

purposes occurring after December 31, 2000, *see* § 26.2642–6.

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## DEPARTMENT OF THE TREASURY

### 31 CFR Part 103

RIN 1506–AA67

#### **Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations—Imposition of Special Measure Against Infobank as a Financial Institution of Primary Money Laundering Concern**

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** FinCEN is issuing this notice of proposed rulemaking to impose a special measure against Infobank as a financial institution of primary money laundering concern, pursuant to the authority contained in 31 U.S.C. 5318A of the Bank Secrecy Act.

**DATES:** Written comments on the notice of proposed rulemaking must be submitted on or before September 23, 2004.

**ADDRESSES:** You may submit comments, identified by RIN 1506–AA67, by any of the following methods:

- *Federal e-rulemaking portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *E-mail:* [regcomments@fincen.treas.gov](mailto:regcomments@fincen.treas.gov). Include RIN 1506–AA67 in the subject line of the message.
- *Mail:* FinCEN, P.O. Box 39, Vienna, VA 22183. Include RIN 1506–AA67 in the body of the text.

**Instructions:** It is preferable for comments to be submitted by electronic mail because paper mail in the Washington, DC, area may be delayed. Please submit comments by one method only. All submissions received must include the agency name and the Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to <http://www.fincen.gov>, including any personal information provided. Comments may be inspected at FinCEN between 10 a.m. and 4 p.m., in the FinCEN reading room in Washington, DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354–6400 (not a toll-free number).

**FOR FURTHER INFORMATION CONTACT:** Office of Regulatory Programs, FinCEN, (202) 354–6400; and Office of Chief Counsel, FinCEN, at (703) 905–3590 (not toll-free numbers).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

###### *A. Statutory Provisions*

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 (the USA Patriot Act), Pub. L. 107–56. 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 part 103. The authority of the Secretary of the Treasury (Secretary) to administer the BSA and its implementing regulations has been delegated to the Director of FinCEN.

Section 311 of the USA Patriot Act (section 311) added section 5318A to the BSA, granting the Secretary the authority, upon finding that reasonable grounds exist for concluding that a foreign jurisdiction, 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” against the primary money laundering concern. Section 311 identifies factors for the Secretary to consider and agencies to consult before the Secretary may conclude that a jurisdiction, institution, or transaction is of primary money laundering concern. The statute also provides similar procedures, *i.e.*, factors and consultation requirements, for selecting the imposition of specific special measures against the primary money laundering concern.

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 give the Secretary the authority to bring additional and useful pressure on those jurisdictions and institutions that pose money laundering threats. Through the imposition of various special measures, the Secretary can gain more information about the concerned jurisdictions, institutions, transactions, and accounts; can more

effectively monitor the respective jurisdictions, institutions, transactions, and accounts; and/or can protect U.S. financial institutions from involvement with jurisdictions, institutions, transactions, or accounts that pose a money laundering concern. Before making a finding that reasonable grounds exist for concluding that a foreign financial institution is of primary money laundering concern, the Secretary is required to consult with both the Secretary of State and the Attorney General.

In addition to these consultations, the Secretary, when finding that a foreign financial institution is of primary money laundering concern, is required by statute to consider “such information as the Secretary determines to be relevant, including the following potentially relevant factors”:

- The extent to which such financial institution is used to facilitate or promote money laundering in or through the jurisdiction;
- The extent to which such financial institution is used for legitimate business purposes in the jurisdiction; and
- The extent to which the finding that the institution is of primary money laundering concern is sufficient to ensure, with respect to transactions involving the institution operating in the jurisdiction, that the purposes of the BSA continue to be fulfilled, and to guard against international money laundering and other financial crimes.

If the Secretary determines that a foreign financial institution is of primary money laundering concern, the Secretary must determine the appropriate special measure(s) to address the specific money laundering risks. Section 311 provides a range of special measures that can be imposed, individually, jointly, in any combination, and in any sequence.<sup>1</sup> The Secretary’s imposition of special measures follows procedures similar to those for designations, but carries with it additional consultations to be made and factors to consider. The statute requires the Secretary to consult with appropriate Federal agencies and other

<sup>1</sup> Available special measures include requiring: (1) Recordkeeping and reporting of certain financial transactions; (2) collection of information relating to beneficial ownership; (3) collection of information relating to certain payable-through accounts; (4) collection of information relating to certain correspondent accounts; and (5) prohibition or conditions on the opening or maintaining of correspondent or payable-through accounts. 31 U.S.C. 5318A(b)(1)–(5). For a complete discussion of the range of possible countermeasures, *see* 68 FR 18917 (April 17, 2003) (proposing to impose special measures against Nauru).

interested parties<sup>2</sup> and to consider the following specific factors:

- Whether similar action has been or is being taken by other nations or multilateral groups;
- 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;
- 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 institution; and
- The effect of the action on United States national security and foreign policy.<sup>3</sup>

#### B. Infobank

In this rulemaking, FinCEN proposes to impose the fifth special measure (31 U.S.C. 5318A(b)(5)) against Infobank. The fifth special measure prohibits or conditions the opening or maintaining of correspondent or payable-through accounts. This special measure may be imposed only through the issuance of a regulation.

Infobank was established in 1994, in Minsk, Belarus, and is one of the country's ten largest banks. Infobank maintains four domestic branches. It had operated two additional branches in Russia until 2001 when they were closed by the Central Bank of Russia.<sup>4</sup> Infobank is a national commercial bank licensed by the National Bank of the Republic of Belarus (NBRB) to engage in foreign trade including foreign exchange transactions. As of 2003, the NBRB expanded Infobank's license to enable it

to carry out banking operations in gems and precious metals. It maintains correspondent accounts with several European banks and at least one bank in New York City. Infobank is a joint-stock bank. Shareholders of Infobank include many private Belarusian companies. The government of Belarus is a principal shareholder of the bank's capital. In 2001, Infobank sold a 35 percent share of its shares to the Libyan Arab Foreign Bank (LAFB), which is fully owned by the Central Bank of Libya.

In addition to banking operations, Infobank is actively involved in a number of business ventures through a network of affiliated entities, joint ventures, and its subsidiary. These concerns include Bel-Cel, a cellular telecommunications corporation, Systems Business Management, a joint venture that specializes in project finance in the Middle East and Eastern Europe, and MAZ-MAN, a tractor manufacturing company. Infobank, however, is widely reported to be a bank specializing in financial transactions related to arms exports because of the activities of its subsidiary corporation, Belmetalnergo. Infobank and Belmetalnergo have procured and financed weapons and military equipment for several nations deemed by the United States to be State Sponsors of Terrorism. Until the collapse of the former Iraqi regime, Belmetalnergo brokered various contracts with the former Iraqi government for the provision of, among other things, military equipment and training for Iraqi armed forces in violation of relevant United Nations (U.N.) resolutions. In addition, Infobank's Chairman, Victor Shevstov, reportedly had close ties with the former Iraqi regime. Shevstov served as Chairman of the Iraqi-Belarus Friendship Society. Despite the collapse of the former Iraqi regime, Infobank continues to maintain funds in accounts established for the Central Bank of Iraq.<sup>5</sup> At this time, the government of Belarus has not taken steps to transfer the funds at Infobank in compliance with UNSCR 1483.

The Republic of Belarus has a weak anti-money laundering regime. Drug or nondrug related money laundering is criminalized, but not explicitly, in the anti-money laundering legislation.

Additionally, the money laundering legislation is not consistent with international standards as set forth in the Financial Action Task Force's 40 Recommendations on Money Laundering. There is no time frame for the reporting of suspicious transactions to government authorities and there are no penalties for non-compliance. Further, Belarus has failed to implement effectively the anti-money laundering legislation that has been adopted. Belarus' banking system is particularly vulnerable to money laundering because it suffers from a general lack of transparency and the role of the primary regulatory authority, the NBRB, is overshadowed by the Presidential Administration, which, in practice, maintains significant influence over the central and commercial banking operations of the country. Belarus also is a major exporter of arms. It is widely reported to be involved in supplying arms, equipment services, and training to Libya, Syria, and Iraq.

## II. Imposition of Special Measure Against Infobank as a Financial Institution of Primary Money Laundering Concern

### A. Finding

Based upon a review and analysis of relevant information, consultations with relevant agencies and departments, and after consideration of the factors enumerated in section 311, the Secretary, through his delegate, the Director of FinCEN, has determined that Infobank is a financial institution of primary money laundering concern. Infobank is well positioned to coordinate illicit activity using its subsidiary and network of affiliated entities and to launder the proceeds of those activities directly through its banking operations. FinCEN has reason to believe that Infobank actively laundered funds for the former Iraqi regime of Saddam Hussein. In addition to this money laundering activity described in detail below, Infobank's high risk activities noted above, including the sale of military equipment and weapons to a jurisdiction that was embargoed by the United Nations and to jurisdictions deemed to be sponsors of terrorism by the United States, exacerbate the risk it presents to the U.S. financial system. A discussion of the section 311 factors relevant to this finding follows.

<sup>2</sup> Section 5318A(a)(4)(A) requires the Secretary to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Secretary of State, the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the National Credit Union Administration (NCUA), and, in the sole discretion of the Secretary, "such other agencies and interested parties as the Secretary may find to be appropriate." The consultation process must also include the Attorney General, if the Secretary is considering prohibiting or imposing conditions on domestic financial institutions maintaining correspondent account relationships with the designated entity.

<sup>3</sup> Classified information used in support of a section 311 finding and measure(s) may be submitted by Treasury to a reviewing court *ex parte* and *in camera*. See section 376 of the Intelligence Authorization Act for Fiscal Year 2004, Pub. L. 108-177 (amending 31 U.S.C. 5318A by adding new paragraph (f)).

<sup>4</sup> In addition, activity indicative of money laundering has been reported transiting the Moscow branch's correspondent accounts in the U.S., which were subsequently closed by the U.S. correspondent.

<sup>5</sup> UNSCR 1483 requires Member States in which there are funds or other financial assets of the previous Government of Iraq or its state bodies, corporations, or agencies, located outside Iraq, to freeze those assets and, unless they are the subject of prior judicial, administrative, or arbitral lien or judgment, to transfer them to the Development Fund of Iraq.

### 1. The Extent to Which Infobank Has Been Used To Facilitate or Promote Money Laundering in or Through the Jurisdiction

FinCEN has reason to believe, based upon a variety of sources, that Infobank is used to facilitate or promote money laundering. The U.S. Government has information through classified and other sources that Infobank has laundered funds for the former Iraqi regime of Saddam Hussein. Specifically, Infobank laundered funds illegally paid to the former regime in order to obtain contracts to purchase Iraqi oil in violation of comprehensive United Nations sanctions and programs. Under the United Nations' Oil-for-Food program (UN OFF),<sup>6</sup> substantial controls were placed on Iraq's ability to export oil and import humanitarian goods. The Iraqi State Oil Marketing Organization (SOMO) negotiated contracts with international oil companies to sell Iraqi oil. U.N. overseers approved the contracts and the funds paid under the contract were deposited by the purchasers directly into an escrow account controlled by the U.N. Contracts to supply the Iraqi people with humanitarian goods also were approved by the U.N. and paid from the escrow account. However, around 2001, to defraud the governments enforcing the sanctions regime,<sup>7</sup> Iraq's SOMO began demanding the payment of a surcharge from potential buyers of oil to be paid directly into Iraqi bank accounts. Public information shows that in 2001, Infobank's subsidiary, Belmetalnergo, entered into contracts to purchase Iraqi oil. Information from a variety of sources further indicates that Belmetalnergo agreed to pay the illegal surcharges and deposited those funds into Infobank accounts for the benefit of the Iraqi government. Additional information suggests that Belmetalnergo entered into contracts for the provision

of humanitarian goods to Iraq; these contracts inflated the value of the goods that Belmetalnergo actually provided. The excess funds paid under the contract were placed in Infobank accounts held for the benefit of the former Iraqi government. These fraudulently obtained funds derived from the illegal surcharges and the inflated UN OFF contracts were laundered through several other foreign banks and shell corporations. Finally, proceeds from the illegal surcharges and inflated contracts either were returned to the Iraqi government, in violation of the UN OFF program conditions, or were used to purchase weapons or finance military training through Infobank and Belmetalnergo.<sup>8</sup>

### 2. The Extent to Which Infobank Is Used for Legitimate Business Purposes in the Jurisdiction

It is difficult to determine the extent to which Infobank is used for legitimate purposes. Most banking transactions within Belarus are conducted by the country's six largest banks, while Infobank ranks as the tenth largest. Infobank likely engages in some legitimate activity given its participation through its partnerships and affiliated entities in such business ventures as cellular telecommunications and project finance. Given the weak anti-money laundering regime in Belarus, however, the activities of Infobank are not subject to meaningful scrutiny or oversight, and there is little information about its legitimate activities available to the public.

In any event, Infobank's involvement in laundering funds for the former Iraqi regime and in illicit and black market arms trade significantly outweighs any legitimate use of its banking operations. As stated earlier, Infobank is well positioned both to direct and coordinate illegal activity and to launder funds through its banking operations, making it a significant money laundering risk.

### 3. The Extent to Which Such Action Is Sufficient To Ensure, With Respect to Transactions Involving Infobank, That the Purposes of the BSA Continue To Be Fulfilled, and To Guard Against International Money Laundering and Other Financial Crimes

As detailed above, FinCEN has reasonable grounds to believe that

Infobank is being used to promote or facilitate money laundering. At the moment, there are no protective measures that specifically target Infobank. Thus, finding Infobank to be a financial institution of primary money laundering concern and prohibiting the maintenance of correspondent accounts for that institution are necessary steps to ensure that Infobank is not able to access the U.S. financial system to facilitate money laundering or to engage in any other criminal purpose.

### B. Imposition of Special Measure

As a result of the finding that Infobank is a financial institution of primary money laundering concern, and based upon the additional consultations and the consideration of all relevant factors, the Secretary, through his delegate, the Director of FinCEN, has determined that reasonable grounds exist for the imposition of the special measure authorized by section 5318A(b)(5).<sup>9</sup> That special measure authorizes the prohibition of the opening or maintaining of correspondent accounts<sup>10</sup> by any domestic financial institution or agency for or on behalf of a targeted financial institution. A discussion of the additional section 311 factors relevant to imposing this particular special measure follows.

### 1. Whether Similar Actions Have Been or Will Be Taken by Other Nations or Multilateral Groups Against Infobank

Infobank's Russian branches have been closed by Russia's Central Bank. Other countries have not, as yet, taken an action similar to the one proposed in this rulemaking that would prohibit domestic financial institutions and agencies from opening or maintaining a correspondent account for or on behalf of Infobank. The U.S. Government hopes that other countries will take similar action based on the findings contained in this rulemaking. In the meantime, lack of similar action by other countries makes it even more imperative that the fifth special measure be imposed in order to prevent access by Infobank to the U.S. financial system.

<sup>6</sup>In 1995, the U.N. Security Council adopted Resolution 986, establishing the Oil-for-Food Program. The Program provided Iraq with an opportunity to sell oil to finance the purchase of medicines, health supplies, food, and other humanitarian goods, notwithstanding the U.N.-imposed sanctions then in effect with respect to Iraq. The first Iraqi oil under the Program was exported in December 1996 and the first shipments of food arrived in March 1997.

<sup>7</sup>The Department of the Treasury's Office of Foreign Assets Control (OFAC) implemented the U.N. sanctions program governing transactions with Iraq under regulations contained in 31 CFR 575 *et seq.* Among other things, the OFAC regulations required U.S. persons interested in engaging in contracts under the UN OFF program to obtain a license from OFAC once the contract had been approved by the U.N. overseers and prior to performance, and required that all payments be made only to the escrow account controlled by the U.N. See 31 CFR 575.523.

<sup>8</sup>United Nations Security Council Resolution (UNSCR) 661, dating back to 1990, imposed a full trade embargo barring all imports or exports to Iraq with limited exceptions for humanitarian goods. Although the United Nations has lifted most sanctions against Iraq with the passage of UNSCR 1483 following the collapse of the Hussein regime, certain prohibitions on arms and weapons transfers to Iraq are still in place.

<sup>9</sup>In connection with this action, FinCEN consulted with staff of the Federal functional regulators, the Department of Justice, and the State Department.

<sup>10</sup>For purposes of the proposed rule, 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.

## 2. Whether the Imposition of the Fifth 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

The fifth special measure sought to be imposed by this rulemaking would prohibit covered financial institutions from opening and maintaining correspondent accounts for, or on behalf of, Infobank. As a corollary to this measure, covered financial institutions also would be required to apply special due diligence to all of their correspondent accounts to ensure that no such account is being used indirectly to provide services to Infobank. The burden associated with these requirements is not expected to be significant, given that few U.S. banks currently maintain correspondent accounts for Infobank. In addition, all U.S. financial institutions currently apply some degree of due diligence to the transactions or accounts subject to sanctions administered by the Office of Foreign Assets Control (OFAC) of the Department of the Treasury. As explained in more detail in the section-by-section analysis below, financial institutions should be able to adapt their current screening procedures for OFAC sanctions to comply with this special measure. Thus, the special due diligence that would be required by this rulemaking is not expected to impose a significant additional burden upon U.S. financial institutions.

## 3. The Extent to Which the Proposed Action or Timing of the Action Will Have a Significant Adverse Systemic Impact on the International Payment, Clearance, and Settlement System, or on Legitimate Business Activities of Infobank

This rulemaking targets Infobank specifically; it does not target a class of financial transactions (such as wire transfers) or a particular jurisdiction or jurisdictions. Infobank is not a major participant in the international payment system and is not relied upon by the international banking community for clearance or settlement services. Thus, the imposition of the fifth special measure against Infobank will not have a significant adverse systemic impact on the international payment, clearance, and settlement system. As noted above, there is little information available about Infobank's legitimate business activities, but in light of the reasons for imposing this special measure, FinCEN does not believe it will impose undue burden on legitimate business activities,

and notes that the presence of nine larger banks in Belarus will alleviate the burden on legitimate business activities within that jurisdiction.

## 4. The Effect of the Proposed Action on United States National Security and Foreign Policy

The exclusion from the U.S. financial system of banks that serve as conduits for significant money laundering activity and other financial crimes enhances national security, making it more difficult for criminals to access the substantial resources of the U.S. financial system. More generally, the imposition of the fifth special measure would complement diplomatic actions undertaken by the U.S. Government to curb Belarus' involvement in international arms trafficking.

Therefore, after conducting the required consultations and weighing the relevant factors, FinCEN has determined that reasonable grounds exist for concluding that Infobank is a financial institution of primary money laundering concern and for imposing the special measure authorized by 31 U.S.C. 5318A(b)(5).

## III. Section-by-Section Analysis

The proposed rule would prohibit covered financial institutions from establishing, maintaining, administering, or managing in the United States any correspondent account for, or on behalf of, Infobank. Infobank is defined specifically in the proposed notice to include Belmetalnergo. Although Belmetalnergo is not a banking institution, its activities are controlled and directed by Infobank, and it has been a substantial participant in the money laundering activity transiting Infobank. Therefore, FinCEN is defining Infobank to include Belmetalnergo under the proposed notice to ensure that Infobank cannot indirectly access the U.S. financial system through Belmetalnergo. As a corollary to this prohibition, covered financial institutions would be required to apply special due diligence to their correspondent accounts to guard against their indirect use by Infobank. At a minimum, that special due diligence must include two elements. First, a covered financial institution must notify its correspondent account holders that they may not provide Infobank with access to the correspondent account maintained at the covered financial institution. Second, a covered financial institution must take reasonable steps to identify any indirect use of its correspondent accounts by Infobank, 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 should take a risk-based approach when deciding what, if any, additional due diligence measures it should adopt to guard against the indirect use of its correspondent accounts by Infobank, based on risk factors such as the type of services it offers and geographic locations of its correspondents.

## A. 103.190(a)—Definitions

### 1. Correspondent Account

Section 103.190(a)(1) defines the term "correspondent account" by reference to the definition contained in 31 CFR 103.175(d)(1)(ii). Section 103.175(d)(1)(ii) defines a correspondent account to mean 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.

In the case of a U.S. depository institution, this broad definition would include most types of banking relationships between a U.S. depository institution and a foreign bank, including payable-through accounts.

In the case of securities broker-dealers, futures commission merchants, introducing brokers, and investment companies that are open-end companies (mutual funds), a correspondent account would include any account that permits the foreign bank to engage in (1) trading in securities and commodity futures or options, (2) funds transfers, or (3) other types of financial transactions.

FinCEN is using the same definition for purposes of the proposed rule as that established in the final rule implementing sections 313 and 319(b) of the USA Patriot Act<sup>11</sup> except that the term is being expanded to cover such accounts maintained by futures commission merchants, introducing brokers, and mutual funds.

### 2. Covered Financial Institution

Section 103.190(a)(2) of the proposed rule defines covered financial institution to mean all of the following: any insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)); a commercial bank or trust company; a private banker; an agency or branch of a foreign bank in the United States; a credit union; a thrift institution; a corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611 *et seq.*); a broker or dealer registered or required to register with the SEC under the

<sup>11</sup> See 67 FR 60562 (September 26, 2002), codified at 31 CFR 103.175(d)(1).

Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*); a futures commission merchant or an introducing broker registered, or required to register, with the CFTC under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*); and an investment company (as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3)) that is an open-end company (as defined in section 5 of the Investment Company Act of 1940 (15 U.S.C. 80a-5)) that is registered, or required to register, with the SEC under Section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8).

### 3. Infobank

Section 103.190(a)(3) of the proposed rule defines Infobank to include all headquarters, branches, and offices of Infobank operating in Belarus or in any jurisdiction. All subsidiaries of Infobank, including Belmetalnergo, are included in the definition, although FinCEN understands that Infobank currently only has one subsidiary, Belmetalnergo. FinCEN will provide updated information as it is available; however, covered financial institutions should take commercially reasonable measures to determine whether a customer is a subsidiary of Infobank.

#### *B. 103.190(b)—Requirements for Covered Financial Institutions*

##### 1. Prohibition on Direct Use of Correspondent Accounts

Section 103.190(b)(1) of the proposed rule prohibits all covered financial institutions from establishing, maintaining, administering, or managing a correspondent or payable-through account in the United States for, or on behalf of, Infobank. The prohibition would require all covered financial institutions to review their account records to ensure that they maintain no accounts directly for, or on behalf of, Infobank.

##### 2. Special Due Diligence of Correspondent Accounts To Prohibit Indirect Use

As a corollary to the prohibition on maintaining correspondent accounts directly for Infobank, section 103.190(b)(2) requires a covered financial institution to apply special due diligence to its correspondent accounts<sup>12</sup> that is reasonably designed to guard against their indirect use by Infobank. At a minimum, that special

due diligence must include notifying correspondent account holders that they may not provide Infobank with access to the correspondent account maintained at the covered financial institution. For example, a covered financial institution may satisfy this requirement by transmitting the following notice to all of its correspondent account holders:

*Notice:* Pursuant to U.S. regulations issued under section 311 of the USA PATRIOT Act, 31 CFR 103.190, we are prohibited from establishing, maintaining, administering or managing a correspondent account for, or on behalf of, Infobank or any of its subsidiaries (including Belmetalnergo). The regulations also require us to notify you that you may not provide Infobank or any of its subsidiaries with access to the correspondent account you hold at our financial institution. If we become aware that Infobank or any of its subsidiaries is indirectly using the correspondent account you hold at our financial institution, we will be required to take appropriate steps to block such access, including by terminating your account.

The purpose of the notice requirement is to help ensure cooperation from correspondent account holders in denying Infobank access to the U.S. financial system, as well as to increase awareness within the international financial community of the risks and deficiencies of Infobank. However, FinCEN does not require or expect a covered financial institution to obtain a certification from its correspondent account holders that indirect access will not be provided in order to comply with this notice requirement. Instead, methods of compliance with the notice requirement could include, for example, transmitting a one-time notice by mail, fax, or e-mail to a covered financial institution's correspondent account customers, informing them that they may not provide Infobank with access to the covered financial institution's correspondent account, or including such information in the next regularly occurring transmittal from the covered financial institution to its correspondent account holders. FinCEN specifically solicits comments on the appropriate form and scope of the notice that would be required under the rule.

A covered financial institution also would be required under this rulemaking to take reasonable steps to identify any indirect use of its correspondent accounts by Infobank, 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. For example, a covered financial institution would be expected to apply an appropriate screening mechanism to be able to identify a funds transfer order that on its face listed

Infobank as the originator's or beneficiary's financial institution, or otherwise referenced Infobank. An appropriate screening mechanism could be the mechanism used by a covered financial institution to comply with sanctions programs administered by OFAC. FinCEN specifically solicits comments on the requirement under the proposed rule that a covered financial institution take reasonable steps to screen its correspondent accounts in order to identify any indirect use of such accounts by Infobank.

Notifying its correspondent account holders and taking reasonable steps to identify any indirect use of its correspondent accounts by Infobank in the manner discussed above are the minimum due diligence requirements under the proposed rule. Beyond these minimum steps, a covered financial institution should adopt a risk-based approach for determining what, if any, additional due diligence measures it should implement to guard against the indirect use of its correspondents accounts by Infobank, based on risk factors such as the type of services it offers and the geographic locations of its correspondent account holders.

A covered financial institution that obtains knowledge that a correspondent account is being used by a foreign bank to provide indirect access to Infobank must take all appropriate steps to block such indirect access, including, where necessary, terminating the correspondent account. A covered financial institution may afford the foreign bank a reasonable opportunity to take corrective action prior to terminating the correspondent account. Should the foreign bank refuse to comply, or if the covered financial institution cannot obtain adequate assurances that the account will no longer be used for impermissible purposes, the covered financial institution must terminate the account within a commercially reasonable time. This means that the covered financial institution should not permit the foreign bank to establish any new positions or execute any transactions through the account, other than those necessary to close the account. A covered financial institution may reestablish an account closed under the proposed rule if it determines that the account will not be used to provide banking services indirectly to Infobank. FinCEN specifically solicits comment on the requirement under the proposed rule that a covered financial institution block indirect access to Infobank, once such indirect access is identified.

<sup>12</sup> Again, for purposes of the proposed rule, 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.

### 3. Reporting Not Required

Section 103.190(b)(3) of the proposed rule clarifies that the rule does not impose any reporting requirement upon any covered financial institution that is not otherwise required by applicable law or regulation. A covered financial institution must, however, document its compliance with the requirement that it notify its correspondent account holders that they may not provide Infobank with access to the correspondent account maintained at the covered financial institution.

### IV. Request for Comments

FinCEN invites comments on all aspects of the proposal to prohibit the opening or maintaining of correspondent accounts for or on behalf of Infobank, and specifically invites comments on the following matters:

1. The appropriate form and scope of the notice to correspondent account holders that would be required under the rule;
2. The appropriate scope of the proposed requirement for a covered financial institution to take reasonable steps to identify any indirect use of its correspondent accounts by Infobank;
3. The appropriate steps a covered financial institution should take once it identifies an indirect use of one of its correspondent accounts by Infobank; and
4. The impact of the proposed special measure upon legitimate transactions with Infobank.

### V. Regulatory Flexibility Act

It is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. FinCEN understands that Infobank currently maintains only a handful of correspondent accounts in the United States, and that those accounts are maintained at very large banks. Thus, the prohibition on maintaining such accounts will not have a significant impact on a substantial number of small entities. In addition, all U.S. persons, including U.S. financial institutions, currently exercise some degree of due diligence in order to comply with U.S. sanctions programs administered by OFAC, which can easily be modified to monitor for the use of correspondent accounts by Infobank. Thus, the special due diligence that would be required by this rulemaking—*i.e.*, the one-time transmittal of notice to correspondent account holders—is not expected to impose a significant additional economic burden upon small U.S. financial institutions. FinCEN invites

comments from members of the public who believe there will be a significant economic impact on small entities.

### VI. Paperwork Reduction Act

The collection of information contained in this proposed rule is being submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent (preferably by fax (202) 395-6974) to Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, DC 20503 (or by e-mail to [jlackeyj@omb.eop.gov](mailto:jlackeyj@omb.eop.gov)), with a copy to FinCEN by mail or e-mail at the addresses previously specified. Comments on the collection of information should be received by September 23, 2004. In accordance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), and its implementing regulations, 5 CFR 1320, the following information concerning the collection of information as required by 31 CFR 103.190 is presented to assist those persons wishing to comment on the information collection.

The collection of information in this proposed rule is in 31 CFR 103.190(b)(2)(i) and 31 CFR 103.190(b)(3)(i). The disclosure requirement in 31 CFR 103.190(b)(2)(i) is intended to ensure cooperation from correspondent account holders in denying access to the U.S. financial system, as well as to increase awareness within the international financial community of the risks and deficiencies of Infobank. The information required to be maintained by 31 CFR 103.190(b)(3)(i) will be used by Federal agencies and certain self-regulatory organizations to verify compliance by covered financial institutions with the provisions of 31 CFR 103.190. The class of financial institutions affected by the disclosure requirement is identical to the class of financial institutions affected by the recordkeeping requirement. The collection of information is mandatory.

*Description of Affected Financial Institutions:* Banks, broker-dealers in securities, futures commission merchants and introducing brokers, and mutual funds maintaining correspondent accounts.

*Estimated Number of Affected Financial Institutions:* 5,000.

*Estimated Average Annual Burden Hours per Affected Financial Institution:* The estimated average

burden associated with the collection of information in this proposed rule is 1 hour per affected financial institution.

*Estimated Total Annual Burden:* 5,000 hours.

FinCEN specifically invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the mission of FinCEN, including whether the information shall have practical utility; (b) the accuracy of FinCEN's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information required to be maintained; (d) ways to minimize the burden of the required collection of information, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to maintain the information.

### VII. Executive Order 12866

This proposed rule is not a significant regulatory action for purposes of Executive Order 12866, "Regulatory Planning and Review."

### List of Subjects in 31 CFR Part 103

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

### Authority and Issuance

For the reasons set forth in the preamble, part 103 of title 31 of the Code of Federal Regulations is proposed to be amended as follows:

### PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FINANCIAL TRANSACTIONS

1. The authority citation for part 103 is revised to read as follows:

**Authority:** 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314, 5316–5332; title III, secs. 311, 312, 313, 314, 319, 326, 352, Pub. L. 107–56, 115 Stat. 307.

2. Subpart I of part 103 is proposed to be amended by adding new § 103.190 to read as follows:

#### § 103.190 Special measures against Infobank.

- (a) *Definitions.* For purposes of this section:

- (1) *Infobank* means all headquarters, branches, offices, and subsidiaries of Infobank operating in Belarus or in any jurisdiction, including Belmetalnergo.

- (2) *Correspondent account* has the same meaning as provided in § 103.175(d)(1)(ii).

(3) *Covered financial institution* has the same meaning as provided in § 103.175(f)(2) and also includes:

(i) A futures commission merchant or an introducing broker registered, or required to register, with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*); and

(ii) An investment company (as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–5)) that is an open-end company (as defined in section 5 of the Investment Company Act (15 U.S.C. 80a–5)) and that is registered, or required to register, with the Securities and Exchange Commission under section 8 of the Investment Company Act (15 U.S.C. 80a–8).

(4) *Subsidiary* means a company of which more than 50 percent of the voting stock or analogous equity interest is owned by another company.

(b) *Requirements for covered financial institutions—(1) Prohibition on direct use of correspondent accounts.* A covered financial institution shall terminate any correspondent account that is established, maintained, administered, or managed in the United States for, or on behalf of, Infobank.

(2) *Special due diligence of correspondent accounts to prohibit indirect use.* (i) A covered financial institution shall apply special due diligence to its correspondent accounts that is reasonably designed to guard against their indirect use by Infobank. At a minimum, that special due diligence must include:

(A) Notifying correspondent account holders that they may not provide Infobank with access to the correspondent account maintained at the covered financial institution; and

(B) Taking reasonable steps to identify any indirect use of its correspondent accounts by Infobank, to the extent that such indirect use can be determined from transactional records maintained in the covered financial institution's normal course of business.

(ii) A covered financial institution shall take a risk-based approach when deciding what, if any, additional due diligence measures it should adopt to guard against the indirect use of its correspondent accounts by Infobank.

(iii) A covered financial institution that obtains knowledge that a correspondent account is being used by the foreign bank to provide indirect access to Infobank, shall take all appropriate steps to block such indirect access, including, where necessary, terminating the correspondent account.

(3) *Recordkeeping and reporting.* (i) A covered financial institution is required

to document its compliance with the notice requirement set forth in paragraph (b)(2)(i)(A) of this section.

(ii) Nothing in this section shall require a covered financial institution to report any information not otherwise required to be reported by law or regulation.

Dated: August 18, 2004.

**William J. Fox,**

*Director, Financial Crimes Enforcement Network.*

[FR Doc. 04–19266 Filed 8–23–04; 8:45 am]

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## DEPARTMENT OF THE TREASURY

### 31 CFR Part 103

#### RIN 1506–AA65

#### **Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations—Imposition of Special Measure Against First Merchant Bank OSH Ltd, Including Its Subsidiaries, FMB Finance Ltd, First Merchant International Inc, First Merchant Finance Ltd, and First Merchant Trust Ltd, as a Financial Institution of Primary Money Laundering Concern**

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** FinCEN is issuing this notice of proposed rulemaking to impose a special measure against First Merchant Bank OSH Ltd as a financial institution of primary money laundering concern, pursuant to the authority contained in 31 U.S.C. 5318A of the Bank Secrecy Act.

**DATES:** Written comments on the notice of proposed rulemaking must be submitted on or before September 23, 2004.

**ADDRESSES:** You may submit comments, identified by RIN 1506–AA65, by any of the following methods:

- Federal e-rulemaking portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- E-mail: [regcomments@fincen.treas.gov](mailto:regcomments@fincen.treas.gov). Include RIN 1506–AA65 in the subject line of the message.

- Mail: FinCEN, P.O. Box 39, Vienna, VA 22183. Include RIN 1506–AA65 in the body of the text.

*Instructions:* It is preferable for comments to be submitted by electronic mail because paper mail in the Washington, DC, area may be delayed. Please submit comments by one method only. All submissions received must

include the agency name and the Regulatory Information Number (RIN) for this proposed rulemaking. All comments received will be posted without change to <http://www.fincen.gov>, including any personal information provided. Comments may be inspected at FinCEN between 10 a.m. and 4 p.m., in the FinCEN reading room in Washington, DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354–6400 (not a toll-free number).

#### **FOR FURTHER INFORMATION CONTACT:**

Office of Regulatory Programs, FinCEN, at (202) 354–6400 or Office of Chief Counsel, FinCEN, at (703) 905–3590 (not toll-free numbers).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

###### *A. Statutory Provisions*

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 (the USA Patriot Act), Pub. L. 107–56. 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 Part 103. The authority of the Secretary of the Treasury (Secretary) to administer the BSA and its implementing regulations has been delegated to the Director of FinCEN.

Section 311 of the USA Patriot Act (section 311) added section 5318A to the BSA, granting the Secretary the authority, upon finding that reasonable grounds exist for concluding that a foreign jurisdiction, 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” against the primary money laundering concern. Section 311 identifies factors for the Secretary to consider and Federal agencies to consult before the Secretary may find that reasonable grounds exist for concluding that a jurisdiction, institution, or transaction is of primary money laundering concern. The statute also provides similar procedures, *i.e.*, factors and consultation requirements, for selecting the imposition of specific special measures against the primary money laundering concern.