



American
Bankers
Association®



The Clearing House®

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

Imposition of Special Measure against Banca Privada d'Andorra, RIN 1506-AB30

Dear Sir or Madam,

The American Bankers Association (ABA)¹ and The Clearing House Association² (together “the Associations”) appreciate the opportunity to comment on FinCEN’s proposal to impose special measures against Banca Privada d’Andorra (BPA). On March 6, 2015, FinCEN used its authority under section 311 of the USA PATRIOT Act to designate BPA as an institution of primary money laundering concern, finding that bank senior management had knowingly helped funnel the proceeds of organized crime.³ Section 311 authorizes the Secretary of the Treasury, who has delegated that authority to the Director of FinCEN, to require covered financial institutions to impose certain special measures to address money laundering concerns related to designated institutions and jurisdictions.

Pursuant to this delegated authority, the Director proposes to invoke the “fifth special measure” which authorizes FinCEN to:

[P]rohibit, or impose conditions upon, the opening or maintaining in the United States of a correspondent account or payable-through account by any domestic financial institution or domestic financial agency for or on behalf of a foreign banking institution, if such correspondent account or payable-through account involves any such jurisdiction or

¹ The American Bankers Association is the voice of the nation’s \$15 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$11 trillion in deposits, and extend more than \$8 trillion in loans.

² Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world’s largest commercial banks, which collectively hold more than half of all U.S. deposits and which employ over one million people in the United States and more than two million people worldwide. The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., which is regulated as a systemically important financial market utility, owns and operates payments technology infrastructure that provides safe and efficient payment, clearing and settlement services to financial institutions, and leads innovation and thought leadership activities for the next generation of payments. It clears almost \$2 trillion each day, representing nearly half of all automated clearing house, funds transfer and check-image payments made in the United States. See The Clearing House’s web page at www.theclearinghouse.org.

³ http://www.fincen.gov/news_room/nr/html/20150310.html

institution, or if any such transaction may be conducted through such correspondent account or payable-through account.⁴

In addition to identifying direct correspondent accounts for BPA, FinCEN would require all covered financial institutions to apply commercially reasonable measures to determine whether any existing or prospective customer is a branch, office, or subsidiary of BPA. And, using a risk-based approach, covered financial institutions would be expected to apply special due diligence to all foreign correspondent accounts and take steps reasonably designed to guard against processing transactions initiated by, through or for the benefit of BPA, its branches, offices, and subsidiaries.

A covered financial institution would be required to notify a foreign correspondent account holder that it knows, or has reason to know, provides services to BPA that the correspondent may not permit BPA access to the correspondent account. FinCEN would not require a covered financial institution to obtain certification of compliance from its foreign correspondents. Finally, while the proposal does not impose a reporting requirement, all covered financial institutions would be expected to document their compliance with the requirement to notify their foreign correspondent account holders.

Association Comments

The Associations have long supported and continue to support FinCEN's efforts to protect the United States and the U. S. financial system from money laundering, terrorist financing, and financial crimes. Hence, we generally support FinCEN's designation of BPA and the proposed special measure. At the same time, however, we believe that FinCEN should:

- Research and publish a list of all subsidiaries of BPA to help covered financial institutions in their compliance efforts;
- Ensure that the designation and special measure are effective by finalizing the proposed rule (and other outstanding proposals) in a timely fashion so that FinCEN's compliance expectations are clear; and
- Not minimize the compliance burden the special measure creates.

Each of these suggestions as well our additional comments are discussed more fully below.

FinCEN Should Provide a List of BPA Subsidiaries

The task of identifying subsidiaries of BPA is likely to be extremely challenging. There is no authoritative published list of subsidiaries of designated entities, and while some screening list services will include known or suspected subsidiaries of designated entities, covered financial institutions have no assurance that these compilations of subsidiaries provided by these services are complete or up-to-date. Hence, it will often not be possible for financial institutions to know with certainty whether a potential customer or a transaction the financial institution is asked to process on behalf of a correspondent customer involves a BPA subsidiary.

Although covered financial institutions can and should be expected to take reasonable steps to meet their obligations under the proposed special measure, it is equally incumbent on FinCEN to help identify BPA subsidiaries, because it is not always possible for covered financial institutions to identify those subsidiaries using reasonable due diligence. Therefore, the Associations strongly encourage FinCEN to publish a list of all subsidiaries of BPA to help covered financial institutions meet this obligation. Doing so will further the

⁴ 31 USC 5318A(b)(5).

cooperative relationship between FinCEN and the private sector and more likely result in optimal effectiveness of the special measure.

FinCEN Should Act Expeditiously to Finalize the Proposal

All too frequently, proposed special measures under section 311 are never finalized, leaving covered financial institutions in limbo. A review of the FinCEN website shows the following pending proposals against foreign financial institutions that have never been finalized or rescinded:

- Imposition of Special Measure Against FBME Bank Ltd., Formerly Known as Federal Bank of the Middle East, Ltd., as a Financial Institution of Primary Money Laundering Concern – pending since July 15, 2014 (comment period closed September 22, 2014)
- Imposition of Special Measure against Liberty Reserve S.A. as a Financial Institution of Primary Money Laundering Concern – pending since May 28, 2013 (comment period closed August 5, 2013)
- Imposition of Special Measure against the JSC CredexBank as a Financial Institution of Primary Money Laundering Concern – pending since May 22, 2012 (comment period closed July 30, 2012)

As we pointed out in a July 30, 2012, joint letter, the uncertainty that accompanies a proposal that FinCEN fails to finalize creates additional burdens and costs.⁵

These delays cause problems for the covered financial institutions. As time goes by with no final rule in sight, correspondent banking customers begin to wonder whether the prohibition against using their correspondent accounts to provide services to the sanctioned party is still in effect. They ask why—if the U.S. government has not taken the trouble to finalize its rule—they must still restrict their dealings with the sanctioned party, and what legal right their U.S. bank has to restrict their business dealings when there is no final rule in place.

The Associations urge FinCEN to act expeditiously and conclusively. Moreover, it is critically important that FinCEN communicate with the banking industry and provide regular updates and information regarding the status of any un-finalized special measures from previous designations under section 311.⁶

FinCEN Should Permit Banks to Provide Notice to all Foreign Correspondent Banks

FinCEN indicates that a covered financial institution must “apply special due diligence to its foreign correspondent accounts that is reasonably designed to guard against their use to process transactions involving [BPA]. At a minimum, that special due diligence must include: notifying those foreign correspondent account holders that the covered financial institution knows or has reason to know provide services to [BPA] that such correspondents may not provide [BPA] with access to the correspondent account maintained at the covered financial institution.” However, for many covered financial institutions it would be far simpler and less burdensome for them to notify all correspondents instead of sorting through their correspondents, identifying some, and documenting why some correspondents were notified and others were not. A statement by FinCEN that it is acceptable to notify all correspondents regarding the BPA special measure would make it clear to examiners, auditors and bankers that a broad notification to all foreign correspondents is an acceptable

⁵ <http://www.aba.com/Advocacy/commentletters/Documents/clFinCENcredexBank2012July.pdf>

⁶ We note that in addition to the special measures noted above that have not been finalized, there are other measures that are still outstanding and not finalized for PJSC Trustbank (previously National Bank of Belarus, August 2005); Lebanese Canadian Bank (February 2011); Islamic Republic of Iran (November 2011); Halawi Exchange Co. (April 2013); and Kassam Rmeiti & Co. Foreign Exchange (April 2013).

compliance procedure.⁷ This also would further the intent to prohibit indirect use by ensuring that foreign correspondents that might consider providing services for BPA in the future are aware of BPA's designation as an institution of primary money laundering concern.

FinCEN Underestimates the Burdens That Will be Imposed

Because FinCEN has identified only a handful of correspondent accounts maintained by BPA, it believes the proposed requirements will not have a significant adverse systemic impact, even though other jurisdictions have not imposed similar sanctions. Moreover, FinCEN asserts that the proposal will not result in significant compliance burdens because covered financial institutions can use existing screening mechanisms to detect transactions involving BPA. Although FinCEN acknowledges some burden inherent in the one-time notice financial institutions must send their correspondents,⁸ FinCEN believes it is outweighed by the need to protect the U.S. financial system.

We are concerned that FinCEN underestimates the burdens imposed by the proposed special measure. Although BPA may not be a major player in international finance and only a small number of covered financial institutions ultimately may identify affected accounts or transactions, the actual volume of BPA related transactions is an inadequate measure of compliance burden. Under the proposal *all* financial institutions must take steps to review foreign correspondent relationships and transactions, despite the fact that only a small number of transactions or relationships might be identified. In other words, the true burden is not determined by how small the presence of BPA is in the international financial system but by the entire volume of international correspondent activity across all covered financial institutions for which screening as well as procedures to look for attempts to disguise BPA activity must be put in place, expanding the monitoring efforts of each covered financial institution to verify that there are no BPA transactions.

Conclusion

Thank you for the opportunity to comment. As always, the Associations look forward to working with FinCEN to take appropriate steps to protect the financial sector and the national security interests of the United States. If you have questions or need additional information, please contact the undersigned.

Sincerely,

Robert G. Rowe, III
Vice President & Associate Chief Counsel
202-663-5029
rrowe@aba.com

Alaina Gimbert
Senior Vice President and Associate General Counsel
The Clearing House Payments Company, LLC
336-769-5302
alaina.gimbert@theclearinghouse.org

⁷ It is our understanding that some examiners have questioned whether it is appropriate to notify foreign correspondents without determining there are indicators that the correspondent may be conducting transactions for the identified entity.

⁸ A model notice is included with the proposal.