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DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Part 1010

RIN [1506-AA83]

Financial Crimes Enforcement Network; Repeal of Special Measure Involving Banco Delta Asia (BDA).

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

ACTION: Final rule.

SUMMARY: This rule repeals regulations concerning Special measures against Banco Delta Asia, which were issued pursuant to Section 311 of the USA PATRIOT Act (Section 311).

Subsequent to the issuance of this rule, FinCEN will reassess whether BDA is presently a financial institution of primary money laundering concern and additional rulemaking is warranted. Elsewhere in this issue of the Federal Register, FinCEN is publishing a withdrawal of the finding regarding BDA, issued September 20, 2005.

DATES: Effective [INSERT DATE OF PUBLICATION].

FOR FURTHER INFORMATION CONTACT: The FinCEN Resource Center at frc@fincen.gov.

I. Statutory Background

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Public Law 107-56 (USA PATRIOT Act). Title III of the USA PATRIOT Act amends the

anti-money laundering provisions of the Bank Secrecy Act (BSA), codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314, 5316–5332, to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism. Regulations implementing the BSA appear at 31 CFR chapter X. The authority of the Secretary of the Treasury to administer the BSA and its implementing regulations has been delegated to the Director of FinCEN.

Section 311 of the USA PATRIOT Act grants the Secretary the authority, upon finding that reasonable grounds exist for concluding that a foreign jurisdiction, foreign financial institution, class of transactions, or type of account is of “primary money laundering concern,” to require domestic financial institutions and financial agencies to take certain “special measures” to address the primary money laundering concern. The five special measures enumerated under Section 311 are prophylactic safeguards that defend the U.S. financial system from money laundering and terrorist financing. FinCEN may impose one or more of these special measures in order to protect the U.S. financial system from these threats. To that end, special measures one through four, codified at 31 U.S.C. 5318A(b)(1)–(b)(4), impose additional recordkeeping, information collection, and information reporting requirements on covered U.S. financial institutions. The fifth special measure, codified at 31 U.S.C. 5318A(b)(5), allows the Secretary to prohibit or impose conditions on the opening or maintaining of correspondent or payable-through accounts by covered U.S. financial institutions for or on behalf of a foreign banking institution.

Taken as a whole, Section 311 provides the Secretary with a range of options that can be adapted to target specific money laundering and terrorist financing concerns most effectively. These options provide the authority to bring additional and necessary pressure on those

jurisdictions and institutions that pose money-laundering threats and the ability to take steps to protect the U.S. financial system. Through the imposition of various special measures, FinCEN can: gain more information about the concerned jurisdictions, financial institutions, transactions, and accounts; monitor more effectively the respective jurisdictions, financial institutions, transactions, and accounts; and, ultimately, protect U.S. financial institutions from involvement with jurisdictions, financial institutions, transactions, or accounts that pose a money laundering concern.

II. Administrative Background

On September 20, 2005, FinCEN published a finding in the Federal Register that reasonable grounds existed to conclude that BDA was a foreign financial institution of primary money laundering concern (Notice of Finding).¹ Simultaneous with publication of the Notice of Finding, FinCEN published a Notice of Proposed Rulemaking proposing the imposition of the fifth special measure against BDA.² On March 19, 2007, FinCEN published a final rule in the Federal Register imposing the fifth special measure against BDA, codified at 31 CFR 103.193 (subsequently renumbered as 31 CFR 1010.655) (Final Rule).³

Shortly after FinCEN concluded its rulemaking proceedings, in April 2007, BDA submitted a petition requesting the immediate rescission of the Final Rule. The following month, Stanley Au and Delta Asia Group (Holdings) Ltd., the owners of BDA, filed a separate petition for rescission of the Final Rule. FinCEN denied both petitions on September 21, 2007. On November 16, 2010, BDA again petitioned FinCEN to repeal the Final Rule. As part of an ongoing dialogue between FinCEN and BDA from 2012 through 2019, BDA agreed to arrange

¹ 70 FR 55214 (Sept. 20, 2005).

² *Id.* at 55217.

³ 72 FR 12731 (Mar. 19, 2007).

for two independent reviews of the bank, the results of which were subsequently shared with FinCEN.

By letter dated September 26, 2019, FinCEN ultimately denied BDA's November 2010 petition, providing BDA a memorandum thoroughly explaining its decision. In its denial, FinCEN discussed the results of the independent reviews of BDA and identified the limitations in these reviews. FinCEN acknowledged that BDA had taken steps to address some of the deficiencies highlighted in the Notice of Finding and Final Rule, but concluded that BDA had failed to correct other significant deficiencies. FinCEN ultimately determined that BDA's AML compliance efforts remained inadequate to address the risks identified in the Notice of Finding and Final Rule.

In addition to petitioning FinCEN to withdraw the Final Rule, BDA filed suit on March 14, 2013, in the United States District Court for the District of Columbia challenging the Notice of Finding and the Final Rule. This litigation was stayed for many years so that the dialogue described above could continue. Both FinCEN and BDA have since agreed that there are advantages to FinCEN's revisiting the Final Rule and to settling this litigation. This course of action allows BDA to submit any remaining additional comments and permits FinCEN to take stock of the present circumstances and, if appropriate, to avail itself of the informal rulemaking process (providing the public with an opportunity for notice and comment, in contrast to action on a petition) if it decides to take further action. As part of this settlement, FinCEN has agreed to reassess whether BDA is presently a financial institution of primary money laundering concern. BDA will be permitted to submit comments to FinCEN regarding the September 26, 2019, petition denial prior to FinCEN's engaging in any additional Section 311 rulemaking involving BDA.

In the event that FinCEN determines that the imposition of any special measures may be warranted, it will undertake a new rulemaking effort (including the publication of a new notice of proposed rulemaking). Any such proposed rule will allow for 30 days of comment, and as part of the rulemaking proceeding, FinCEN will make available for comment the unclassified, non-protected material relied upon by FinCEN in connection with any such rulemaking. If FinCEN determines that a final rule is appropriate, FinCEN will publish such a final rule 60 days following the close of the comment period. If the extent of submitted comments requires additional time, or if COVID-19-related issues hinder the agency's ability to satisfy the proposed timeframes, FinCEN will so announce in the Federal Register.

III. Repeal of the Final Rule

For the reasons set forth above, FinCEN hereby repeals the Final Rule. Elsewhere in this issue of the Federal Register, FinCEN is publishing a withdrawal of the Notice of Finding.

IV. Regulatory Matters

Although Section 553 of the Administrative Procedure Act (5 U.S.C. §§ 551 et seq.) requires notice and an opportunity for comment before an agency issues a final rule as well as a 30-day delayed effective date, it provides that an agency may dispense with these procedures when good cause exists. In this final rule, FinCEN has found that public comment procedures and delaying the effective date of the removal of the regulation would be contrary to the public interest. As discussed earlier in this document, FinCEN has agreed to reassess whether BDA is presently a financial institution of primary money laundering concern. Accordingly, FinCEN has found that good cause exists to dispense with prior notice and comment and a delay in effective date.

A. Executive Order 12866

It has been determined that this rulemaking is not a significant regulatory action for purposes of Executive Order 12866. Accordingly, a regulatory impact analysis is not required.

B. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act), Public Law 104–4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 202 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. FinCEN has determined that it is not required to prepare a written statement under Section 202 and has concluded that on balance the rule provides the most cost effective and least burdensome alternative to achieve the objectives of the rule.

C. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.), FinCEN certifies that this final regulation likely will not have a significant economic impact on a substantial number of small entities. The regulatory changes in this final rule merely remove the current obligations for financial institutions under 31 CFR 1010.654.

D. Paperwork Reduction Act

This regulation discontinues the Office of Management and Budget Control Number 1506–0041 assigned to the final rule and, as a result, reduces the estimated average burden of one hour per affected financial institution, totaling 5,000 hours. This regulation contains no new information collection requirements subject to review and approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d) et seq.).

List of Subjects in 31 CFR Part 1010

Administrative practice and procedure, Banks and banking, Brokers, Counter-money laundering, Counter-terrorism, Foreign banking.

Authority and Issuance

For the reasons set forth above, 31 CFR part 1010 is amended as follows:

PART 1010—GENERAL PROVISIONS

- 1. The authority citation for 31 CFR part 1010 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314, 5316–5332; Title III, sec. 314, Pub. L. 107–56, 115 Stat. 307; sec. 701, Pub. L. 114–74, 129 Stat. 599.

§ 1010.655 [Removed]

- 2. Section 1010.655 is removed.

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