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November 1, 2004

Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183-0039

Re: Notice of Proposed Rulemaking RIN 1506-AA67

To The Financial Crimes Enforcement Network:

We are counsel for Closed Joint Stock Commercial Bank "Infobank" ("Infobank"). Infobank hereby submits the following comments, which include this letter, the declaration of Infobank's General Manager and exhibits, in response to the Notice of Proposed Rulemaking ("Notice") issued by the Financial Crimes Enforcement Network ("FinCEN")[1], dated August 18, 2004.

Infobank proposes below several steps that seek to resolve FinCEN's concerns without the need for the imposition of the proposed special measure. Moreover, Infobank would welcome, and hereby repeats its request for, a dialogue with FinCEN that would enable FinCEN and Infobank to discuss their respective concerns.

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[1] The term "FinCEN" is used herein to refer, as appropriate, to both FinCEN and to the Secretary of the Treasury.

I. Preliminary Statement

FinCEN has found that Infobank is a financial institution of "primary money laundering concern." That finding, however, is predicated on factual assertions that are demonstrably wrong. Chief among them is the assertion that Infobank engaged, through its "subsidiary," Limited Liability Company "Belmetallenergo" ("Belmetallenergo"), in money laundering and illegal transactions with the former Iraqi government. Belmetallenergo, however, is not a subsidiary of Infobank. To the contrary, as the financial statements of Infobank, certified by Deloitte & Touche (Exhibit A hereto), make clear, Infobank owns only 10% of the stock of Belmetallenergo -- an amount that is insufficient as a matter of law to make Belmetallenergo a subsidiary or to permit Infobank to act through Belmetallenergo.[2]

Similarly, the Notice states that Infobank "had operated two additional branches in Russia until 2001 when they were closed by the Central Bank of Russia." 69 Fed. Reg. 51974, col. 1. The Notice further states that "activity indicative of money laundering has been reported transiting the Moscow branch's correspondent accounts in the U.S." Id. at 51974 n.4. In fact, there evidently was an entity in Russia called Infobank, but it had

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[2] FinCEN itself defines "subsidiary" as "a company of which more than 50 percent of the voting stock or analogous equity interest is owned by another company." See proposed rule § 103.190(a)(4).

nothing to do with the Belarus entity of the same name that is the subject of this proceeding. Infobank never had branches in Russia, and none of its branches has been closed by the Central Bank of Russia or by any other authority.

Additionally, the Notice states that "the government of Belarus is a principal shareholder of the bank's capital." 69 Fed. Reg. 51974, col. 2. In fact, as shown by the financial statements certified by Deloitte & Touche, the government of Belarus is not a shareholder of Infobank.

Factual misstatements such as these pervade the Notice. And there is at least one good reason why FinCEN's "finding" is based on such factual errors: The "finding" was made without any notice to Infobank and with no opportunity for Infobank to be heard. FinCEN has denied Infobank these irreducible minima required by the Due Process Clause, and hence, FinCEN's "finding" cannot stand.

Infobank is at a severe disadvantage in attempting to respond to the factual assertions contained in the Notice because, as discussed more fully below, the rulemaking procedure employed here prevents Infobank from obtaining access to the witnesses and documents upon which FinCEN relies. This, too, deprives Infobank of due process.

Even if the finding that Infobank is of "primary money laundering concern" were supportable, the special measure sought to be imposed is unnecessary and would have a severe impact not only on Infobank but upon its customers and employees and the developing economy of Belarus. As demonstrated below, less severe measures, including those suggested below, should be adopted.

II. The Applicable Statute And This Rulemaking Procedure Are Unconstitutional

The applicable statute, 31 U.S.C. § 5318A, and this rulemaking procedure would deprive Infobank of property without due process of law. See U.S. Const., Amend. V.

A. The Applicable Statute And The Rulemaking Procedure Deny Procedural Due Process

The Notice does not set forth the basis for its assertions of fact; it does not identify the persons, if any, who provided FinCEN with the information that is said to support these assertions; it does not identify the documents, if any, upon which FinCEN relied. Infobank has no opportunity to cross-examine witnesses; indeed, it cannot even learn who the witnesses may be. These failures violate Infobank's right to due process. See Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 205 (D.C. Cir. 2001).[3]

Additionally, the Notice states that all material submitted by Infobank will become part of the public record. Infobank possesses many documents that cannot be made public -- as does every other bank. Infobank also possesses certain other information and documents that are relevant to the proposed rulemaking, the disclosure

[3] Infobank, a foreign entity, is protected under the Due Process Clause because it has property (one or more correspondent bank accounts) in this country. See, e.g., Nat'l Council of Resistance of Iran, 251 F.3d at 201; 32 County Sovereignty Comm. v. Dep't of State, 292 F.3d 797, 799 (D.C. Cir. 2002).

of which would be damaging to Infobank's business. Infobank should be permitted to submit certain information on a confidential basis. See Cable & Wireless P.L.C. v. Fed'l Communications Comm'n, 166 F.3d 1224, 1233-34 (D.C. Cir. 1999). A procedure that does not accommodate the legal and commercial need for confidentiality does not permit Infobank to respond fully to the allegations against it and denies Infobank a meaningful opportunity to be heard, as required by due process.

These procedural deficiencies arise in part because the rulemaking process is not suited for the determination at issue here. The facts underlying the question whether Infobank is a financial institution of "primary money laundering concern" are not the type of "legislative" facts that may appropriately be found in the context of a rulemaking. Rather, they are, by any definition, "adjudicative" facts that may be found only in the context of an adjudication.

This proceeding is – in substance, if not in form -- an adjudication. It is predicated on allegations of historical fact -- which Infobank disputes -- and it proposes to direct a remedy at one entity. Indeed, the Notice admits, "This rulemaking targets Infobank specifically; it does not target a class of financial transactions (such as wire transfers) or a particular jurisdiction or jurisdictions." 69 Fed. Reg. 51976, col. 1. See United States v. Florida East Coast Railway Co., 410 U.S. 224, 245 (1973) ("[There is a] recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.").

In an adjudication, Infobank would be afforded procedural due process rights and safeguards. Infobank's rights cannot be diminished merely because this proceeding is styled as a rulemaking. Infobank requests, as it did in its letter dated October 19, 2004:

1. To be apprised of the evidence against it. (Because of potential confidentiality concerns, Infobank further requests that its counsel be permitted to review any such evidence prior to its being made public so that those concerns can be addressed.)

2. The opportunity to rebut that evidence, including by cross-examination of any witnesses.

3. The opportunity to present evidence, testimonial and/or documentary.

4. The opportunity to submit sensitive and confidential information without having it made public.[4]

Such procedural safeguards are closely analogous to those specifically provided by statute applicable to adjudications. Thus, 5 U.S.C. § 556(d) provides, "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal

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[4] Infobank's letter, along with subsequent letters dated October 21, 2004 and October 22, 2004, from, respectively, FinCEN and Infobank, are annexed as Exhibit B hereto.

evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

The applicable statute apparently requires FinCEN to act by "regulation." See 31 U.S.C. § 5318A(a)(2)(C). That, however, does not warrant the denial of the procedural rights that Infobank would have in an adjudication. See The Bell Tel. Co. of Pennsylvania v. Fed'l Communications Comm'n, 503 F.2d 1250, 1268 (3d Cir. 1974) ("Regardless of the label and the procedure utilized, the ultimate standard against which we must evaluate the fairness of the proceedings is due process of law.") (internal quotations omitted). As a matter of administrative and constitutional law, Infobank should be allowed to enjoy the procedural safeguards applicable in adjudications, see 5 U.S.C. § 556, and those required by the Due Process Clause and requested in Infobank's October 19, 2004 letter to FinCEN. Absent such safeguards, the statute and the rulemaking procedure are unconstitutional as applied in this matter.

In the alternative, if Infobank cannot exercise the procedural rights available and required in an adjudication, then any rule promulgated by FinCEN would be a bill of attainder in violation of U.S. Const., art. I, § 9, cl.3. The bill of attainder clause should apply to an administrative rule adopted pursuant to authority delegated by Congress. Dehainaut v. Pena, 32 F.3d 1066, 1070-71 (7th Cir. 1994). The rule proposed by FinCEN would constitute a bill of attainder because that rule would apply specifically and only to Infobank and would impose punishment on Infobank without judicial trial or proceedings. Foretich v. United States, 351 F.3d 1198, 1217 (D.C. Cir. 2003).

B. The Statute Permits Action Based On A Standard Of Proof That Is Unconstitutionally Lenient

The statutory language permits FinCEN to take "special measures" when it finds that "reasonable grounds exist for concluding that . . . [a] financial institution[] . . . is of primary money laundering concern." 31 U.S.C. § 5318A(a)(1). This statute deprives Infobank of due process because it permits FinCEN to take action that will deprive Infobank of its property on the basis of nothing more than "reasonable grounds." Due process requires that FinCEN be held to a standard of proof at least as demanding as the "preponderance of the evidence" standard generally applicable in civil litigation.

When Congress prescribes the "degree of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an administrative proceeding," the judiciary will defer to that standard "absent countervailing constitutional constraints." Steadman v. Securities and Exchange Comm'n, 450 U.S. 91, 95 (1981). Thus, the judiciary will not uphold an administrative finding or rule pursuant to a standard of proof that fails to satisfy the requirements of the Due Process Clause. Santosky v. Kramer, 455 U.S. 745, 754-55 (1982). The standard of proof required in any particular case is determined under the three-factor test identified in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). See Santosky, 455 U.S. at 754. In no case, however, is a standard less than a "preponderance of the evidence" permissible. Id. at 755 ("[T]he minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how

the risk of error should be distributed between the litigants. . . . [A]pplication of a 'fair preponderance of the evidence' standard indicates [the] society's minimal concern with the outcome[.]") (internal quotations omitted); Charlton v. Fed'l Trade Comm'n, 543 F.2d 903, 907-08 (D.C.Cir. 1976) ("[I]n American law a preponderance of the evidence is rock bottom at the factfinding level of civil litigation. Nowhere in our jurisprudence have we discerned acceptance of a standard of proof tolerating something less than the weight of the evidence. . . . That the proceeding is administrative rather than judicial does not diminish this wholesome demand[.]") (internal quotations omitted) (vacating a Federal Trade Commission finding based on "substantial evidence," interpreted as "evidence [that] a reasonable mind might accept as adequate to support a conclusion"); Valmonte v. Bane, 18 F.3d 992 (2d Cir. 1994) (holding an administrative decision to list petitioner's name in a Central Register of Child Abuse and Mistreatment violated the Due Process Clause because it was based on "some credible evidence," not a preponderance of the evidence); Doyle v. Camelot Care Centers, Inc., 305 F.3d 603 (7th Cir. 2002) (same); Young v. Apfel, 198 F.3d 260 (10th Cir. 1999) (remanding a Commissioner of Social Security finding based on "substantial evidence" for reconsideration under the "preponderance of the evidence" standard).

C. The Statute Is Unconstitutionally Vague

The language "primary money laundering concern" -- which is undefined in the statute -- is impermissibly vague. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of

Rockford, 408 U.S. 104, 108 (1972). A law that either fails to provide fair warning as to what conduct is proscribed, or fails adequately to constrain arbitrary enforcement, is invalid. Id. at 108-09 ("Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . [Second,] laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

The words "primary money laundering concern" are inherently subjective. The statute provides no guidance as to what connection to money laundering constitutes a "concern," or when that concern is "primary." Thus, Infobank had inadequate warning as to what actions or omissions would render it subject to special measures, and FinCEN is left unlimited discretion in determining when and how to apply special measures.

III. The Statute Has Not Been Satisfied

A. The Statute May Not Be Applied Retroactively

The applicable statute, 31 U.S.C. § 5318A, became effective on October 26, 2001. It does not apply to conduct that occurred before that date. See Immigration and Naturalization Serv. v. St. Cyr, 533 U.S. 289, 316 (2001) ("A statute may not be applied retroactively, however, absent a clear indication from Congress that it intended such a result.") The Notice states merely that Infobank engaged in certain conduct "in 2001."

To the extent that FinCEN relies upon conduct that allegedly occurred prior to the effective date of 31 U.S.C. § 5318A, such reliance is improper because the statute may not be applied retroactively. As noted above, Infobank has not been provided with notice of the evidence against it, and is therefore unable to determine whether and to what extent FinCEN does so rely.

The Notice does not distinguish between pre- and post-effective date conduct. Any rulemaking that relies on pre-effective date conduct is not "in accordance with the law" and would be "unlawful" under the Administrative Procedure Act. See 5 U.S.C. § 706(2)(A). Therefore, FinCEN cannot proceed on this Notice, which does not identify which conduct occurred after the effective date of 31 U.S.C. § 5318A. At the very least, FinCEN cannot rely on post-effective date conduct to promulgate the proposed rule.

B. The Consultation Requirements Of The Statute Have Not Been Satisfied

The Notice does not show that FinCEN has complied with the consultation requirements of 31 U.S.C. § 5318A. The Notice refers to "consultations with relevant agencies and departments" (69 Fed. Reg. 51974, col. 3) in connection with the "determin[ation] that Infobank is a financial institution of primary money laundering concern." The statute, however, required that FinCEN consult with the Secretary of State and the Attorney General before making that finding. 31 U.S.C. § 5318A(c)(1). The Notice gives no indication that these officials were consulted.

The Notice also refers to consultation with "staff of the Federal functional regulators, the Department of Justice, and the State Department" (69 Fed. Reg. 51975 n.

9) in connection with the proposed imposition of special measure. The statute, however, requires, at minimum, consultation with "the Chairman of the Board of Governors of the Federal Reserve System, . . . the Secretary of State, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the National Credit Union Administration Board" and (in the case of imposition of the special measure proposed here) the Attorney General. 31 U.S.C. §§ 5318A(a)(4)(A), (b)(5). The Notice does not show any consultation with officials other than staff of the Departments of State and Justice and unnamed other agencies. Consultation with staff does not satisfy the statutory requirements. See United States v. Giordano, 416 U.S. 505, 512-13 (1974).

IV. Discussion Of The Facts

A. Infobank -- Background

Infobank has operated in the Republic of Belarus since November 1994. It is registered by the National Bank of the Republic of Belarus as a closed joint stock company with foreign capital participation. Infobank's activities are regulated by the National Bank of the Republic of Belarus.

Infobank has six shareholders.[5] The Notice states, "The government of Belarus is a principal shareholder of the bank's capital." 69 Fed. Reg. 51974, col. 2. The Notice,

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[5] The shareholders and their percentages of ownership are:

(Cont'd on following page)

however, is wrong. The government of Belarus owns none of the bank's shares. (See Exhibit A, page 7.)

Infobank's management conforms to international standards for comparable banks. For example, Infobank is audited by the "Big 4" accounting firm Deloitte & Touche. Infobank's management includes representatives of the Libyan Arab Foreign Bank ("LAFB"), a bank that has $9 billion in assets and is one of Infobank's shareholders. LAFB has sent professionals to Infobank to assist in the operations and management of Infobank. LAFB has been recognized by The Banker (July 2004) as one of the "Top 1000 World Banks." In that report, LAFB was shown to have the highest profit on capital of any bank in the Middle East. LAFB also received The Banker's "Bank of the Year" award as best bank in Libya.

Infobank has 376 employees. It has branches in Minsk, Grodno, Vitebsk and Mogilev (all in Belarus).

Infobank engages in typical commercial banking activities. (See 2003 Annual Report, annexed as Exhibit C.) Its principal activity consists of extending commercial credit. This year, it has extended $30 million in short-term loans, and its credit portfolio

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(Cont'd from preceding page)

Libyan Arab Foreign Bank (Libya) (35.0%); UE Tekhnokhimtrade (Belarus) (33.1%); JV Saturn-Info Ltd. (Belarus) (11.3%); Technologie und Investitiosverwaltungs GmbH (Austria) (9.7%); JV CJSC Intersportproekt (Belarus) (6.6%); JV Delikates, Ltd. (Belarus) (4.3%).

is its largest single asset. The great majority of its loans (approximately 78%) are made to productive enterprises (e.g., industrial; trade; and construction companies). Another 17% are made to service providers, such as medical services. The remaining 5% are made to individuals.

Other activities include issuance and payment of bills of exchange and depositary certificates, credit cards, precious metals transactions and accounts, foreign exchange, servicing export-import activities and maintaining individual accounts. Infobank has participated in a number of international payment and settlement systems, including SWIFT, Europay (MasterCard/Eurocard), Western Union and American Express travelers checks.

Infobank has about 40,000 customers, of which about 39,000 are individuals. Its largest commercial customers include JV Belcel Ltd. (telecommunications), OJSC Grodno Khimvolokno (chemicals), OJSC Makrodor (asphalt), URE Mogilev Automobile Plant Named After Kirov (road machines), OJSC Belkard (cardan shafts) and RUE Grodno Auto Unit Plant (shock absorbers and brake chambers).

B. No Connection to Russian Bank

Infobank's operations are limited to Belarus. It has no operations in Russia and never has. It is not regulated by the Central Bank of Russia. It had nothing to do with the Russian bank of the same name. That Russian bank evidently was closed in 2001. Infobank has located, on the public record, the identity of the Russian bank's shareholders (those holding more than 5% of the bank's stock) and of its board of directors as of 2001.

(Exhibit D hereto.) As the attached chart (Exhibit E demonstrates), there was no overlap between those shareholders and board members and the shareholders and board members of Infobank.

C. Infobank's Efforts To Prevent Money Laundering

Infobank has detailed internal procedures for detecting and preventing money laundering (English translation annexed as Exhibit F). In brief, these procedures require Infobank to identify and obtain information concerning prospective customers; to verify such information; and to identify, analyze and (if necessary) report suspicious transactions. Infobank has a security department consisting of 10 professionals who implement the procedures. These procedures are routinely followed with respect to all customers.

In addition, Infobank complies with all Belarus legal requirements. Thus, Infobank regularly sends information to the State Control Committee of the Republic of Belarus concerning suspected improprieties. Additionally, it reports to the Financial Monitoring Service, a department of the State Control Committee, all transactions of over US $10,000.

The National Bank of Belarus has audited Infobank's compliance with the laws concerning money laundering. Attached as Exhibit G is a report (with English translation) that concludes that Infobank (a) has not acted in violation of law and (b) has adequate internal controls.

D. Infobank Stock Holdings

The law of Belarus provides that a bank like Infobank may own the stock of another company but limits a bank's ownership to 10% unless approval is received from the National Bank. (See letter of Borovtsov & Salei, dated October 20, 2004, Exhibit H hereto.) Consistent with Belarus law, Infobank owns stock in the following companies (as certified by Deloitte & Touche), but not more than 10% of the outstanding stock (except in one instance noted below, as to which National Bank approval was requested and obtained):

-- Belmetallenergo -- 10% of outstanding stock. [See discussion below]

-- JV Bel-Cel Ltd. (a telecommunications operator) -- 17% of outstanding stock

-- System Business Management (a business consultant) -- 10% of outstanding stock

-- JV BME-export (construction) -- 10% of outstanding stock

-- JV MAZ-MAN (a truck manufacturer) -- 6.7% of outstanding stock

In May 2004, however, well before FinCEN published the Notice, Infobank made a strategic decision to divest all of its non-bank holdings, so that it may concentrate on its core banking business. It has taken the first steps to do so. (See Exhibit I, excerpt from minutes of May 10, 2004 meeting of Infobank's shareholders, agreeing to divest shareholdings in Belmetallenergo.)

E. Belmetallenergo

FinCEN based its "finding" against Infobank on misconduct by Belmetallenergo, which, according to FinCEN, is Infobank's "subsidiary" and which, according to FinCEN, Infobank "control[s] and direct[s]." 69 Fed. Reg. 51976, col. 2.; see id. 51974, col. 2; 51975, col. 1. As noted above, that premise is simply wrong. Belmetallenergo is not Infobank's subsidiary. As certified by Infobank's auditors, Deloitte & Touche, Infobank owns only 10% of the stock of Belmetallenergo. As a matter of law, that percentage is too small to establish a parent-subsidiary relationship.

Nor does Infobank control or direct Belmetallenergo in any other way. Infobank and Belmetallenergo have separate management. Belmetallenergo (which does not have a Board of Directors) is managed by its Director, Mr. Zhavrid. Mr. Zhavrid is not an employee, officer or director of Infobank.

In short, there is no factual basis for attributing Belmetallenergo's conduct to Infobank. And, shorn of the allegations about Belmetallenergo's conduct, the Notice provides no basis for action against Infobank. If FinCEN has some other, secret evidence showing that Infobank controls and directs Belmetallenergo, notwithstanding Infobank's 10% ownership and Belmetallenergo's separate management, FinCEN should disclose that evidence (as requested above) so that Infobank can address it. Indeed, FinCEN would deny due process to Infobank if it promulgates the proposed rule or takes other adverse action against Infobank without further disclosure of allegations of wrongdoing by Infobank itself (as distinct from Belmetallenergo).

Belmetallenergo is a banking customer of Infobank. Infobank, however, has no knowledge of the activities attributed to Belmetallenergo in the Notice, and the Notice does not allege facts that support an inference of Infobank's knowledge. Infobank has complied with its internal procedures for avoidance of money laundering in its dealings with Belmetallenergo, and has not knowingly allowed money laundering by Belmetallenergo. In the absence of knowledge, a bank, whether in the United States or elsewhere, is not culpable because a customer uses the bank to facilitate the customer's improper dealings.

In any event, there is no probability of future misconduct involving Belmetallenergo and Infobank, for two reasons. First, as noted above, Infobank has determined to divest its non-banking holdings. It has entered into a contract to sell its holding in Belmetallenergo. Second, in view of FinCEN's belief in the impropriety of Belmetallenergo's conduct, Infobank is prepared to terminate its banking relationship with Belmetallenergo.

Infobank has not "specializ[ed] in financial transactions related to arms exports," as alleged by FinCEN. As a matter of administrative and constitutional law, FinCEN cannot rely on something allegedly "widely reported" without disclosing the source (as requested above). Infobank is a bank, not a trading firm or an import-export firm. Infobank has never engaged in the sale of military equipment and weapons.

F. Accounts at Infobank

The Notice states that Infobank "continues to maintain funds in accounts established for the Central Bank of Iraq." 69 Fed. Reg. 51974, col. 2. In view of the short comment period, Infobank respectfully requests the opportunity to supplement this comment. This particular allegation remains under investigation, and Infobank is checking related information.

Infobank does not have any customers that engage in arms sales. Under Belarus law, no company may deal in arms unless it has a license to engage in such sales. (See Exhibit H.) Four companies are known to hold such licenses. None of those four companies has an account at Infobank.

G. Impact of Proposed Special Measure

The pendency of this Notice has already had a severe adverse effect on Infobank and its customers. Imposition of the proposed special measure would have a very detrimental effect.

Infobank would like very much to inform FinCEN in detail concerning the manner in which Infobank has been adversely affected by the pendency of this proceeding. Much of the information that Infobank would disclose in this respect, however, is competitively sensitive. Disclosure of this information would itself further damage Infobank's business and assist Infobank's competitors. Accordingly, Infobank respectfully requests an opportunity to supplement these comments with a short confidential submission.

Infobank is able to state on the public record that it is likely that Infobank will have to close some of its branches, with a resultant loss of employment for the employees of those branches.

In addition to the effect of these actions on Infobank and its employees, Infobank's shareholders and customers have been and will be seriously and adversely affected. This in turn has an adverse impact on the economy of Belarus. For example, Infobank's largest shareholder, LAFB, has written a letter in support of Infobank's position. See Exhibit I. As a further example, the closing of credit lines may prevent Infobank's customers from obtaining the funds they need for trade operations and for the modernization of their facilities in Belarus, or may force them to obtain credit at higher rates.

V. The Finding That Infobank Is Of "Primary Money Laundering Concern" Is Erroneous

FinCEN has already found that Infobank is a financial institution of "primary money laundering concern." That finding, however, was made without notice to Infobank or an opportunity to be heard, and thus, in violation of Infobank's right to due process. See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.") (internal quotations omitted). The statute authorizing such an ex parte finding is unconstitutional under the Due Process Clause. FinCEN's finding cannot stand.

Under the rule of avoidance, the statute should be construed to avoid its unconstitutionality. See, e.g., Almendarez-Torres v. United States, 523 U.S. 224, 237-38 (1998) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."), quoting United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916). Thus, the statute, 31 U.S.C. § 5318A, should be construed to allow FinCEN to reopen and reexamine whether Infobank is a bank of primary money laundering concern. Infobank hereby specifically requests such a reopening and reexamination.

FinCEN's finding is based on erroneous information and is incorrect. In making this finding, FinCEN did not give appropriate weight to the statutory factors.

Section 5318A(c)(2)(B)(i) requires FinCEN to analyze "the extent to which such financial institutions . . . are used to facilitate or promote money laundering . . . ." The statute speaks in the present tense; it says "are used," not "have been" or "has been" used. There is no evidence that Infobank is being used by Belmetallenergo or any other customer to facilitate or promote money laundering. FinCEN's allegations are historical and relate only to a single customer. These are insufficient to warrant the drastic finding made by FinCEN. As noted above, there is no evidence that this matter involves anything other than a single customer laundering funds through a bank that did not have the requisite knowledge about its customer's activities. Further, as discussed below, Infobank will take steps to avoid any future money laundering through Infobank by any client.

Nor did FinCEN give appropriate weight to the factor set forth at 31 U.S.C. § 5318A(c)(2)(B)(ii): "the extent to which such institution[] . . . [is] used for legitimate business purposes in the jurisdiction." FinCEN acknowledged the likelihood that Infobank "engages in some legitimate activity" (69 Fed. Reg. 51975, col. 2) but concluded that "there is little information about its legitimate activities available to the public." These comments demonstrate that Infobank engages in a very substantial amount of legitimate business, which would be seriously jeopardized by the proposed rule, with damaging ripple effects on customers, employees and the economy of Belarus.

Finally, FinCEN did not give appropriate weight to the third factor, which requires FinCEN to consider the extent to which FinCEN's action is sufficient to insure that the purposes of the statute continue to be fulfilled and to guard against international money laundering and other financial crimes. 31 U.S.C. § 5318A(c)(2)(B)(ii). Infobank below proposes several measures which will be sufficient to ensure and guard against these matters. Infobank requests the opportunity to discuss these with FinCEN.

VI. <u>The Proposed Special Measure Should Not Be Imposed</u>

Even if the finding that Infobank is of "primary money laundering concern" were correct, the proposed special measure should not be imposed, for many reasons:

The proposed special measure is unnecessary. Infobank is seeking to grow, and to attract new investors. It has every incentive to continue to operate properly. Moreover, to the extent that FinCEN believes that the alleged misconduct of Belmetallenergo can be imputed to Infobank because of Infobank's stockholdings or

because of Belmetallenergo's accounts at Infobank, such imputation will no longer be possible because of Infobank's planned divestiture of its interest and planned closing of the accounts.

The proposed special measure will have a "significant adverse systemic impact ... on legitimate business activities involving the particular jurisdiction [Belarus], [and] institution [Infobank] . . . ." 31 U.S.C. § 5318A(a)(4)(B)(iii). It will have an undue effect on Infobank's business, which consists of legitimate activities. Even if the inaccurate statements of fact that underlie FinCEN's finding were to be credited, it cannot be disputed that Infobank provides many perfectly legitimate and routine banking services for its 40,000 customers. Its ability to continue to service those customers would be jeopardized by the imposition of the proposed special measure, and many customers would be disadvantaged by, for example, their inability to obtain credit from Infobank.

In the Notice, FinCEN contends that the statutory factor set out in 31 U.S.C. § 5318A(a)(4)(B)(i) -- whether similar action has been or is being taken by other nations or multilateral groups -- supports imposition of the proposed special measure, because other countries have not acted against Infobank (except, FinCEN contends, for Russia, which, as discussed above, has in fact acted not against this Infobank but against a different one). This factor, however, could be used to support FinCEN's conclusion regardless of the facts: If the entire world community had imposed sanctions upon a bank, FinCEN could contend that the unanimity of opinion demonstrates the correctness of its conclusion.

This factor can be relied upon regardless of the facts. Such a factor provides no guidance and must be disregarded.

In connection with imposition of special measures, FinCEN is also required to consider the effect of the proposed action on United States national security and foreign policy. 31 U.S.C. § 5318A(a)(4)(B)(iv). Here, the proposed special measure would have no effect. The alleged conduct that the special measure is designed to remedy took place in 2001. The allegations concern Infobank's relationship with only one customer -- and Infobank is prepared to terminate its relations with that customer.

Even accepting as true FinCEN's erroneous allegations, Infobank's continuing conduct poses no threat to United States national security. Nevertheless, Infobank has offered to strengthen its procedures to guard against for money laundering. (See below.) Such enhanced procedures will be sufficient to alleviate any concerns FinCEN may have.

VII. Proposed Alternative Measures

For the foregoing reasons, Infobank respectfully urges FinCEN to adopt measures short of a prohibition on the opening and maintaining of correspondent accounts, or to postpone this proposed rule pending further remedial action by Infobank. In addition to the proposal set forth above regarding the termination of Infobank's relationship with Belmetallenergo, Infobank proposes to work with FinCEN to enhance Infobank's money laundering safeguards. Specifically, Infobank proposes as follows:

1. A member of Infobank's security department will be designated as a compliance officer, responsible for enforcement of money laundering procedures and laws.

2. That compliance officer will promptly receive training in a program to be designated by FinCEN.

3. The rest of the security department personnel will also receive training, the details of which can be discussed.

4. Existing internal procedures will be enhanced pursuant to discussions with FinCEN. Such discussions shall include, as appropriate, ways to obtain additional customer information and to adopt and implement the other "best practices" regarding anti-money laundering.

5. Infobank's money laundering procedures will be audited periodically by a person or firm to be agreed upon with FinCEN.

Conclusion

For the foregoing reasons, the proposed rule should not be promulgated.

Very truly yours,

Kenneth A. Caruso

Financial Crimes Enforcement Network
Notice of Proposed Rulemaking RIN 1506-AA67

DECLARATION OF MR. ALEXANDER D. OSMOLOVSKY, GENERAL MANAGER OF CLOSED JOINT STOCK COMMERCIAL BANK 'INFOBANK', MINSK, REPUBLIC OF BELARUS

Mr. Alexander D. Osmolovsky states:

1. I am the General Manager of Closed Joint Stock Commercial Bank "Infobank" ("Infobank"). I submit this declaration in support of Infobank's Comment in response to the Notice of Proposed Rulemaking ("Notice") issued by the Financial Crimes Enforcement Network ("FinCEN"), dated August 18, 2004.

2. Infobank has operated in the Republic of Belarus since November 1994. It is registered by the National Bank of the Republic of Belarus as a closed joint stock company with foreign capital participation. Infobank's activities are regulated by the National Bank of the Republic of Belarus.

3. Infobank has six shareholders.[1] The government of Belarus owns none of the bank's shares. Infobank is seeking to grow, and to attract new investors.

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[1] The shareholders and their percentages of ownership are:

Libyan Arab Foreign Bank (Libya) (35.0%); UE Tekhnokhimtrade (Belarus) (33.1%); JV Saturn-Info Ltd. (Belarus) (11.3%); Technologie und Investitionsverwaltungs GmbH (Austria) (9.7%); JV CJSC Intersportprodkt (Belarus) (6.6%); JV Delikates, Ltd. (Belarus) (4.3%).

4. Infobank's management conforms to international standards for comparable banks. For example, Infobank is audited by the "Big 4" accounting firm Deloitte & Touche. (Exhibit A to the Comment is the financial statements of Infobank for the year ended December 31, 2003.) Infobank's management includes representatives of the Libyan Arab Foreign Bank ("LAFB"), a bank that has $9 billion in assets and is one of Infobank's shareholders. LAFB has sent professionals to Infobank to assist in the operations and management of Infobank. LAFB has been recognized by The Banker (July 2004) as one of the "Top 1000 World Banks." In that report, LAFB was shown to have the highest profit on capital of any bank in the Middle East. LAFB also received The Banker's "Bank of the Year" award as best bank in Libya.

5. Infobank has 376 employees. It has branches in Minsk, Grodno, Vitebsk and Mogilev (all in Belarus).

6. Infobank engages in typical commercial banking activities. (Exhibit C to the Comment is Infobank's 2003 annual report.) Its principal activity consists of extending commercial credit. This year, it has extended $30 million in short-term loans, and its credit portfolio is its largest single asset. The great majority of its loans (approximately 78%) are made to productive enterprises (e.g., industrial, trade, and construction companies). Another 17% are made to service providers, such as medical services. The remaining 5% are made to individuals.

7. Other activities include issuance and payment of bills of exchange and depositary certificates, credit cards, precious metals transactions and accounts, foreign

exchange, servicing export-import activities and maintaining individual accounts. Infobank has participated in a number of international payment and settlement systems, including SWIFT, Europay (MasterCard/Eurocard), Western Union and American Express travelers checks.

8. Infobank has about 40,000 customers, of which about 39,000 are individuals. Its largest commercial customers include JV Belcel Ltd. (telecommunications), OJSC Grodno Khimvolokno (chemicals), OJSC Makrodor (asphalt), URE Mogilev Automobile Plant Named After Kirov (road machines), OJSC Belkard (cardan shafts) and RUE Grodno Auto Unit Plant (shock absorbers and brake chambers).

9. Infobank's operations are limited to Belarus. It has no operations in Russia and never has. It is not regulated by the Central Bank of Russia. It had nothing to do with the Russian bank of the same name. Infobank never had branches in Russia, and none of its branches has been closed by the Central Bank of Russia or by any other authority. Exhibit E to the Comment accurately sets forth the identity of Infobank's shareholders and Board of Directors as of 2001, and the location of its branches in 2001.

10. Infobank has detailed internal procedures for detecting and preventing money laundering (English translation annexed as Exhibit F to the Comment). In brief, these procedures require Infobank to identify and obtain information concerning prospective customers; to verify such information; and to identify, analyze and (if necessary) report suspicious transactions. Infobank has a security department consisting

of ten professionals who implement the procedures. These procedures are routinely followed with respect to all customers.

11. In addition, Infobank complies with all Belarus legal requirements. Thus, Infobank regularly sends information to the State Control Committee of the Republic of Belarus concerning suspected improprieties. Additionally, it reports to the Financial Monitoring Service, a department of the State Control Committee, all transactions of over US $10,000.

12. The National Bank of Belarus has audited Infobank's compliance with the laws concerning money laundering. Attached as Exhibit G to the Comment is a report (with English translation) that concludes that Infobank (a) has not acted in violation of law and (b) has adequate internal controls.

13. The law of Belarus provides that a bank like Infobank may own the stock of another company but limits a bank's ownership to 10% unless approval is received from the National Bank. Consistent with Belarus law, Infobank owns stock in the following companies, but not more than 10% of the outstanding stock (except in one instance noted below, as to which National Bank approval was requested and obtained):

-- Belmetallenergo -- 10% of outstanding stock.

-- JV Bel-Cel Ltd. (a telecommunications operator) -- 17% of outstanding stock

-- System Business Management (a business consultant) -- 10% of outstanding stock

-- JV BME-export (construction) -- 10% of outstanding stock

-- JV MAZ-MAN (a truck manufacturer) -- 6.7% of outstanding stock

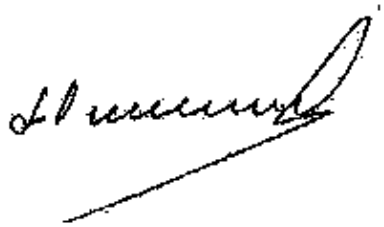
14. In May 2004, Infobank made a strategic decision to divest all of its non-bank holdings, so that it may concentrate on its core banking business. It has taken the first steps to do so. Infobank has entered into a contract to sell its holding in Belmetallenergo. (Exhibit I to the Comment is an excerpt from the minutes of the May 10, 2004 meeting of Infobank's shareholders, agreeing to divest shareholdings in Belmetallenergo.)

15. Belmetallenergo is not Infobank's subsidiary. Infobank owns only 10% of the stock of Belmetallenergo. Nor does Infobank control or direct Belmetallenergo in any other way. Infobank and Belmetallenergo have separate management. Belmetallenergo (which does not have a Board of Directors) is managed by its Director, Mr. Zhavrid. Mr. Zhavrid is not an employee, officer or director of Infobank.

16. Belmetallenergo is a banking customer of Infobank. Infobank, however, has no knowledge of the activities attributed to Belmetallenergo in the Notice. Infobank has complied with its internal procedures for avoidance of money laundering in its dealings with Belmetallenergo.

17. In view of FinCEN's belief in the impropriety of Belmetallenergo's conduct, Infobank is prepared to terminate its banking relationship with Belmetallenergo.

18. Infobank has not "specializ[ed] in financial transactions related to arms exports," as alleged by FinCEN. Infobank is a bank, not a trading firm or an import-



export firm. Infobank has never engaged in the sale of military equipment and weapons. Infobank has not knowingly allowed money laundering by Belmetallenergo in the past.

19. Infobank does not have any customers that engage in arms sales. Under Belarus law, no company may deal in arms unless it has a license to engage in such sales. Four companies are known to hold such licenses. None of those four companies has an account at Infobank.

20. The Notice states that Infobank "continues to maintain funds in accounts established for the Central Bank of Iraq." This particular allegation remains under investigation, and Infobank is checking related information.

21. If FinCEN adopts the proposed special measure, it is likely that Infobank will have to close some of its branches, with a resultant loss of employment for the employees of those branches.

22. In addition to the effect of these actions on Infobank and its employees, Infobank's shareholders and customers have been and will be seriously and adversely affected. This in turn has an adverse impact on the economy of Belarus. For example, Infobank's largest shareholder, LAFB, has written a letter in support of Infobank's position. See Exhibit I to the Comment. As a further example, the closing of credit lines may prevent Infobank's customers from obtaining the funds they need for trade operations and for the modernization of their facilities in Belarus, or may force them to obtain credit at higher rates.

23. Infobank possesses many documents that cannot be made public. Infobank also possesses certain other information and documents that are relevant to the proposed rulemaking, the disclosure of which would be damaging to Infobank's business.

I state under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 29, 2004

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F

EXHIBIT G

EXHIBIT H

EXHIBIT I

EXHIBIT J