

Notice to Members

APRIL 2007

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KEY TOPICS

Anti-Money Laundering

INFORMATIONAL

Anti-Money Laundering

NASD and NYSE Joint Release Regarding Special Measures against Specified Banks Pursuant to Section 311 of the USA PATRIOT Act

Executive Summary

This is to inform members¹ that the Financial Crimes Enforcement Network (FinCEN) has issued a final rule imposing a special measure,² effective **April 18, 2007**, against Banco Delta Asia SARL, including its subsidiaries Delta Asia Credit Limited and Delta Asia Insurance Limited (Banco Delta Asia or bank).³ Banco Delta Asia is a commercial bank in Macau, Special Administrative Region, China. This measure is comparable to that imposed against the Latvian bank VEF Banka and its subsidiaries, including Veiksmes Iizings.⁴

Questions/Further Information

NASD: Patricia Albrecht, Assistant General Counsel, OGC, at (202) 728-8026.

NYSE: Stephen Kasprzak at 212-656-5226 or Cory Figman at (212) 656-4893.

Background

The factors described in USA PATRIOT Act Section 311 (Section 311) are considered in determining whether reasonable grounds exist to conclude there is a primary money laundering concern. In addition, Section 311 provides various options to effectively target specific money laundering and terrorist financing concerns. The Director is required by the Bank Secrecy Act to consult with the Secretary of State and the Attorney General prior to finding that reasonable grounds exist for concluding that a foreign financial institution is of primary money laundering concern. Furthermore, in determining that an institution is of primary money laundering concern, Section 311 requires the Director to consider relevant

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information, including: (1) whether the institution is used to promote or facilitate money laundering in or through the jurisdiction; (2) if the institution is used for a legitimate business purpose in its jurisdiction; and (3) whether the action contemplated to be taken will fulfill the purposes of the Bank Secrecy Act and will prevent the financial institution from engaging in international money laundering and other financial crimes.

Appropriate special measures to address the money laundering risks must be applied if it is determined that reasonable grounds exist for concluding that a foreign financial institution is of primary money laundering concern. According to Section 311, the appropriate federal agencies and parties must be consulted and the following factors must be considered when imposing special measures:⁵ (1) whether other nations or multilateral groups have taken similar action; (2) if any special measure being imposed would create a significant competitive disadvantage for financial institutions organized or licensed in the United States; (3) the extent of any significant adverse systemic impact on the international payment, clearance and settlement system, or on the legitimate business activities of the institution; and (4) what effect there would be on the national security and foreign policy of the United States.

Discussion

FinCEN has issued a final rule that imposes special measures against Banco Delta Asia and its subsidiaries (the Specified Banks) in response to findings that the Specified Banks are financial institutions of primary money laundering concern. Under the special measures, covered financial institutions, which include broker-dealers, are subject to the following requirements with respect to the Specified Banks:

Prohibition of the Direct Use of Correspondent Accounts by the Specified Banks

Covered financial institutions are prohibited from opening or maintaining a correspondent account⁶ in the United States for, or on behalf of, the Specified Banks. This prohibition requires all covered financial institutions to review their account records to ensure that they maintain no accounts directly for, or on behalf of, the Specified Banks.

Due Diligence to Prevent Indirect Use

As a corollary to the prohibition on the opening or maintaining of correspondent accounts directly for the Specified Banks, each covered financial institution is required to apply due diligence to its correspondent accounts that is reasonably designed to guard against their indirect use by the Specified Banks. At a minimum, such due diligence must include two elements:

1) Notification to Correspondent Accountholders

A covered financial institution must notify its correspondent accountholders that their account(s) may not be used to provide the Specified Banks with access to the covered financial institution. The purpose of the notice requirement is to help ensure that the Specified Banks are denied access to the United States financial system, as well as to increase awareness within the international financial community of the risks and deficiencies of the Specified Banks. However, the final rules emphasize that FinCEN is not requiring or expecting financial institutions to obtain a certification from their correspondent accountholders that indirect use will not be provided.

Although FinCEN makes clear that covered financial institutions have flexibility in choosing their method of notification, sample notification language which may be used for this purpose is provided, as follows:

"Notice: Pursuant to U.S. regulations issued under section 311 of the USA PATRIOT Act, 31 CFR 103.192, we are prohibited from opening or maintaining a correspondent account for, or on behalf of, [the Specified Banks]. The regulations also require us to notify you that your correspondent account with our financial institution may not be used to provide [the Specified Banks] with access to our financial institution. If we become aware that [the Specified Banks] are indirectly using the correspondent account you hold at our financial institution, we will be required to take appropriate steps to prevent such access, including terminating your account."

Methods of compliance with the notice requirement could include, for example, transmitting a one-time notice by mail, fax or email, or including such information in the next regularly occurring transmittal from the covered financial institution to its correspondent accountholders. Each covered financial institution must document its compliance with the requirement that it notify its correspondent accountholders that the accounts may not be used to provide the Specified Banks with access to the covered financial institution.

2) Identification of Indirect Use

A covered financial institution must take reasonable steps in order to identify any indirect use of its correspondent accounts by the Specified Banks, to the extent that such indirect use can be determined from transactional records maintained by the covered financial institution in the normal course of business. A covered financial institution must take a risk-based approach when deciding what, if any, additional due diligence measures it should adopt to guard against the indirect use of correspondent accounts by the Specified Banks, based on risk factors such as the type of services offered by, and geographic locations of, its correspondents. Unlike the duties imposed under the one-time notification requirement, covered financial institutions have an ongoing obligation to take reasonable steps to identify all correspondent account services they may directly or indirectly provide to the Specified Banks.

Members are urged to consult the following links for further details:

- ▶ www.fincen.gov/bda_final_rule.pdf (for additional information regarding the final rule issued against Banco Delta Asia and its subsidiaries);
- ▶ www.fincen.gov/vef_final_rule_070706.pdf; and
- ▶ www.fincen.gov/reg_section311.html (for information on all special measures issued by FinCEN and to sign up for email notifications when Section 311 special measures are updated).

Endnotes

- 1 For purposes of this joint release, the term “member” refers to NYSE member organizations and NASD members.
- 2 The rule was issued pursuant to the authority contained in 31 U.S.C. 5318A. Section 311 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) added Section 5318A to the Bank Secrecy Act and granted the Secretary of the Treasury, in consultation with the Departments of Justice and State and appropriate federal financial regulators, the authority, after finding that reasonable grounds exist for concluding that a foreign jurisdiction, foreign financial institution, international class of transactions or type of account is of “primary money laundering concern,” to require domestic financial institutions and domestic financial agencies to take certain “special measures” against the primary money laundering concern.
- 3 See 72 FR 12730 (March 19, 2007).
- 4 See 71 FR 39554 (July 13, 2006) available at www.fincen.gov/vef_final_rule_070706.pdf.
- 5 See 31 U.S.C. 5318(c)(1).
- 6 For purposes of these final rules, a “correspondent account” is defined as an account established to receive deposits from, or make payments or other disbursements on behalf of, a foreign bank, or handle other financial transactions related to the foreign bank (see 31 U.S.C. 5318A(e)(1)(B) as implemented in 31 C.F.R. 103.175(d)(1)(ii)).

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