accounts by Credex.

*Possible Future Implementation of First Special Measure by Order*

10. FinCEN has the authority, pursuant to 31 U.S.C. 5318A(b)(1), to impose the first special measure by order, without notice and comment, for up to 120 days prior to the implementation of a final rule imposing that special measure. FinCEN requests comment on the feasibility of so implementing the requirements of the first special measure by order prior to a final rule imposing the first special measure;

11. The feasibility of implementing an order imposing the first special measure in the absence of a prohibition on opening and maintaining correspondent accounts with the identified institution under the fifth special measure;

12. Whether the current definition of covered financial institutions would be appropriate if the first special measure were implemented by order; and

13. Whether there are any potential differences among the types of covered financial institutions that might make it more difficult for some to implement the order.

#### **IV. Regulatory Flexibility Act**

It is hereby certified that the proposed imposition of the first and fifth special measures would not have a significant economic impact on a substantial number of small entities.

On the basis of publicly available information, FinCEN understands that Credex currently maintains no correspondent accounts in the United States. Moreover, to the extent that a transaction related to Credex were to be processed through a U.S. financial institution, this would most likely involve the small subset of the largest financial institutions that actively engage in international transactions. Thus, the requirement to report transactions related to Credex under the first special measure would not have a significant impact on a substantial number of small entities. In addition, all U.S. persons, including U.S. financial institutions, currently must exercise some degree of due diligence in order to comply with various legal requirements. The tools used for such purposes, including commercially available software used to comply with the economic sanctions programs administered by OFAC and existing suspicious activity reporting programs, can easily be modified to monitor for and report transactions related to Credex. Thus, any increase in the reporting burden that would be required by the imposition of the first special measure – *i.e.*, reporting of all transactions related to Credex on a timelier basis – would not impose a significant additional economic burden upon small U.S. financial institutions.

As noted above, FinCEN understands that Credex currently maintains no correspondent accounts in the United States. Thus, the prohibition on maintaining such accounts under the fifth special measure would not have a significant impact on a

substantial number of small entities. In addition, all U.S. persons, including U.S. financial institutions, currently must exercise some degree of due diligence in order to comply with various legal requirements. The tools used for such purposes, including commercially available software used to comply with the economic sanctions programs administered by OFAC, can easily be modified to monitor for the use of correspondent accounts by Credex. Thus, the special due diligence that would be required by the imposition of the fifth special measure – *i.e.*, the one-time transmittal of notice to certain correspondent account holders and the screening of transactions to identify any indirect use of correspondent accounts – would not impose a significant additional economic burden upon small U.S. financial institutions.

FinCEN invites comments from members of the public who believe there will be a significant economic impact on small entities from the imposition of the first and fifth special measures on Credex.

#### **V. Paperwork Reduction Act**

The collection of information contained in this proposed rule is being submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, D.C. 20503 (or by e-mail to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov) with a copy to FinCEN by mail or e-mail at the addresses previously specified. Comments should be submitted by one method only. Comments on the collection of information should be received by [INSERT DATE THAT IS 60 DAYS AFTER DATE OF

PUBLICATION IN THE FEDERAL REGISTER]. In accordance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), and its implementing regulations, 5 CFR 1320, the following information concerning the collection of information as required by 31 CFR 1010.658 is presented to assist those persons wishing to comment on the information collection.

31 CFR 1010.658 is proposed imposing the first and fifth special measures under 31 U.S.C. 5318A. The Paperwork reduction act analysis for both follows.

The provisions in this proposed rule pertaining to the collection of information can be found in sections 1010.658(b)(1), 1010.658(c)(2)(i), and 1010.658(c)(3)(i). The information required to be reported by section 1010.658(b)(1) will be used by the U.S. Government to monitor the activities of the institution of primary money laundering concern. The notification requirement in section 1010.658(c)(2)(i) is intended to ensure cooperation from correspondent account holders in denying Credex access to the U.S. financial system. The information required to be maintained by section 1010.658(c)(3)(i) will be used by federal agencies and certain self-regulatory organizations to verify compliance by covered financial institutions with the provisions of 31 CFR 1010.658. The class of financial institutions affected by the notification requirement is identical to the class of financial institutions affected by the recordkeeping requirement. The collection of information is mandatory.

Description of Affected Financial Institutions: Banks, broker-dealers in securities, futures commission merchants and introducing brokers-commodities, and mutual funds.

Estimated Number of Affected Financial Institutions: 5,000.

Estimated Average Annual Burden Hours Per Affected Financial Institutions: The estimated average burden associated with the collection of information in this proposed rule is one hour per affected financial institution.

Estimated Total Annual Burden: 5,000 hours.

FinCEN specifically invites comments on: (a) whether the proposed collection of information is necessary for the proper performance of the mission of FinCEN, including whether the information shall have practical utility; (b) the accuracy of FinCEN's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information required to be maintained; (d) ways to minimize the burden of the required collection of information, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to report the information.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a valid OMB control number.

## **VI. Executive Order 12866**

Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It has been determined that the final rule is not a "significant regulatory action" for purposes of Executive Order 12866.

## **List of Subjects in 31 CFR Chapter X**

Administrative practice and procedure, banks and banking, brokers, counter-money laundering, counter-terrorism, foreign banking.

### **Authority and Issuance**

For the reasons set forth in the preamble, Chapter X of title 31 of the Code of Federal Regulations is proposed to be amended as follows:

## **CHAPTER X – FINANCIAL CRIMES ENFORCEMENT NETWORK, DEPARTMENT OF THE TREASURY**

1. The authority citation for Chapter X continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951-1959; 31 U.S.C. 5311-5314, 5316-5332 Title III, secs. 311, 312, 313, 314, 319, 326, 352, Pub. L. 107-56, 115 Stat. 307.

2. Subpart F of Part Chapter X is proposed to be amended by adding new § 1010.658, as follows:

A. Under the undesignated center heading “SPECIAL DUE DILIGENCE FOR CORRESPONDENT ACCOUNTS AND PRIVATE BANKING ACCOUNTS” to read as follows:

### **§ 1010.658 Special measures against the JSC CredexBank**

- (a) Definitions. For purposes of this section:

- (1) JSC CredexBank means all branches, offices, and subsidiaries of JSC CredexBank operating in any jurisdiction.

- (2) Correspondent account has the same meaning as provided in § 1010.605(c)(1)(ii).

(3) Covered financial institution has the same meaning as provided in §1010.605(e)(1).

(4) Beneficial Owner means 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.

(5) Subsidiary means a company of which more than 50 percent of the voting stock or analogous equity interest is owned by another company.

(b) Reporting requirements for covered financial institutions (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 JSC CredexBank:

(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 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;

(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) When to file. 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.

(c) Prohibition on accounts and due diligence requirements for covered financial institutions

(1) Prohibition on direct use of correspondent accounts. A covered financial institution shall terminate any correspondent account that is established, maintained, administered, or managed in the United States for, or on behalf of, JSC CredexBank.

(2) Special due diligence of correspondent accounts to prohibit indirect use. (i) A covered financial institution shall apply special due diligence to its correspondent accounts that is reasonably designed to guard against their indirect use by JSC CredexBank. At a minimum, that special due diligence must include:

(A) Notifying those correspondent account holders that the covered financial institution knows or has reason to know provide services to JSC CredexBank, that such correspondents may not provide JSC CredexBank with access to the correspondent account maintained at the covered financial institution; and

(B) Taking reasonable steps to identify any indirect use of its correspondent accounts by JSC CredexBank, to the extent that such indirect use can be determined from transactional records maintained in the covered financial institution's normal course of business.

(ii) A covered financial institution shall take a risk-based approach when deciding what, if any, other due diligence measures it should adopt to guard against the indirect use of its correspondent accounts by JSC CredexBank.

(iii) A covered financial institution that obtains knowledge that a correspondent account is being used by the foreign bank to provide indirect access to JSC CredexBank, shall take all appropriate steps to prevent such indirect access, including the notification of its correspondent account holder under paragraph (b)(2)(i)(A) and, where necessary, terminating the correspondent account.

(3) Recordkeeping and reporting. (i) A covered financial institution is required to document its compliance with the notice requirement set forth in paragraph (b)(2)(i)(A) of this section.

(ii) Nothing in this subsection (c) shall require a covered financial institution to report any information not otherwise required to be reported by law or regulation.

Dated: \_\_May 22, 2012\_\_\_\_\_

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Peter S. Alvarado  
Deputy Director  
Financial Crimes Enforcement Network

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