

exemption from or license issued pursuant to Executive Order 13310 of July 28, 2003.

I. Background

A. Section 311 of the USA PATRIOT Act

On October 26, 2001, the President signed the Act into law. Title III of the Act amends the anti-money laundering provisions of the Bank Secrecy Act (BSA) (codified in subchapter II of chapter 53 of title 31, United States Code) to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism.

Section 311 of the Act (Section 311) added section 5318A to the BSA, granting the Secretary of the Treasury (Secretary) authority to designate a foreign jurisdiction, institution(s), class(es) of transactions, or type(s) of account(s) as a "primary money laundering concern" and to require U.S. financial institutions to take certain "special measures" against the primary money laundering concern.

Section 311 identifies factors to consider and agencies to consult before the Secretary may designate a primary money laundering concern. The statute also provides similar procedures, *i.e.*, factors and consultation requirements, for selecting the imposition of specific special measures against the designee.

Taken as a whole, Section 311 provides Treasury with a range of options that can be adapted to target most effectively specific money laundering and terrorist financing concerns. These options give the Secretary the authority to bring additional and useful pressure on those jurisdictions and institutions that pose money laundering threats. Through the imposition of various special measures, the Secretary can gain more information about the concerned jurisdictions, institutions, transactions, and accounts; more effectively monitor the respective institutions, transactions, and accounts; and/or protect U.S. financial institutions from involvement with jurisdictions, institutions, transactions, or accounts that pose a money laundering concern.

1. Required Consultations and Statutory Considerations To Be Made Prior to Designating a Foreign Financial Institution To Be of Primary Money Laundering Concern

Before making a finding that reasonable grounds exist for concluding that a foreign financial institution is of primary money laundering concern, the Secretary is required to consult with both the Secretary of State and the Attorney General.

In addition to these consultations, the Secretary is required by statute to consider "such information as the Secretary determines to be relevant, including the following potentially relevant factors," when designating a foreign financial institution:

- 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 such action is sufficient to ensure, with respect to transactions involving the institution operating in the jurisdiction, that the purposes of this subchapter continue to be fulfilled, and to guard against international money laundering and other financial crimes.

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 institution is of primary money laundering concern.

2. Imposition of Special Measures

If the Secretary determines that a foreign financial institution 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:

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 Futures Trading Commission

• 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 institution; 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 Mayflower Bank and Asia Wealth Bank. This special measure may only be imposed through the issuance of a regulation.

B. Burma, Myanmar Mayflower Bank, and Asia Wealth Bank

1. The Burmese Anti-Money Laundering Regime

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 and 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 or regulations.

(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 entity.

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