DEPARTMENT OF THE TREASURY

31 CFR Part 103

Imposition of Special Measures Against Burma as a Jurisdiction of Primary Money Laundering Concern

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: On November 18, 2003, the Secretary of the Treasury designated Burma as a jurisdiction of primary money laundering concern pursuant to 31 U.S.C. 5318A, as added by section 311 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. The Department of the Treasury, acting through FinCEN, is issuing this proposed rule to impose special measures against this jurisdiction.

DATES: Written comments on the notice of proposed rulemaking must be submitted on or before December 26, 2003.

ADDRESSES: It is preferable for comments to be submitted by electronic mail because paper mail in the Washington, DC area may be delayed. Comments submitted by electronic mail may be sent to *regcomments@fincen.treas.gov* with the caption in the body of the text, ''ATTN: Section 311—Designation of Burma.'' Comments also may be submitted by paper mail to FinCEN, PO Box 39, Vienna, VA 22183, Attn: Section 311 Special Measure Regulation (Burma). Please submit comments by one method only. Comments may be inspected at FinCEN between 10 a.m. and 4 p.m., in the FinCEN reading room in Washington, DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354–6400 (not toll-free number).

FOR FURTHER INFORMATION CONTACT: Office of the General Counsel, Department of the Treasury, (202) 622–1927; the Executive Office for Terrorist Financing and Financial Crimes, (Treasury), (202) 622–0470; or the Office of Chief Counsel (FinCEN), (703) 905–3590 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: The Secretary of the Treasury has designated Burma as a jurisdiction of primary money laundering concern under 31 U.S.C. 5318A, as added by section 311(a) of the USA PATRIOT Act (Pub. L. 107–56).

Treasury, acting through FinCEN, is also proposing the imposition of special measures authorized by section 5318A(b)(5). The special measures imposed under this section would generally prohibit certain U.S. financial institutions from establishing, maintaining, administering, or managing correspondent or payable-through accounts in the United States for, or on behalf of, Burmese financial institutions, unless (as explained below) operation of those accounts is not prohibited by Executive Order 13310 of July 28, 2003, and the Burma-related activities of such accounts are solely to affect transactions that are exempt from, or licensed pursuant to, Executive Order 13310. This prohibition extends to correspondent or payable-through accounts maintained for other foreign banks when such accounts are used by the foreign bank to provide financial services to a Burmese financial institution indirectly.

Additionally, the Secretary designated two Burmese financial institutions, Myanmar Mayflower Bank and Asia Wealth Bank, as financial institutions of primary money laundering concern. By a separate proposed rule, Treasury and FinCEN are proposing the imposition of the fifth special measure as well. This special measure would prohibit certain U.S. financial institutions from establishing, maintaining, administering, or managing correspondent or payable-through accounts for, or on behalf of, Myanmar Mayflower Bank or Asia Wealth Bank, notwithstanding any exemption from, or license issued pursuant to Executive Order 13310.

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) to be of ''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 as well as agencies and departments 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 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 obtain 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 Jurisdiction To Be of Primary Money Laundering Concern

Before making a finding that reasonable grounds exist for concluding that a jurisdiction 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 jurisdiction:

- Evidence that organized criminal groups, international terrorists, or both, have transacted business within the designated jurisdiction;
- The extent to which the jurisdiction or financial institutions operating in the jurisdiction offer bank secrecy or special regulatory advantages to nonresidents or nondomiciliaries of the jurisdiction;
- The substance and quality of administration of the bank supervisory and counter-money laundering laws of the jurisdiction;
- The relationship between the volume of financial transactions occurring in the jurisdiction and the size of the economy of the jurisdiction;
- The extent to which the jurisdiction is characterized as an offshore banking or secrecy haven by credible international organizations or multilateral expert groups;

• 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 parties[2] 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 identificaiton 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-cooperation 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) Recordingkeeping 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 disignated jurisdiction.

[3] For further informaiton on the FATF go to *http://www.fatf-gafi.org.*

Executive Order 13310 prohibits broadly the provision of financial services to Burma from the United States or by a U.S. person, subject to limited exceptions.[4] Since the President signed the Order, however, Treasury has issued several licenses to permit transactions with Burma for certain specified purposes. For example, Treasury issued licenses authorizing transactions for the conduct of the official business of the United States Government, the United Nations, the World Bank, and the International Monetary Fund, and non-commercial personal remittances of up to $300 per household per quarter. The exemptions and licenses reflect the judgment of the United States that certain transactions are necessary and appropriate, even within the framework of this sanctions regime.

D. The Proposed Section 311 Special Measures

The proposed imposition of Section 311 special measures reinforces the existing restrictions on transactions with Burma that are outlined above. Although they are similar in their effect, the proposed Section 311 special measures differ in certain respects and serve distinct policy goals. First, the proposed Section 311 special measures are potentially broader than the existing sanctions in at least one respect—they would apply to all foreign branches of Burmese financial institutions. Second, the purposes served by the Section 311 action differ markedly from the purposes of the economic sanctions described above. This action under Section 311 is premised on the Secretary's determination that Burma poses an unacceptable risk of money laundering and other financial crimes, due to its failure to implement an effective anti-money laundering regime. The goals of this action include protecting the U.S. financial system and encouraging Burma to make the necessary changes to its anti-money laundering regime. The existing sanctions pursuant to Executive Order 13310, on the other hand, were imposed for different reasons, in particular to take additional steps with respect to the government of Burma's continued repression of the democratic opposition.

These underlying purposes for the designation of Burma fuel another intended consequence, namely, to encourage other jurisdictions and financial institutions to take similar steps to cut off Burma from the international financial system due to the unacceptable risk of money laundering. In addition to stemming the flow of illicit funds from Burma into the United States, the act of naming Burma publicly and formally denying them access to the U.S. financial system is an important statement to the rest of the world about the need for caution in financial dealings with Burma and the need for reform.

Next, this action fulfills an important role of the United States in supporting the multilateral effort to encourage Burma to implement effective anti-money laundering controls. The FATF has called on all members to impose additional countermeasures as a result of Burma's failure to address its money laundering deficiencies. The assessment of Section 311 special measures, premised squarely on the absence of money laundering controls, fulfills this obligation in a way that the existing sanctions cannot.

Finally, the proposed Section 311 special measures incorporate the exemptions from, and licenses issued pursuant to, Executive Order 13310. Thus, U.S. financial institutions may maintain otherwise prohibited correspondent account relationships so long as the maintenance of such accounts is not prohibited by E.O. 13310 and provided that the only transactions conducted on behalf of Burmese financial institutions are those that are otherwise permissible under the existing sanctions regime. The policy of allowing certain transactions under the Executive Order should not be undermined by Section 311 special measures. However, Burma has been designated under Section 311 of the Act due to inadequate anti-money laundering controls, and the fact that the overarching purpose for a transaction is permissible under the Executive Order does not itself reduce the risk of money laundering. Therefore, while the exemptions and licenses are incorporated into the proposed Section 311 special measures, U.S. financial institutions processing such transactions must still conduct enhanced scrutiny to guard against the flow of illicit proceeds.

II. Designation of Burma as a Jurisdiction of Primary Money Laundering Concern

Based upon a review and analysis of relevant information, consultations with relevant agencies and departments, and a consideration of the factors outlined above, the Secretary has determined that Burma is a jurisdiction of primary money laundering concern. See the notice published elsewhere in this separate part.

The Secretary has found Burma to be a jurisdiction of primary money laundering concern due to a number of factors, including: (1) Inadequate anti-money laundering controls; and (2) lack of cooperation with U.S. law enforcement agencies in criminal matters.

As provided by Section 311, the Secretary also considered the following:

1. Evidence That Organized Criminal Groups, International Terrorists, or Both, Have Transacted Business in That Jurisdiction

As set forth in the accompanying Section 311 designation of the two Burmese banks, Myanmar Mayflower Bank and Asia Wealth Bank,[5] the Secretary has information that specific financial institutions within Burma are essentially controlled by and used to facilitate money laundering for organized drug trafficking organizations such as the United Wa State Army[6] and members of the Kokang ethnic group. The Burmese government has failed to take any regulatory or enforcement action against these financial institutions, despite their well-known criminal links. Additionally, there is evidence of activity within Burma involving the counterfeiting of U.S. currency. This activity is believed to be linked to Burmese government officials, and the Burmese government has failed to cooperate with U.S. law enforcement on the matter.

2. The Extent to Which That Jurisdiction or Financial Institutions Operating in That Jurisdiction Offer Bank Secrecy or Special Regulatory Advantages to Non-Residents or Nondomiciliaries of That Jurisdiction

There are no explicit secrecy provisions within Burmese law. Burma does not have an offshore sector catering to foreign investors or depositors, and the Burmese anti-money laundering law contains customer identification and recordkeeping requirements. However, as noted above, this law cannot be enforced absent implementing regulations, which Burma has failed to issue. Thus, as a practical matter, the laws that would give rise to effective anti-money laundering controls and transparency are unenforceable.

[4] For example, the prohibition does not extend to transacitons relating to certain contracts entered into prior to May 21, 1997. *See* Executive Order 13310, § 13.

[5] *See* the notice published in today's edition of the **Federal Register**.

[6] The United States as designated the United Wa State Army as significant narcotics traffickers under the Foreign Narcotics Kingpin Designation Act (the ''Kingpin Act''), 21 U.S.C. 1901–1908, 8 U.S.C 1182.

3. The Substance and Quality of Administration of the Bank Supervisory and Counter-Money Laundering Law of That Jurisdiction

In addition to the deficiencies discussed above, the Central Bank of Burma—which is responsible for the regulation and supervision of all Burmese financial institutions—has failed to include anti-money laundering provisions within its regulations for financial institutions.

4. The Relationship Between the Volume of Financial Transactions Occurring in That Jurisdiction and the Size of the Economy of the Jurisdiction

Assessment of this factor is difficult due to difficulties in estimating the overall size of the Burmese economy. Official data is unreliable, and the black market and border trade likely comprise a significant portion of the overall economy.

5. The Extent to Which That Jurisdiction Is Characterized as an Offshore Banking or Secrecy Haven by Credible International Organizations or Multilateral Expert Groups

As noted above, in June 2001, the FATF identified Burma as non-cooperative in international efforts to fight money laundering due to significant deficiencies in its anti-money laundering system. In October 2003, due to Burma's continuing failure to address these deficiencies, the FATF called upon its members to impose additional countermeasures on Burma as of November 3, 2003.

6. Whether the United States Has a Mutual Legal Assistance Treaty With That Jurisdiction, and the Experience of United States Law Enforcement Officials in Obtaining Information About Transactions Originating in or Routed Through or to Such Jurisdiction

The U.S. does not have a mutual legal assistance treaty with Burma. Additionally, U.S. law enforcement indicates that they rarely gain access to bank-related information pursuant to investigations. Moreover, as previously indicated, U.S. law enforcement has received no cooperation regarding counterfeiting investigations involving Burma.

7. The Extent to Which That Jurisdiction Is Characterized by High Levels of Official or Institutional Corruption

Transparency International—the leading international non-governmental organization devoted to curbing corruption—has ranked Burma as the fourth most corrupt jurisdiction out of 133 jurisdictions assessed worldwide.

III. Imposition of Special Measures

As a result of the designation of Burma as a jurisdiction of primary money laundering concern, and based upon consultations [7] and the consideration of all relevant factors, the Secretary has determined that grounds exist for the imposition of the special measures authorized by section 5318A(b)(5). Thus, the proposed rulemaking would prohibit covered financial institutions from establishing, maintaining, administering, or managing in the United States any correspondent or payable-through account for, or on behalf of, a Burmese financial institution. This prohibition would extend to any correspondent or payable-through account maintained in the United States for any foreign bank if the account is used by the foreign bank to provide banking services indirectly to a Burmese financial institution. Financial institutions covered by this proposed rule that obtain knowledge that this is occurring would be required to ensure that any such account no longer is used to provide such services, including, where necessary, terminating the correspondent relationship in the manner set forth in this rulemaking. Other than with respect to Myanmar Mayflower Bank and Asia Wealth Bank, the proposed rule does, however, allow U.S. financial institutions to maintain correspondent accounts otherwise prohibited by this rule if such accounts are permitted to be maintained pursuant to Executive Order 13310 and the Burma-related activity of those accounts is solely for the purpose of conducting transactions that are exempt from, or authorized by regulation, order, directive, or license issued pursuant to, Executive Order 13310.

In imposing this special measure, the Secretary has considered the following pursuant to section 5318A(a)(4)(b):

1. Similar Actions Have Been or Will be Taken by Other Nations or Multilateral Groups Against Burma Generally

In June 2001, the FATF designated Burma as an NCCT, resulting in FATF members issuing advisories to their financial sectors recommending enhanced scrutiny of transactions involving Burma. In April 2002 FinCEN issued an advisory notifying U.S. financial institutions that they should accord enhanced scrutiny with respect to transactions and accounts involving Burma. In October 2003, FATF called upon its 33 members to take additional countermeasures with respect to Burma as of November 3, 2003. Imposition of the fifth special measure on Burma is consistent with this call for additional countermeasures and forms part of an international effort to protect the financial system. Based on informal discussions and the past practices of the FATF membership, the majority of FATF members are expected to take countermeasures, including all of the Group of Seven countries. The countermeasures imposed by such FATF members will likely include imposition of additional reporting requirements, issuance of additional advisories, shifting the burden for reporting obligations, and/or restrictions on the licensing of Burmese financial institutions.

2. Imposition of the Fifth Special Measure Would Not Create a Significant Competitive Disadvantage, Including Any Undue Cost or Burden Associated With Compliance, for Financial Institutions Organized or Licensed in the United States

U.S. financial institutions are already prohibited from providing financial services to Burma, unless such services are exempted or licensed. The imposition of the fifth special measure potentially imposes a broader prohibition than currently exists, because it would preclude maintaining correspondent accounts for foreign branches of Burmese financial institutions. However, on balance, it is unlikely that the imposition of the fifth special measure will create any significant additional costs or place U.S. financial institutions at a competitive disadvantage. In fact, Treasury's action is intended to encourage other jurisdictions and financial institutions to take similar steps to cut off Burma from the international financial system, which would further minimize any potential competitive disadvantage for U.S. financial institutions.

Moreover, the proposed rule would not itself require U.S. financial institutions to perform additional due diligence on their existing foreign bank correspondent account customers beyond what is already required under existing regulations.

3. The Proposed Action or the Timing of the Action Will Not Have a Significant Adverse Systemic Impact on the International Payment, Clearance, and Settlement System, or on Legitimate Business Activities Involving the Jurisdiction

Given the preexisting sanctions on Burma, it is unlikely that these new measures or the timing of the new

[7] For purposes of this action, the required consultation with the Federal functional regulators was performed at the staff level.

measures will have a significant adverse systemic impact on the international payment, clearance, and settlement system, or on legitimate business activities of Burma.

4. The Proposed Action Would Enhance the National Security of the United States and Is Consistent With, and in Furtherance of, United States Foreign Policy

The imposition of this countermeasure on Burma is consistent with an overall foreign policy strategy to enhance our national security through comprehensive economic and political sanctions against Burma.

IV. Section-by-Section Analysis

A. Overview

The designation published elsewhere in this separate part and this proposed rule are intended to deny Burmese financial institutions access to the U.S. financial system through correspondent accounts, which includes payable-through accounts. The proposed rule would prohibit certain U.S. financial institutions from establishing, maintaining, administering, or managing correspondent accounts in the United States for, or on behalf of, a Burmese financial institution. If a U.S. financial institution covered by this proposed rule learns that a correspondent account that it maintains for a foreign bank is being used by that foreign bank to provide services indirectly to a Burmese financial institution, the U.S. institution must ensure that the account no longer is used to provide such services, including, where necessary, terminating the correspondent relationship. As explained below, the proposed rule does not itself require U.S. financial institutions to perform additional due diligence on foreign bank customers.

The proposed rule does allow U.S. financial institutions to maintain otherwise prohibited correspondent accounts to the extent they are permitted pursuant to Executive Order 13310 and the Burma-related activities of those accounts are for the purpose of conducting transactions that are exempt from, or licensed pursuant to, Executive Order 13310.

B. Definitions

Correspondent account. Section 103.186(a)(1) of the proposed rule's definition of correspondent account is the definition contained in 31 U.S.C. 5318A(e) (as added by Section 311 of the Act), which defines the term for banks to mean an account established to receive deposits from or make payments on behalf of a foreign financial institution, or handle other financial transactions related to the foreign financial institution.

In the case of a U.S. depository institution, this broad definition would include most types of banking relationships between a U.S. depository institution and a foreign financial institution, including payable-through accounts. In the case of securities broker-dealers, futures commission merchants, introducing brokers, and mutual funds, a correspondent account would include any account that permits the foreign financial institution to engage in (1) trading in securities and commodity futures or options, (2) funds transfers, or (3) other types of financial transactions. Treasury is using the same definition for purposes of the proposed rule as that established in the final rule implementing Sections 313 and 319(b) of the Act [8] with two notable exceptions: (1) the term also applies to such accounts maintained by futures commission merchants, introducing brokers, and mutual funds; and (2) the definition applies to such accounts maintained for any Burmese financial institution, as opposed to just Burmese banks.

Covered financial institution. Section 103.186(a)(2) of the proposed rule defines covered financial institution to mean all of the following: any insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)); a commercial bank or trust company; a private banker; an agency or branch of a foreign bank in the United States; a credit union; a thrift institution; a corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611 *et seq.*); a broker or dealer registered or required to register with the SEC under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*); a futures commission merchant or an introducing broker registered, or required to register, with the CFTC under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*); and an investment company (as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3)) that is an open-end company (as defined in section 5 of the Investment Company Act of 1940 (15 U.S.C. 80a–5) that is registered, or required to register, with the SEC pursuant to that Act.

Burmese financial institution. Section 103.186(a)(3) of the proposed rule defines a Burmese financial institution to include all foreign banks chartered or licensed by Burma and any other person organized under the law of Burma who conducts as a business one or more of the following activities or operations on behalf of customers: trading in (1) Money market instruments; (2) exchange, interest rate, and index instruments; (3) transferable securities; and (4) commodity futures or options. The definition of foreign bank is that contained in 31 CFR 103.11(o). The inclusion in this definition of financial institutions other than depository institutions is done in recognition that these activities are alternate viable routes for money laundering activity. Foreign branches and offices of Burmese financial institutions are included in this definition. However, subsidiaries are not at this time. Also, the Central Bank of Burma is not a Burmese financial institution.

C. Requirements for Covered Financial Institutions

1. Prohibition on Correspondent Accounts

Section 103.186(b)(1) of the proposed rule would prohibit generally all covered financial institutions from establishing, maintaining, administering, or managing a correspondent or payable-through account in the United States for, or on behalf of, a Burmese financial institution. The prohibition would require all covered financial institutions to review their account records to determine that they maintain no accounts directly for, or on behalf of, a Burmese financial institution. This prohibition is subject to the exception contained in section 103.186(b)(4), described below.

2. Prohibition on Indirect Correspondent Accounts

Under section 103.186(b)(2) of the proposed rule, if a covered financial institution obtains knowledge that a correspondent or payable-through account that it maintains for a foreign bank is being used by that foreign bank to provide services indirectly to a Burmese financial institution, the U.S. institution must ensure that the account no longer is used to provide such services, including, where necessary, terminating the correspondent relationship. In contrast to the obligation placed on covered financial institutions to identify correspondent accounts maintained directly for, or on behalf of, a Burmese financial institution in section 103.186(b)(1), this section would not itself impose an independent obligation on covered financial institutions to review or investigate correspondent accounts they

[8] 67 FR 60562 (September 26, 2002) (codified at 31 CFR 103.175 (d)(1))

maintain for foreign banks to ascertain whether a foreign bank is using the account to provide services to a Burmese financial institution. Instead, if covered financial institutions become aware, through due diligence that is otherwise appropriate or required under existing anti-money laundering obligations, that a foreign bank is using its correspondent account to provide banking services indirectly to a Burmese financial institution, then the covered financial institutions must ensure that the account is no longer used for such purposes. This reflects the approach taken in the proposed rulemaking imposing special measures against Nauru.[9]

Additionally, when a covered financial institution becomes aware that a foreign bank customer is using the U.S. correspondent account to provide services to a Burmese financial institution indirectly, the covered financial institution may afford that foreign bank customer a reasonable opportunity to take corrective action prior to terminating the U.S. correspondent account. Should the foreign bank customer refuse to comply, or if the covered financial institution cannot obtain adequate assurances that the account will no longer be used for impermissible purposes, the covered financial institution must terminate the account in accordance with this regulation. Treasury has also incorporated the requirement of termination within a reasonable period of time and the reinstatement of a terminated correspondent account found in the final regulation implementing Sections 313 and 319(b) of the Act.[10]

This provision is likewise subject to the exception contained in section 103.186(b)(3), described below.

3. Exception

Section 103.186(b)(3) provides for an exception to the prohibition on both direct and indirect correspondent account relationships of the proposed rule. U.S. financial institutions covered by the proposed rule may maintain a correspondent account relationship otherwise prohibited by this rule if the maintenance of such an account is permitted pursuant to Executive Order 13310 and if the transactions involving Burmese financial institutions that are conducted through the correspondent account are limited solely to transactions that are exempted in, or otherwise authorized by regulation, order, directive, or license issue pursuant to, Executive Order 13310. As described previously in section I(C)(1), certain transactions with Burma are exempt from the prohibitions of Executive Order 13310 or have been authorized through the licensing process. The general licenses (*i.e.*, those of general applicability) or other authorizations issued will be set forth in 31 CFR part 537, and are available on the website of Treasury's Office of Foreign Assets Control, *http://www.treas.gov/offices/eotffc/ofac/sanctions/sanctguide-burma.html.* To ensure that those authorized activities are available as a practical matter, U.S. correspondent accounts permitted to operate pursuant to Executive Order 13310 may be used to effect those permitted transactions.

4. Reporting and Recordkeeping Not Required

Section 103.186(b)(3) of the proposed rule states that it does not impose any reporting or recordkeeping requirement upon any covered financial institution that is not otherwise required by applicable law or regulation.

V. Designation of Burma To Be of Primary Money Laundering Concern

Effective November 18, 2003, Burma was designated by the Secretary of the Treasury to be a jurisdiction of primary money laundering concern under 31 U.S.C. 5318A, as added by Section 311(a) of the Act. See the notice published elsewhere in this separate part.

VI. Public Comments Requested

Comments are invited from all interested persons concerning this proposed rulemaking, and are specifically sought from the financial sector, including domestic financial institutions and agencies, concerning the appropriateness and effectiveness of this particular special measure, the ability to comply with the special measure, and any competitive disadvantage, cost, or burden associated with compliance.

VII. Regulatory Flexibility Act

It is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. As explained above, financial institutions covered by this proposed rulemaking are already prohibited under existing sanctions from maintaining correspondent accounts for Burmese financial institutions. Given the comprehensive sanctions regime, Treasury and FinCEN believe that few foreign correspondent bank customers of small U.S. financial institutions covered by the proposed rulemaking will themselves maintain correspondent accounts for Burmese financial institutions. Treasury and FinCEN specifically request comment on the extent to which the prohibition contained in the proposed rule would affect small U.S. financial institutions beyond obligations already imposed by existing economic sanctions.

VIII. Executive Order 12866

Because this rule involves a foreign affairs function of the United States, it is not subject to Executive Order 12866, ''Regulatory Planning and Review.''

List of Subjects in 31 CFR Part 103

Banks and banking, Brokers, Counter-money laundering, Counter-terrorism, Currency, Foreign banking, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth in the preamble, 31 CFR part 103 is proposed to be amended as follows:

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

1. The authority citation for part 103 is revised to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314, 5316–5332; title III, sec. 311, 312, 313, 314, 319, 326, 352, Pub. L. 107–56, 115 Stat. 307; 12 U.S.C. 1818; 12 U.S.C. 1786(q).

2. Subpart I of part 103 is proposed to be amended by adding § 103.186 under the undesignated centerheading ''SPECIAL DUE DILIGENCE FOR CORRESPONDENT ACCOUNTS AND PRIVATE BANKING ACCOUNTS'' to read as follows:

§ 103.186 Special measures against Burma.

(a) *Definitions.* For purposes of this section:

(1) *Correspondent account* means an account established to receive deposits from, or make payments on behalf of, a foreign financial institution, or handle other financial transactions related to such institution.

(2) *Covered financial institution* has the same meaning as provided in § 103.175(f)(2) and also includes the following:

(i) A futures commission merchant or an introducing broker registered, or required to register, with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*); and

[9] 68 FR 18917 (April 17, 2003).

[10] 67 FR 60562 (September 26, 2002) (codified at 31 CFR 103.177).

(ii) An investment company (as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–5)) that is an open-end company (as defined in section 5 of the Investment Company Act (15 U.S.C. 80a–5)) and that is registered, or required to register, with the Securities and Exchange Commission pursuant to that Act.

(3) *Burmese financial institution* means the following:

(i) Any foreign bank, as that term is defined in § 103.11(o), chartered or licensed by Burma, including branches and offices located outside Burma; and

(ii) Any other person organized under the law of Burma, including branches or offices located outside of Burma, who conducts as a business one or more of the following activities or operations on behalf of customers:

(A) Trading in money market instruments;

(B) Trading in exchange, interest rate, and index instruments;

(C) Trading in transferable securities; or

(D) Trading in commodity futures or options.

(b) *Requirements for covered financial institutions*—(1) *Prohibition on correspondent accounts.* A covered financial institution shall terminate any correspondent account that is established, maintained, administered, or managed in the United States for, or on behalf of, a Burmese financial institution.

(2) *Prohibition on indirect correspondent accounts.* (i) If a covered financial institution has or obtains knowledge that a correspondent account established, maintained, administered, or managed by that covered financial institution in the United States for a foreign bank is being used by the foreign bank to provide banking services indirectly to a Burmese financial institution, the covered financial institution shall ensure that the correspondent account is no longer used to provide such services, including, where necessary, terminating the correspondent account; and

(ii) A covered financial institution required to terminate an account pursuant to paragraph (b)(2)(i) of this section:

(A) Shall do so within a commercially reasonable time, and shall not permit the foreign bank to establish any new positions or execute any transactions through such account, other than those necessary to close the account; and

(B) May reestablish an account closed pursuant to this paragraph if it determines that the account will not be used to provide banking services indirectly to a Burmese financial institution.

(3) *Exception.* The provisions of paragraphs (b)(1) and (2) of this section shall not apply to a correspondent account provided that the operation of such account is not prohibited by Executive Order 13310 and the transactions involving Burmese financial institutions that are conducted through the correspondent account are limited solely to transactions that are exempted from, or otherwise authorized by regulation, order, directive, or license pursuant to, Executive Order 13310.

(4) *Reporting and recordkeeping not required.* Nothing in this section shall require a covered financial institution to maintain any records, obtain any certification, or report any information not otherwise required by law or regulation.

Dated: November 19, 2003.

William F. Baity,

Acting Director, Financial Crimes Enforcement Network.

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DEPARTMENT OF THE TREASURY

31 CFR Part 103

Imposition of Special Measures Against Myanmar Mayflower Bank and Asia Wealth Bank as Financial Institutions of Primary Money Laundering Concern

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: On November 18, 2003, the Secretary of the Treasury designated Myanmar Mayflower Bank (Mayflower Bank) and Asia Wealth Bank, both Burma banks, as financial institutions of primary money laundering concern pursuant to 31 U.S.C. 5318A, as added by section 311 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. The Department of the Treasury, acting through FinCEN, is issuing this proposed rule to impose special measures against these two institutions.

DATES: Written comments on the notice of proposed rulemaking must be submitted on or before December 26, 2003.

ADDRESSES: It is preferable for comments to be submitted by electronic mail because paper mail in the Washington, DC area may be delayed. Comments submitted by electronic mail may be sent to *regcomments@fincen.treas.gov* with the caption in the body of the text, ''Attn: Section 311—Designation of Burmese Banks.'' Comments also may be submitted by paper mail to FinCEN, P.O. Box 39, Vienna, VA 22183, Attn: Section 311 Special Measures Regulations (Burmese Banks). Please submit comments by one method only. Comments may be inspected at FinCEN between 10 a.m. and 4 p.m., in the FinCEN reading room in Washington, DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354–6400 (not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Office of the General Counsel, Department of the Treasury, (202) 622–1927; the Executive Office for Terrorist Financing and Financial Crimes (Treasury) (202) 622–0470; or the Office of Chief Counsel (FinCEN), (703) 905–3590 (not toll free numbers).

SUPPLEMENTARY INFORMATION: The Secretary of the Treasury has designated Myanmar Mayflower Bank (Mayflower Bank) and Asia Wealth Bank to be financial institutions of primary money laundering concern under 31 U.S.C. 5318A, as added by section 311(a) of the USA PATRIOT Act (Pub. L. 107–56).

Treasury, acting through FinCEN, is also proposing the imposition of special measures authorized by section 5318A(b)(5). The special measures imposed under this section would prohibit certain U.S. financial institutions from maintaining correspondent or payable-through accounts in the United States for, or on behalf of, Mayflower Bank and Asia Wealth Bank. This prohibition extends to correspondent or payable-through accounts maintained for other foreign banks when such accounts are used to provide banking services to the two named Burmese banks indirectly.

Additionally, the Secretary designated the jurisdiction of Burma as a jurisdiction of primary money laundering concern. By a separate proposed rule, Treasury and FinCEN are proposing a special measure to prohibit certain U.S. financial institutions from maintaining correspondent or payable-through accounts for, or on behalf of, any Burmese financial institution. The special measure in this notice would prohibit certain U.S. financial institutions from establishing, maintaining, administering, or managing correspondent or payable-through accounts for, or on behalf of, Myanmar Mayflower Bank or Asia Wealth Bank, notwithstanding any