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VIA ELECTRONIC MAIL

Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183-1618

Re: Imposition of Special Measure Against First Merchant Bank OSH Ltd., et al. - Section 311 - RIN 1506-AA65

Ladies and Gentlemen:

Through counsel, First Merchant Bank OSH Ltd., FMB Finance Ltd., First Merchant International Inc., First Merchant Finance Ltd., and First Merchant Trust Ltd. -- collectively "FMB" -- respectfully submit this letter in opposition to the Notice of Proposed Rulemaking, 69 Fed. Reg. 51979 (the "Proposed Rule"), issued by the Financial Crimes Enforcement Network of the Department of the Treasury ("FinCEN"), designating FMB as a "financial institution of primary money laundering concern" and imposing a "special measure" on FMB pursuant to § 311(a) of Title III of the USPATRIOT ACT of 2001 (the "Patriot Act").

FinCEN's determinations in the Proposed Rule are groundless, and the imposition of any special measure against FMB is unreasonable and contrary to the provisions of the Patriot Act.

The Proposed Rule designates FMB as a financial institution of primary money laundering concern pursuant to 31 U.S.C. § 5318A of the Bank Secrecy Act (as amended by § 311(a) of the Patriot Act), and sets forth FinCen's intent to impose one of the special measures described in 31 U.S.C. § 5318A(b)(1)-(5) upon FMB. Specifically, the Proposed Rule states that FinCEN intends to impose the fifth, and most prohibitive, special measure upon FMB, which precludes covered financial institutions from "establishing, maintaining, administering, or managing in the United States any correspondent account for, or on behalf of [FMB]." (Proposed Rule, at 51983). For the reasons discussed below, the Proposed Rule is based upon innuendo as well as unsupported and unproven allegations, and as a result should not be enacted.

I. Statutory Provisions

Section 311 of the Patriot Act ("Section 311"), which added Section 5318A to the Bank Secrecy Act (the "BSA"), grants the Secretary of the Treasury (the "Secretary") the authority, upon finding that "reasonable grounds exist for concluding that a . . . financial institution[] operating outside of the United States . . . is of primary money laundering concern," to require domestic financial institutions and financial agencies to take certain "special measures" against such an institution. See 31 U.S.C. § 5318A(a). In order to impose one or more of the "special measures" described in Section 311, the Secretary must make a two-step inquiry: first, the Secretary must conclude that reasonable grounds exist for concluding that a financial institution is of primary money laundering concern; and second, the Secretary must select which "special measure" or measures should be taken. For each inquiry, the Secretary is mandated to consider specified factors and consult with certain Federal agencies before reaching a conclusion.

In determining the first step of the inquiry -- whether reasonable grounds exist for concluding that a financial institution is of primary money laundering concern -- the Secretary is required to consult with the Secretary of State and the Attorney General, and in addition must consider:

> (i) the extent to which such financial institutions . . . are used to facilitate or promote money laundering in or through the jurisdiction;
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> (ii) the extent to which such institutions . . . are used for legitimate business purposes in the jurisdiction; and
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> (iii) the extent to which such action is sufficient to ensure, with respect to transactions involving the . . . institutions operating in the jurisdiction, that the purposes of this subchapter continue to be fulfilled, and to guard against international money laundering and other financial crimes.

31 U.S.C. § 5318A(c)(2)(B).

If the Secretary determines that reasonable grounds exist for concluding that a foreign financial institution is of primary money laundering concern, the Secretary must select which special measure, or measures, to impose. For this second determination, the Secretary must consult with the Chairman of the Board of Governors of the Federal Reserve System, the Secretary of State, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Nation Credit Union Administration Board, and any other appropriate Federal banking agency as defined in Section 3 of the Federal Deposit Insurance Act. In addition, the Secretary must consider:

> (i) whether similar action has been or is being taken by other nations or multilateral groups;
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> (ii) whether the imposition of any particular special measure would create a significant competitive disadvantage, including any undue cost or burden associated with compliance, for federal institutions organized or licensed in the United States;
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> (iii) the extent to which the action or the timing of the action would have a significant adverse systematic impact on the international payment, clearance, and settlement system, or on legitimate business activities involving the . . . institution; and
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> (iv) the effect of the action on United States national security and foreign policy.

31 U.S.C. § 5318A(a)(4).

II. There Is No Reasonable Basis For Determining That FMB Is A Financial Institution Of Primary Money Laundering Concern

The Proposed Rule sets forth a number of findings that apparently led the Secretary to determine that reasonable grounds exist for concluding that FMB is of primary money laundering concern. Each finding is groundless and inaccurate, or is based upon misleading and disingenuous information. The Proposed Rule purports to discuss each of the Section 311 factors relevant to the findings. These factors are reproduced below, together with a summary of the Secretary's findings for each factor, followed by FMB's objection to each finding.

A. The Extent to Which FMB Has Been Used To Facilitate or Promote Money Laundering in or Through the Jurisdiction

> *1. [FMB] is licensed as an offshore bank in the [Turkish Republic of Northern Cyprus ("TRNC")], a jurisdiction with inadequate anti-money laundering controls, particularly those applicable to the offshore sector.*

The Secretary found that because FMB operates out of TRNC, FMB is necessarily of primary money laundering concern, because "TRNC has a sizeable offshore sector that is not subject to anti-money laundering regulation." (Proposed Rule, at 51980). This finding is unreasonable and is based upon improper inference and conjecture.

Financial institutions operating out of TRNC are subject to well-established and strict anti-money laundering regulations, and are exposed to the jurisdiction of numerous governmental agencies. The Proposed Rule correctly notes that TRNC financial institutions are audited by the Turkish Cypriot Central Bank and are required to submit a yearly report on their activities. (Id.). However, the Proposed Rule incorrectly states that "the 'Central Bank' has no regulatory authority over offshore banks and can neither grant nor revoke licenses." (Id.). In fact, the Central Bank's responsibilities include much more than annual audits: it is instrumental, together with the Ministry of Finance, in the licensing process; and, if it learns of wrongdoing, it has the authority to take a variety of measures against TRNC financial institutions, including the revocation of licenses.

The Proposed Rule also states that TRNC financial institutions are subject to Turkish Cyrpiot Ministry of the Interior supervision, but that "the process [is] open to politicization and possible corruption." (Id.). However, other than conjecture, the Proposed Rule provides no evidence that the TRNC licensing process is in fact flawed. In reality, the Ministry of the Interior, together with the Central Bank and the Ministry of Finance, conduct the required due diligence and consult together before granting licenses.

The Proposed Rule also fails to note that other organizations supervise and regulate TRNC financial institutions. For example, the Financial Crime Prevention Committee of Turkey, an Organization for Economic Co-operation and Development ("OECD") member, regulates TRNC financial institutions through the investigation of financial crimes. This internationally recognized agency has counterpart task forces in the TRNC which are instructed to investigate and report on any financial criminal activity concerning TRNC financial institutions.

Finally, in addition to the various regulatory agencies, TRNC financial institutions are regulated by written law. The Proposed Rule notes that the "Turkish-Cypriot anti-money laundering law became effective in 1999," but that "[a]lthough the law, on paper, is a significant improvement over the money laundering controls previously in place, the Government of the 'TRNC' has received few suspicious activity reports from financial institutions and has been lax in enforcing the law." (Proposed Rule, at 51980). Even if this conclusory statement were credited, in addition to the TRNC anti-money laundering law, Turkey has been a signatory to the laws of the OECD since 1996. Through the Central Bank, TRNC financial institutions are held to the same OECD standards as financial institutions around the world.

Thus, the Secretary's finding that TRNC is "a jurisdiction with inadequate anti-money laundering controls" is without foundation. FMB is subject

to the regulation of a number of governmental agencies, including agencies that are tasked with upholding internationally recognized regulations. FMB is also audited annually (or bi-annually), and is subject to strict reporting requirements. There is no basis, therefore, to conclude that there is ineffective anti-money laundering regulation of TRNC financial institutions.

2. [FMB] is involved in the marketing and sale of fraudulent financial products and services.

The Proposed Rule states that "FinCEN has determined, based on a variety of sources, that [FMB] is used to facilitate or promote money laundering in or through the TRNC." (Proposed Rule, at 51981). In support of this finding, the Secretary noted that in January 2003, FMB's President, Chairman and General Manager, Dr. Hakki Yaman Namli ("Dr. Yaman"), was indicted by a grand jury sitting in the Southern District of New York (the "January 2003 Indictment"). The Secretary stated that the January 2003 Indictment charged Dr. Yaman "as a co-conspirator with an associate, Ralph Jarson, in a scheme to market 'credit enhancement' products, which consisted of deceptive bank documents showing that a customer had assets that did not exist, and to sell worthless 'credit facilities' to investors." (Proposed Rule, at 51981). The Secretary also noted that "because Dr. [Yaman] became a fugitive from justice he was not tried on the indictment; however, his associate, Ralph Jarson, was convicted on six felony counts, including one count of conspiring with Dr. [Yaman] to engage in wire fraud, and five counts of wire fraud, on October 30, 2003." (Id.).

The description of the January 2003 Indictment and subsequent trial of Mr. Jarson is flawed in several respects, and any reliance by the Secretary upon these findings is unreasonable. First, it is an axiom of law that the charges contained in an indictment cannot be used as evidence in a court of law and no adverse inference can be drawn against a defendant from any allegation in an indictment. See Taylor v. Kentucky, 436 U.S. 478, 484, 98 S.Ct. 1930, 1935 (1978) (upholding the maxim that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody or other circumstances not adduced as proof at trial"). Even in the instant context, where the government is not bound by the rules of evidence, the fact that an indictment has been returned against Dr. Yaman alone should not be used as credible evidence of wrongdoing by FMB. Furthermore, the indictment names Dr. Yaman, and not FMB. Notwithstanding this fact, the Proposed Rule purports to describe the acts upon which the indictment was based as having been acts performed by FMB, when in fact, the indictment charges Mr. Jarson and Dr. Yaman, and not FMB.

Other inaccuracies pervade the Proposed Rule's description of the charges. The reference to Dr. Yaman having "bec[o]me a fugitive from justice" is a complete mischaracterization of the truth. At all times -- from the time of the events referenced in the indictment, to the date the indictment was returned in January 2003, through the trial of Mr. Jarson, and continuing to the present date -- Dr. Yaman has resided in Turkey. Dr. Yaman has never fled from justice or "bec[o]me" a fugitive, as the Proposed Rule describes. Dr. Yaman has simply remained in his home country.

Most importantly, relevant facts concerning the January 2003 Indictment undermine a finding that FMB markets fraudulent or deceptive financial products. As set forth in the Proposed Rule, the January 2003 Indictment -- which was a superseding indictment -- describes two different schemes allegedly perpetuated by Mr. Jarson and Dr. Yaman. First, the indictment charged that Mr. Jarson and Dr. Yaman negotiated the sale of a "fraudulent special account statement . . . to an FBI undercover agent posing as a representative of a brokerage firm . . . ." (Proposed Rule, at 51981). Regarding the second scheme, the indictment charged that in exchange for $1 million, Mr. Jarson and Dr. Yaman issued a "worthless letter of credit with a face value of $100 million to an investor for the purchase of discounted medium term bank notes that the investor later discovered were non-existent." (Id.). Dr. Yaman was not charged in the initial indictment, which only alleged the first scheme.

With respect to first charged scheme, the bank document at issue was not deceptive on its face. The account statement provided that the holder had an "account position" of twenty-million U.S. dollars, but that the funds were available only "as per reference [number] and verifiable on a bank to bank basis." (Emphasis added). Thus, it was clear that the holder had a "position," not a cash balance, and that before any credit could be extended to the holder, the account statement had to be verified. During the trial of Mr. Jarson, the government played tape recordings to the jury of conversations between an undercover FBI agent, Mr. Jarson and/or Dr. Yaman, regarding the account statement; despite efforts on the part of the agent to encourage Dr. Yaman to remove the above-referenced language from the statement, Dr. Yaman refused to do so. This lack of evidence may have been the reason why Dr. Yaman was not charged with respect to the first scheme in the initial indictment.

Finally, the Proposed Rule neglects to discuss the fact that Mr. Jarson was acquitted on the charges relating to the second scheme, concerning the "credit facility." Nowhere in the Proposed Rule is there any discussion regarding the fact that the government's sole witness regarding the second scheme, Mr. Gerry Lepkanich, apparently perjured himself on numerous occasions on the witness stand and the jury completely discredited his testimony, as evidenced by its verdict. And while Mr. Lepkanich may have motivated the government to include Dr. Yaman in

the January 2003 Indictment (and charge him with the second and the first schemes) -- the government was contacted by Mr. Gerry Lepkanich, the sole trial witness who provided evidence concerning the second scheme, between the return of the initial indictment and the return of the January 2003 Indictment -- the testimony provided by Mr. Lepkanich was completely rejected by the jury. Absent the "appearance" of Mr. Lepkanich, Dr. Yaman might never have been charged.[1]

In sum, the January 2003 Indictment and the trial against Mr. Jarson do not establish that FMB markets the sale of fraudulent financial products and services.

3. [FMB] has been used as a conduit for the laundering of fraudulently obtained funds.

The Proposed Rule alleges that "it appears that [FMB] has used its correspondent accounts with banks in the U.S. as conduits for the transfer of fraudulently obtained funds." (Proposed Rule, at 51982). Specifically, the Proposed Rule states that:

> [i]n one case, $4 million in proceeds of a "prime bank" fraud were transferred through one of [FMB's] correspondent accounts in the U.S. to the perpetrator's account in the "TRNC." In another case, a former officer of a third bank wired $700,000 to the same correspondent account for the benefit of [FMB]. The third bank suspected that the funds derived from the former officer's misuse of position or self-dealing while employed at the bank.

(Id.). Neither of these vague allegations are evidence of alleged money laundering by FMB. FMB was established in 1993. For the last eleven years, it has been subject to annual (and sometimes bi-annual) audits from the Central Bank. Neither the Central Bank, the Ministry of Finance, the Financial Crime Prevention Committee of Turkey, nor any other governmental agency has ever found improprieties concerning FMB.

Regarding the alleged $4 million "prime bank" fraud, FMB has never been charged with any such wrongdoing. The alleged $700,000 fraud was nothing

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[1] The Secretary's statement that "[a] review of records obtained from a number of financial institutions in the U.S. shows a pattern of fraudulent conduct similar to that described in the indictment" does not provide FMB with enough detail on which to provide comment. To the extent that the Secretary relies on this evidence in reaching its conclusion that FMB is of primary money laundering concern, FMB requests additional details so that it may make informed comments.

more than an erroneous wire-transfer to FMB of money that was immediately retrieved by the ordering bank. Transactional mistakes of this nature, which are of no fault of the receiving financial institution, are commonplace in the banking business and happen to reputable financial institutions around the world.

4. *The individuals who own, control, and operate [FMB] have links with organized crime and apparently have used [FMB] to launder criminal proceeds.*

The Proposed Rule states that "[a]pparently, [FMB] was established, at least in part, to facilitate the movement of funds between organized crime rings and corrupt politicians." (Proposed Rule, at 51982). This finding is completely groundless and the Secretary provides no tangible evidence to substantiate it.

To support the baseless inference that FMB is engaged in wrongdoing, the Proposed Rule references former FMB shareholders and/or partners and their purported involvement with a variety of alleged improprieties. The Secretary charges that one individual, Mr. Kobarel, is alleged to have been involved in "transferring underground money to Russian banks." (Id.). Notwithstanding the complete conjectural nature of this finding, it is public record that Mr. Kobarel, a former shareholder who had sold his entire holding of FMB shares by 1995, is now the owner of a bank with more than 1,800 employees and is the leader of the Russian Orthodox Democratic Party. To FMB's knowledge, Mr. Kobarel has never been convicted of any crime. Another individual, Mr. Umit, is charged by the Secretary to have had links to the Turkish mafia. It is public record, however, that Dr. Yaman provided substantial assistance to the Turkish National Intelligence Organization in the effort to determine the perpetrators behind Mr. Umit's abduction. In fact, Dr. Yaman became the government's "crown witness" in the trial of the individuals who were charged in connection with Mr. Umit's disappearance. With Dr. Yaman's assistance, the government obtained convictions at the trial.

Thus, the Secretary's finding that "the individuals who own, control, and operate [FMB] have links with organized crime and apparently have used [FMB] to launder criminal proceeds" is based on misinformation and conjecture and is contrary to the public record.

B. The Extent to Which FMB Is Used For Legitimate Business Purposes in the Jurisdiction

The Proposed Rule states that given the evidence cited in the Proposed Rule and "the lack of evidence showing that the Bank is used for legitimate business purposes," FMB "is rarely, if ever, used for legitimate business transactions and any legitimate use of [FMB] is significantly outweighed by their

use to promote or facilitate money laundering." (Proposed Rule, at 51982). This statement is groundless. FMB's activities and income statements are a matter of public record. FMB's income derives from trade finance, international tenders, private banking, asset management, loan securitization and other banking activities within the laws and regulations of TRNC, Turkey and the international community.

* * * *

The Secretary's findings in the Proposed Rule are based upon inference, innuendo and conjecture. Little or no evidence is given for each finding. The circumstances surrounding the Southern District of New York indictment against Dr. Yaman, which is the only finding that the Secretary describes with any detail, have been overstated and misconstrued.

In sum, any imposition of a special measure by the Secretary -- let alone the most prohibitive measure -- would be an arbitrary and capricious use of the Secretary's rulemaking authority under the Patriot Act and would be contrary to law. Accordingly, the Proposed Rule should not be enacted.

Respectfully submitted,

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