



FIN-ADMINX-10-2016

Issued: October 7, 2016

Subject: **Exception to Prohibition Imposed by Section 311 Action against Burma**

The Financial Crimes Enforcement Network (FinCEN) hereby provides exceptive relief under 31 U.S.C. § 5318(a)(7) and 31 C.F.R. § 1010.970 to U.S. financial institutions covered by 31 C.F.R. § 1010.651 (FinCEN's rule imposing special measures against Burma under Section 311 of the USA PATRIOT Act). This exceptive relief permits such financial institutions to maintain correspondent accounts for Burmese banks under certain conditions.

FinCEN has the authority, under 31 U.S.C. § 5318(a)(7) and 31 C.F.R. § 1010.970, to make exceptions to the requirements of 31 C.F.R. Chapter X. Such exceptions may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. Moreover, an exception is issuable or revocable in the sole discretion of FinCEN, based on the circumstances to which the exception applies. In this case, FinCEN has determined that the following exception is appropriate:

The provisions of paragraphs (b)(1) and (2) of section 31 C.F.R. § 1010.651 shall not apply to a correspondent account that is established, maintained, administered, or managed in the United States by a covered financial institution (as defined in 31 C.F.R. § 1010.651(a)(3)) for, or on behalf of, a Burmese banking institution, provided that such covered financial institution subjects the account to the due diligence obligations set forth under Section 312 of the USA PATRIOT Act and its implementing regulation 31 C.F.R. § 1010.610.

FinCEN is providing this exceptive relief given (i) FinCEN's assessment of Burma's progress to date in addressing issues identified in FinCEN's 2003 finding that Burma was a jurisdiction of primary money laundering concern; (ii) a high-level commitment by Burma to continue making progress in addressing those issues; and (iii) FinCEN's consideration of the ongoing effect on U.S. national security and foreign policy of U.S. financial institutions' compliance with 31 C.F.R. § 1010.651.

Section 311 Action against Burma

On November 18, 2003, FinCEN found Burma to be a jurisdiction of primary money laundering concern pursuant to 31 U.S.C. § 5318A, as added by Section 311 of the USA PATRIOT Act of 2001 (Section 311).¹ FinCEN based its finding on a number of factors, including (i) Burma's lack of an effective anti-money laundering/countering the financing of terrorism (AML/CFT) regime; (ii) high levels of public corruption in Burma; (iii) a recognition that Burma is a haven for international drug trafficking; and (iv) a lack of cooperation by Burma with U.S. law enforcement agencies in criminal matters. In connection with this finding, on April 12, 2004,

¹ 68 Fed. Reg. 66299 (Nov. 25, 2003).

FinCEN issued a final rule at 31 C.F.R. § 1010.651 prohibiting U.S. financial institutions from maintaining U.S. correspondent accounts for Burmese banking institutions.²

Burma's Progress in Addressing the Concerns Described in the Section 311 Finding

Since FinCEN promulgated the final rule in 2004, Burma has taken steps to improve its AML/CFT regime and to address the issues of corruption, drug trafficking, and law enforcement cooperation.

Improvements to Burma's AML/CFT Regime

FinCEN's finding noted that "the Burmese anti-money laundering law is ineffective and unenforceable" and could not be regarded as effectively remedying a number of AML/CFT deficiencies, including that: (i) the Burmese Central Bank had no anti-money laundering regulations for financial institutions; (ii) banks licensed by Burma were not legally required to obtain or maintain identification information about their customers; (iii) such banks were also not required to maintain transaction records of customer accounts; and (iv) Burmese financial institutions were not required to report suspicious transactions.³

Since 2012, Burma has made significant progress in addressing the strategic AML/CFT deficiencies identified by the Financial Action Task Force (FATF),⁴ which resulted in its removal in June 2016 from the FATF's public list of countries with strategic AML/CFT deficiencies. In 2013, the Burmese Central Bank, which previously had been part of the Ministry of Finance, became independent. Through its 2014 Money Laundering Law and the Burmese Central Bank's 2015 customer due diligence directive, Burma now requires financial institutions to conduct due diligence and know the true identity of their customers including beneficial owners. Burma has criminalized money laundering and terrorist financing, and it has established a legal framework to implement targeted financial sanctions under United Nations Security Council Resolutions (UNSCR) 1267, 1373, and related resolutions. Further, Burma has established a financial intelligence unit and made progress in ensuring that it has operational and budgetary independence.

Actions Addressing Public Corruption in Burma

FinCEN's finding noted that, as of 2003, Transparency International – the leading international non-governmental organization devoted to curbing corruption – ranked Burma as "the fourth most corrupt jurisdiction out of 133 jurisdictions assessed worldwide."⁵ Burma has taken some significant steps to address public corruption. In 2012, Burma ratified the UN Convention

² 69 Fed. Reg. 19093 (Apr. 12, 2004) (codified at 31 C.F.R. § 1010.651).

³ 68 Fed. Reg. at 66300.

⁴ The FATF is an inter-governmental body that sets standards and promotes effective implementation of legal, regulatory, and operational measures for combating money laundering, terrorist financing, and other related threats to the integrity of the international financial system.

⁵ 68 Fed. Reg. at 66302.

against Corruption.⁶ Burma passed an Anti-Corruption Law in 2013 (and amended it in 2016), improving its ability to receive and investigate allegations of official corruption.

Attention to International Drug Trafficking

FinCEN's 2003 finding identified Burma as "a haven for international drug trafficking" and noted that Burma had failed to take any regulatory or enforcement action against financial institutions with well-known criminal links.⁷ Burma is in the process of restructuring and expanding its counternarcotic task forces and Burma has worked regionally on counternarcotics initiatives, including those coordinated through the United Nations Office on Drugs and Crime.

Cooperation with U.S. Law Enforcement Agencies in Criminal Matters

FinCEN noted in its 2003 finding that U.S. law enforcement indicated that they rarely gained access to bank-related information pursuant to investigations, and that they received no cooperation regarding counterfeiting investigations involving Burma.⁸

U.S. law enforcement indicates that cooperation with Burmese authorities has since improved. For example, in September 2014, the U.S. and Burmese governments signed a Letter of Agreement to enhance cooperation in the fight against illicit drugs and transnational crime, and to support the development of Burma's law enforcement capacity and promote the rule of law.

FinCEN's Remaining Concerns

FinCEN is encouraged by Burma's progress thus far, but believes that Burma has not yet fully addressed the concerns articulated in the 2003 finding.

Although Burma has made a number of technical improvements to its AML/CFT regime, FinCEN remains concerned that Burma has not yet implemented its new reforms and has not displayed adequate effectiveness in mitigating the risks and threats of money laundering and terrorist financing. FinCEN also notes that a significant portion of financial activity in Burma relies upon informal money transfer systems, which remain largely unregulated and unsupervised.

FinCEN is also concerned that Burma has not sufficiently addressed the corruption issues identified in the 2003 finding. Burma's ranking on Transparency International's International Corruption Perceptions Index remains high. The U.S. State Department's 2016 International Narcotics Control Strategy Report on Burma notes that "corruption is endemic in both business and government...The rule of law remains weak, and Burma continues to face a significant risk of narcotics proceeds being laundered through commercial ventures."⁹

The United States also continues to recognize Burma as a haven for international drug trafficking. In September 2016, under the Foreign Relations Authorization Act, the President

⁶ United Nations Office of Drugs and Crime, *Myanmar becomes the 165th State Party to UN Convention on Corruption*, January 10, 2013.

⁷ 68 Fed. Reg. at 66300-301.

⁸ *Id.* at 66301.

⁹ U.S. State Department, *2016 International Narcotics Control Strategy Report*, available at <http://www.state.gov/j/inl/rls/nrcrpt/2016/vol2/253387.htm>

determined Burma to be a major illicit drug producing country or major drug-transit country.¹⁰ Further, Burma's cooperation with U.S. law enforcement, while improved since 2003, nonetheless remains nascent and largely untested.

Considerations for Exemptive Relief

As noted in the final rule, the Section 311 action was designed to encourage Burma to make necessary changes to its AML/CFT regime in order to address FinCEN's concerns. Burma has begun to address those concerns, but significant work remains. FinCEN welcomes Burma's recent commitment to work with FinCEN and other components of the U.S. Department of the Treasury, as well as with the U.S. government more broadly, in advancing its AML/CFT efforts. FinCEN has considered Burma's progress, its remaining deficiencies, and its commitment to address those deficiencies in deciding to issue this exemptive relief.

This exemptive relief also takes into account the effect of FinCEN's action on U.S. national security and foreign policy, as did the final rule.¹¹ FinCEN's final rule contained an exemption at 31 C.F.R. § 1010.651(b)(3) that allowed U.S. financial institutions to maintain correspondent accounts for Burmese banks if such activity was licensed under authorities administered by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC). Since 2012, OFAC has, via general licenses, authorized a broad range of financial activity with respect to Burma that would otherwise have been prohibited under the Section 311 rule. On October 7, 2016, the President terminated the national emergency with respect to Burma and revoked all Burma sanctions Executive orders, lifting the economic and financial sanctions on Burma administered by OFAC. As a result of the termination of the Burma sanctions program, the OFAC general licenses referenced above are no longer in effect. Therefore, the exemption incorporated into FinCEN's final rule at 31 C.F.R. § 1010.651(b)(3), which effectively permitted U.S. correspondent account activity with Burmese banks, no longer has any operational effect. FinCEN has taken this into consideration in deciding to issue this exemptive relief.

* * * * *

Financial institutions with questions about this exemptive relief should contact FinCEN's Resource Center at (800) 949-2732.

¹⁰ See Section 706(1) of the Foreign Relations Authorization Act, Fiscal Year 2003 (Public Law 107-228); *2016 Presidential Determination for Major Drug Producing and Transit Countries*, available at <https://www.whitehouse.gov/the-press-office/2016/09/12/presidential-determination-major-drug-transit-or-major-illicit-drug>

¹¹ 69 Fed. Reg. at 19094.