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October 17, 2005

*Via e-mail:* *regcomments@fincen.gov* [as requested]
*regcomments@fincen.treas.gov* [as corrected by FinCEN staff][1]

Mr. William J. Fox
Director
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

**Re: Banco Delta Asia S.A.R.L (RIN 1506-A83)**

Dear Director Fox:

On behalf of Banco Delta Asia S.A.R.L. ("Banco Delta Asia" or the "Bank"), we write to provide comments on the Financial Crimes Enforcement Network's ("FinCEN") notice of proposed rulemaking, published in the Federal Register on September 20, 2005 (the "Notice").[2] After receiving the Notice, Banco Delta Asia retained Heller Ehrman LLP to initiate an internal review of the Bank's operations as they relate to the allegations contained in the Notice. Heller Ehrman, in turn, retained Collier Shannon Scott, PLLC to assist it connection with the Bank's response to the Notice.

In the Notice, FinCEN designated the Bank as a financial institution of "primary money laundering concern" and proposed a rule implementing the fifth measure under Section 311 of the USA PATRIOT Act against Banco Delta Asia, which would prohibit U.S. banks from opening or maintaining correspondent accounts with the Bank (the "Proposed Measure"). For the reasons set forth below, we respectfully request that FinCEN not adopt the Proposed Measure

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1 We note that the e-mail address set forth in the Notice for the submission of comments on the Proposed Measure is incorrect and, as of the date of this letter, no correction has been published. We further note that we were only able to obtain the correct e-mail address upon inquiring of the FinCEN staff.

2 70 Fed. Reg. 55, 217.

and revoke the Notice designating Banco Delta Asia as a financial institution of "primary money laundering concern."[3]

## I. Summary of Points

Banco Delta Asia cannot respond in detail to the allegations contained in the Notice issued by FinCEN within the 30 day comment period and respectfully requests that FinCEN allow it more time to complete its investigation that is currently underway. However, in view of the gravity of the allegations and their impact on the Bank's business as a whole, the Bank and the Macau Government have, even before the completion of the ongoing investigation, initiated a series of remedial steps and measures, which are described below. Banco Delta Asia respectfully submits that FinCEN should not adopt the Proposed Measure in light of the following remedial measures and developments that have occurred or been initiated since the publication of the Notice:

- The Government of Macau, a Special Administrative Region of the People's Republic of China ("PRC"), has appointed a three-person Administrative Committee to take over management of Banco Delta Asia. The Administrative Committee has appointed a new management team to run the Bank.

- The Bank has terminated all accounts of and business with North Korean entities as well as non-North Korean entities that do business with North Korean entities.

- The Bank will no longer provide financial services of any kind to North Korean entities and non-North Korean entities that do business with North Korean enterprises.

- The Macau Government has retained Ernst & Young LLP to lead an investigation into matters relating to the Bank's prior North Korean business.

- The Administrative Committee has retained another major U.S. accounting firm, Deloitte Touche Tohmatsu, to devise and then implement a revised and enhanced anti-money laundering ("AML") program.

In short, the Bank -- and the Macau Government -- has taken remedial steps to address the concerns raised by FinCEN in its Notice despite the fact that the investigations currently underway have not yet been completed. We also understand from the Macau Monetary Authority[4] that the executive branch of the Macau Government has approved new draft

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3 We note that FinCEN previously revoked the designation of the Ukraine as a jurisdiction of "primary money laundering concern" based, in part, on the Ukraine's efforts to introduce enhanced anti-money laundering legislation. See 68 Fed. Reg. 19,071 (Apr. 17, 2003).

4 The Macau Monetary Authority is a state agency that operates as a quasi-central bank and is the regulator of depositary financial institutions such as Banco Delta Asia.

AML/CFT (anti-money laundering and combating the financing of terrorism) legislation[5] for submission to the newly elected Legislative Assembly, which convened today, October 17, 2005.

Furthermore, Banco Delta Asia respectfully submits that FinCEN should not adopt the Proposed Measure in light of the considerations that FinCEN must take into account when rulemaking:

- Prior to the Notice, no other nation or multilateral group took similar action against the Bank. Following the Notice, the Macau Government has taken control of the Bank. FinCEN has not proposed any rulemaking against Macau. Nor is Macau on the Financial Action Task Force's list of Non-Cooperative Countries and Territories.

- Adoption of the Proposed Measure will have a damaging effect on legitimate business activities in Macau that have nothing to do with North Korea.

- Because the Government of Macau now controls the Bank, adoption of the Proposed Measure is effectively action against Macau. Because Macau is a Special Administrative Region of the PRC, such action could impact on Sino-American relations, which are crucial to U.S. interests.

## II. The Bank Is Under New Management

Following the publication of the Notice, the Macau Government assumed control of the Bank. Pursuant to Executive Ruling No. 309/205, the Chief Executive of Macau directed the formation of a three-person Administrative Committee, which assumed control of the Bank on September 29, 2005, when the former members of the Bank's board of directors resigned and were replaced by the Administrative Committee. The members of Administrative Committee are (i) Herculano Jorge Sousa, the Chief Executive Officer of Banco Nacional Ultramarino S.A., one of Macau's note-issuing banks and a subsidiary of Caixa Geral de Depositos of Portugal[6]; (ii) Lei Chin Cheng, the deputy director of the Macau Monetary Authority's internal audit department; and (iii) Maria de Lurdes Costa, a lawyer at Jorge Neto Valente, a prominent Macau law firm. Under relevant empowering legislation,[7] the powers of the general meeting and the audit committee of the Bank have been suspended and are now vested in the Macau Monetary Authority.

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5 We understand from the Monetary Authority of Macau that the legislation is entitled "Prevention and Repression of Money Laundering" and "Prevention and Repression of Terrorist Activities."

6 Caixa Geral de Depositos of Portugal operates a state licensed branch in New York, New York whose license was approved by the Federal Reserve System on September 27, 1999.

7 The Financial System Act (approved by Decree - Law No. 32/93/M).

The Administrative Committee has full authority to run the Bank and is accountable only to the Macau Government. All former heads of the Bank's nine departments have been terminated and the Administrative Committee has appointed a team of individuals from outside the Bank to run each of these departments. These new employees report directly to the Administrative Committee.

## III. The Bank's New Management Has Taken Steps to Address FinCEN's Concerns

Under the control of the Macau Government, Banco Delta Asia has taken steps to address FinCEN's concerns about the Bank's provision of financial services to North Korean entities. *First*, Banco Delta Asia has terminated all of its accounts with North Korean entities and non-North Korean entities that do business principally with North Korean entities.[8] This has resulted in the closure of accounts with approximately 50 entities: (i) 20 North Korean banks, (ii) 11 North Korean trading companies, (iii) nine North Korean citizens, (iv) eight Macau-based companies that conduct business with North Korean entities, and (v) two Macau citizens or permanent residents who conduct business with North Korean entities. On a going forward basis, it is our understanding that Banco Delta Asia will not provide any financial services to North Korean entities or non-North Korean entities that do business with North Korean entities.

*Second*, Banco Delta Asia has commenced an active investigation into the Bank's historical North Korean business. Upon taking over the Bank, the Macau Government retained Ernst & Young LLP to conduct a review of the Bank's North Korean business and related matters. Ernest & Young's mandate includes, among other things, (i) reviewing all of the North Korean accounts to determine the types of transactions that were handled by the Bank, and (ii) determining the amount of revenue generated from North Korean business relative to the Bank's overall business. Presently, Ernst & Young has approximately 14 people on the ground in Macau and is coordinating its interviews of Bank staff with Heller Ehrman.[9] Given the circumstances, the Bank cannot address in detail the allegations made against it in the Notice until Ernst & Young completes its investigation.

*Third*, although the Bank had an AML program prior to the Notice, it plans to substantially revise and enhance the existing AML policies and procedures of the program. The Administrative Committee has retained Deloitte Touche Tohmatsu to review the Bank's existing

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8 In respect of certain non-North Korean account holders, the Bank is contractually committed to honor obligations undertaken by the Bank prior to September 29, 2005 in respect of two L/C transactions. These obligations will fall due during October and November 2005 respectively. The amounts involved are HKD 2.7 million (US $346,154) and HKD 5.4 million (US $692,308). Thereafter, no further business will be transacted on behalf of these account holders.

9 The Bank retained Heller Ehrman prior to the Macau Government's intervention. The Macau Government subsequently ratified Heller Ehrman's retention.

AML program and to devise and implement a revised and enhanced AML program that will incorporate best practices.

Based on the above actions, we respectfully submit that, even to the extent the Bank was ever a financial institution of "primary money laundering concern," such designation is no longer valid.

## IV. The Macau Legislature Will Be Considering New AML Legislation this Fall

Prior to the Notice, Macau financial institutions were subject to AML laws that required, among other things, the filing of suspicious activity reports with the Macau Monetary Authority. Earlier this year, the executive branch of the Macau Government circulated draft legislation concerning revised and enhanced AML/CFT laws to interested parties for comment. Now that comments have been received, the executive branch of the Macau Government has approved the draft legislation for submission to the newly elected Macau Legislative Assembly, which convened today, Monday, October 17, 2005. While these developments have occurred independently of FinCEN's action, the Notice has evidently underscored the need to promptly enact enhanced AML/CFT laws.[10]

We understand further from the Macau Monetary Authority that this legislation will regulate Macau-based financial institutions, as well as offshore finance, insurance and currency exchange companies. The draft legislation also covers companies under the supervision of the Gaming Inspection and Coordination Bureau, such as casinos and other gaming, betting and lottery operators, as well as companies dealing in high-value merchandise, precious metals, precious stones and luxury vehicles, property agents and pawnbrokers. In addition, lawyers, notaries, auditors, registrars, accountants, financial consultants and trust administrators will be subject to the new legislation, when it is passed into law by the Macau legislature.

## V. The Factors that FinCEN Must Consider in Rulemaking Weigh Against Adoption of the Proposed Rule

Even if FinCEN were correct in finding that the Bank was a financial institution of "primary money laundering concern" prior to the issuance of the Notice -- a finding that the Bank cannot address in detail until the completion of Ernst & Young's investigation -- and that such a designation is still applicable, FinCEN is required by statute to consider four factors before adopting a rule implementing the Proposed Measure. As explained below, these factors militate against such adoption.

*First*, FinCEN must determine "whether similar action has been or is being taken [against the Bank] by other nations or multilateral groups." 31 U.S.C. § 5318A(a)(4)(B)(i). In this case, no

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10 We note that the Macau Government sought technical advice and assistance from the Monetary and Financial Systems Department of the International Monetary Fund with regard to, among others, reviewing and advising on AML/CFT compliance procedures and improvements thereto. The IMF issued its report in July 2004.

similar actions have been taken against the Bank by other nations or multilateral groups prior to the Notice. Since the issuance of the Notice, however, the Macau Government has taken over control of the Bank and has, as set forth above, caused the Bank to cease its North Korean business and implement an enhanced AML program. In light of the actions taken by the Macau Government, the Bank respectfully submits that further action by FinCEN is not warranted.

Further, we have reviewed prior rulemaking by FinCEN pursuant to Section 311 of the USA PATRIOT Act and note that FinCEN has never taken action directed specifically at Macau, which now controls the Bank. Similarly, our review of such rulemakings demonstrates that the Financial Action Task Force on Money Laundering ("FATF"), which has previously designated certain jurisdictions like Burma (Myanmar) as a Non-Cooperative Country and Territory ("NCCT"), has never designated Macau as such. The FATF's designation of Burma as an NCCT was cited in prior FinCEN rulemaking as a significant reason for FinCEN's decision to adopt the fifth special measure against Burma and two Burmese banks, Asia Wealth Bank and Myanmar Mayflower Bank. See 69 Fed. Reg. 19,098, 19,099 (Apr. 12, 2004). Moreover, Burma did little to address FinCEN's concerns after FinCEN's proposed rulemaking against it and the two aforementioned banks. See Id.

In contrast, the Macau Government has taken concrete steps to address FinCEN's concerns, and intends to submit to the newly elected Macau legislature new and enhanced AML/CFT laws this year. Thus, the case is more analogous to that of Ukraine, where FinCEN withdrew its notice of proposed rulemaking after Ukraine took steps to satisfy FinCEN's concerns. See 68 Fed. Reg. 19,071 (Apr. 17, 2003).

*Second*, FinCEN must determine "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." 31 U.S.C. § 5318A(a)(4)(B)(ii). We respectfully submit that the Proposed Measure's effect on U.S. financial institutions weighs neither for nor against adoption of the proposed rule.[11]

*Third*, FinCEN must determine "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, institution, or class of transactions." 31 U.S.C. § 5318A(a)(4)(B)(iii). In the case of Asia Wealth Bank and Myanmar Mayflower Bank, FinCEN found that neither bank was permitted, under Burma's banking system, to deal in foreign exchange and that it was unlikely that either bank

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11 We note, however, that the Securities Industry Association (the "SIA") has submitted to FinCEN numerous comment letters in connection with rulemaking proceedings that sought to adopt the fifth special measure. The SIA stated that this measure would require a U.S. financial institution to notify all of its correspondent account holders that they may not provide a designated entity with access to the U.S. bank's correspondent accounts. In the SIA's opinion, this would be "unnecessarily burdensome, redundant, and not the most effective way of achieving the goals of the proposal."

was actually engaging in "any legitimate business activities at this time." 69 Fed. Reg. 19,098, 19,101 (Apr. 12, 2004).

In this case, the adoption of the proposed rule will have a significant and deleterious effect on legitimate business activities in Macau. In its Notice, FinCEN acknowledged that "Banco Delta Asia likely engages in some legitimate activity . . . ." (Notice at 10.) Based on a preliminary internal review of the Bank's business, we understand that, in terms of revenue, over 90% of the Bank's business had nothing to do with North Korea.[12] Moreover, the Bank is not conducting any North Korean business at present. Thus, any action by FinCEN will affect retail and commercial banking services that are provided to customers that have nothing to do with North Korea.

The publication of the Notice has already disrupted the Bank's provision of its non-North Korean banking services. All of Banco Delta Asia's U.S. correspondent banks have notified the Bank of the termination of their correspondent accounts with the Bank. More importantly, the Notice caused a crisis in confidence by the Bank's depositors. In the six days following the Notice, depositors withdrew deposits exceeding 34% of the Bank's total deposits. On September 15, 2005, the Bank had a total of MOP 3,119,110,000 (US $389,888,750) in customer deposits. By September 21, the Bank had lost MOP 1,062,808,000 (US $132,851,000) in customer deposits. In order to permit the Bank to honor its ongoing and maturing obligations related to its non-North Korean business, the Macau Monetary Authority has had to intervene and provide, and is continuing to provide, the Bank with significant liquidity. Although the run on the Bank has since stopped, adoption of the Proposed Measure would in all likelihood result in the Bank's collapse.

*Fourth*, FinCEN must determine "the effect of the action on United States national security and foreign policy." 31 U.S.C. § 5318A(a)(4)(B)(iv). If FinCEN were to adopt the Proposed Measure, it would effectively be taking action against Macau because the Macau Government now controls the Bank. Because Macau is a Special Administrative Region of the PRC, a representative agency of the PRC Government in Macau has been apprised of and is concerned with FinCEN's action to-date. Such concern is likely to increase, should FinCEN proceed to adopt the Proposed Measure. Further, such action by FinCEN could also impact upon Sino-American relations, which are necessary, inter alia, for ensuring the continuation of the multilateral negotiations with North Korea. Consequently, this factor similarly weighs against adoption of the Proposed Measure.

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12 The extent of the Bank's non-North Korean business is one of the subjects of Ernst & Young's current review of the Bank's operations.

For the reasons set forth above, we respectfully request that FinCEN not adopt the Proposed Measure and rescind the Notice including the finding that Banco Delta Asia is a financial institution of "primary money laundering concern."

We have previously requested an in-person meeting with FinCEN to discuss the issues discussed above. FinCEN, however, has refused to meet. We reiterate our request for an in-person meeting. A meeting will provide Banco Delta Asia with the opportunity to be heard and the ability to determine (i) whether the actions it has taken to date are sufficient, (ii) what further actions, if any, may be necessary to dissuade FinCEN from adopting the Proposed Measure, and (iii) what evidence FinCEN has relied upon in finding that the Bank is a financial institution of "primary money laundering concern."

It is particularly difficult for Banco Delta Asia to make these determinations within the comment period without feedback from FinCEN because the Bank is not ordinarily subject to U.S. law and is unaccustomed to dealing with both FinCEN and the quasi-adjudicative rulemaking process created by the USA PATRIOT Act. Further, the Bank requests that FinCEN produce evidence, or at least provide further particulars of the evidence, that it relied upon in making its factual findings. Banco Delta Asia respectfully submits that its requests are reasonable and constitute the minimum process required to ensure that the Bank is treated fairly.

Finally, as we noted previously, the e-mail address set forth in the Notice for the submission of comments on the Proposed Measure is incorrect and we were only able to obtain the correct email address upon inquiring of the FinCEN staff. Consequently, any commenters who relied on the e-mail address as published in the Notice may have been unable to submit their comments electronically. As a result, we request that you consider whether issuing a supplemental notice would provide a more meaningful opportunity for others to comment on the Proposed Measure.

Thank you for your attention to these matters. We look forward to discussing these issues with you in person at your earliest convenience.

Sincerely,

James D. Barnette

cc: Hon. Thomas J. Bliley, Jr.
Joseph T. McLaughlin, Esq.
Paul D. Downs, Esq.