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Adam J. Szubin, Esq.
Director
Office of Foreign Assets Control
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Dear Mr. Szubin:

The Clearing House Association L.L.C.¹ hereby respectfully requests that the Office of Foreign Assets Control (“OFAC”) issue a general license authorizing the operation the operation of Totten trusts and similar accounts in which a Cuban national is a beneficiary with rights only upon the death of the principal account holder. We also request that OFAC consider extending this general license to persons or entities that are blocked under other sanctions programs that it administers.

In a Totten trust, a person (“settlor”) opens an account at a financial institution with instructions to the institution that if the account holder dies and there is a balance in the account, the balance is payable to one or more named beneficiaries. Beneficiary designations are usually indicated by such phrases as “in trust for [name]” or “payable on death to [name].” The law surrounding such accounts is that the settlor has total control over the balance in the account while he or she is alive: the settlor can change the beneficiary or beneficiaries, operate the account as he or she sees fit, withdraw the entire balance of the account, or close the account, all without liability to the beneficiary. The beneficiary has no present claim on the balance as long as the settlor lives; at best he has a future or contingent interest in the account.²

¹ The members of The Clearing House are Bank of America, National Association; The Bank of New York; Citibank, National Association; Deutsche Bank Trust Company Americas; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; LaSalle Bank National Association; UBS AG; U.S. Bank, National Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association.

² See *Matter of Totten*, 179 N.Y. 112 (1904).

Not all banks have conducted OFAC screening on these beneficiaries. Those that have not done so have relied on several points to justify their decision: (i) the beneficiaries have no present rights in the accounts; (ii) the institutions do not have relationships with, or current personal or financial information from, the beneficiaries that would allow the institutions to conduct an accurate screening; and (iii) the financial institutions will conduct OFAC screening before any funds are disbursed to a beneficiary. If the settlor dies and there is a balance in the account, then the institution will perform OFAC screening to ensure that no amount is paid to, and no balance in the account is available to, any person blocked under OFAC's regulations.

In a recent interpretation, OFAC expressed the opinion that because OFAC's regulations define "interest" to include "any interest whatsoever, direct or indirect, present, future or contingent," the beneficiary of a Totten trust or similar account "has a future and/or contingent interest in funds in the account and, consistent with a financial institution's risk profile, beneficiaries should be screened to assure OFAC compliance."³ OFAC therefore suggests that banks and other financial institutions screen beneficiaries against the OFAC lists when an account is opened, when changes are made to the account (e.g., a new beneficiary is added), upon scheduled review of the account, and when funds are distributed upon the death of a settlor.

OFAC's interpretation recognizes the hardship that this approach imposes on financial institutions and those who have opened these kinds of accounts, and it has stated that it "is considering issuing a general license authorizing the operation of account where a Cuban national is named as beneficiary until the death of the primary account holder(s) at which time the interest of a Cuban national would need to be separately addressed."⁴

The Clearing House strongly supports the issuance of a general license. The Clearing House member banks are committed to taking all reasonable steps to ensure that no person or entity that is blocked under OFAC's programs has access to any funds under the banks' control. With respect to Totten trust and similar accounts, the beneficiary has no access to any funds in the account, and it would seem to be a wasted effort for banks to search their records to find all these accounts. If an account holder dies and there is a balance in his account, or if the account holder attempts to transfer the account or a portion of the balance in the account to a blocked person, the banks will screen all payments to beneficiaries to ensure that no payments are made to blocked persons and that any funds due to blocked persons are frozen and OFAC is notified. We also believe that this approach is consistent with existing OFAC regulations regarding Cuba, which provide that a U.S. bank acting as a trustee of a trust or estate in which a Cuban national has an interest is authorized to pay "distributive shares of principal or income to all persons legally entitled thereto" and engage in other transactions arising out

³ Letter from Virginia R. Canter, Acting Associate Director, Policy, Planning & Implementation, Office of Foreign Assets Control, to Linda B. Charity, Division of Financial Institutions, Office of Financial Regulation (Oct. 6, 2006).

⁴ *Id.*

of the administration of the trust or estate, so long as any payment to a Cuban national is made to a blocked account.⁵

We believe that these procedures should be sufficient to ensure that the policy objectives the United States has sought to achieve through the sanction programs administered by OFAC are fully met.

We therefore respectfully request that OFAC issue a general license to allow banks to continue to administer Totten trusts and similar accounts in which a beneficiary may be a Cuban national in a manner that is consistent with the principles outlined above. We also request that OFAC consider issuing similar general licenses to other sanctions programs: the principles are the same and the banks will be able to follow the same procedures to ensure that no blocked entity receives any payment or has access to funds under the banks' control. We would be happy to discuss this broader general license with you at your convenience.

We hope that this letter is helpful. If you have any questions, please call Joseph R. Alexander, Senior Counsel, at (212) 612-9334.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. Alexander", with a horizontal line underneath the name.

JRA:mlr

⁵

31 C.F.R. § 515.524.