

- Whether the United States has a mutual legal assistance treaty with the jurisdiction, and the experience of United States law enforcement and regulatory officials in obtaining information about transactions originating in, or routed through or to, such jurisdiction; and

- The extent to which the jurisdiction is characterized by high levels of official or institutional corruption.

Thus, a designation is based on consideration of the relevant facts and factors, in conjunction with a consultation process, which leads to a decision by the Secretary that there are reasonable grounds to conclude that the jurisdiction is of primary money laundering concern.

2. Imposition of Special Measures

If the Secretary determines that a foreign jurisdiction 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 can be imposed, individually, jointly, in any combination, and in any sequence.¹

The Secretary's imposition of special measures follows procedures similar to those for designations, but carries with it additional consultations to be made and factors to consider. The statute requires the Secretary to consult with appropriate agencies and other interested parties² 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 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 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

- The effect of the action on United States national security and foreign policy.

3. Procedures for Imposing Special Measures

In this proposed rulemaking, the Secretary seeks to impose the fifth special measure (31 U.S.C. 5318A(b)(5)) against Burma. This special measure may only be imposed through the issuance of a regulation.

B. Burma

Burma (also known as Myanmar) has no effective anti-money laundering controls in place. As a result, in June 2001 Burma was designated as a Non-Cooperative Country or Territory (NCCT) by the Financial Action Task Force (FATF)³ for its lack of basic anti-money laundering provisions and weak oversight of the banking sector. Following the designation by the FATF, in April 2002, FinCEN issued an advisory to U.S. financial institutions to give enhanced scrutiny to all transactions originating in or routed to or through Burma, or involving entities organized or domiciled, or persons maintaining accounts, in Burma. Deficiencies identified by FATF and the FinCEN advisory included:

- Burma lacks a basic set of anti-money laundering laws and regulations.
- Money laundering is not a criminal offense for crimes other than drug trafficking in Burma.
- The Burmese Central Bank has no anti-money laundering regulations for financial institutions.
- Banks licensed by Burma are not legally required to obtain or maintain identification information about their customers.
- Banks licensed by Burma are not required to maintain transaction records of customer accounts.
- Burma does not require financial institutions to report suspicious transactions.
- Burma has significant obstacles to international co-operation by judicial authorities.

In June 2002, Burma responded to this international pressure by enacting an anti-money laundering law that purportedly addresses some of these deficiencies. The necessary regulations required for its effective implementation, however, are not in place. As a result, the Burmese anti-money laundering law is ineffective and unenforceable, and cannot be regarded as effectively remedying any of the identified deficiencies. Due to Burma's lack of progress, the FATF called upon its member jurisdictions to impose additional countermeasures on Burma as of November 3, 2003.

The United States continues to recognize that Burma is a haven for international drug trafficking. On January 31, 2003, the President also signed Presidential Determination No. 2003-14, identifying Burma as a major illicit drug producing and/or drug transiting country pursuant to section 706(1) of the Foreign Relations Authorization Act, Fiscal Year 2003 (Pub. L. 107-228) and as a country that has failed demonstrably during the previous twelve months to adhere to its obligations under international counter-narcotics agreements and take the measures set forth in section 489(a)(1) of the Foreign Assistance Act of 1961, as amended (FAA). In addition, this past year Burma continued to be named as a major money laundering country. A major money laundering country is defined by statute as one "whose financial institutions engage in currency transactions including significant amounts of proceeds from international narcotics trafficking." FAA section 481(e)(7).

C. Economic Sanctions

On July 28, 2003, the President signed both the Burmese Freedom and Democracy Act of 2003 and Executive Order 13310, imposing economic sanctions on Burma. These sanctions generally include: (1) A ban on the exportation or reexportation, directly or indirectly, of financial services to Burma; (2) the blocking of property and interests in property of the State Peace and Development Council of Burma and three state-owned foreign trade banks that are in the United States or in the possession or control of U.S. persons; and (3) a ban on the importation of Burmese goods into the United States. The new sanctions have frozen hundreds of thousands of dollars of assets and have disrupted an already weak economy, especially in the important garment sector where many firms have closed or moved outside of Burma.

¹ 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 to impose special measures against Nauru).

² Section 5318A(a)(4)(A) requires the Secretary to consult with the Chairman of the Board of Governors of the Federal Reserve, any other appropriate Federal banking agency, the Secretary of State, the Securities and Exchange Commission (SEC), the Commodity Future 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 and the Secretary of State if the Secretary is considering prohibiting or imposing conditions on domestic financial institutions maintaining correspondent account relationships with the designated jurisdiction.

³ For further information on the FATF go to <http://www.fatf-gafi.org>.