



## Department of the Treasury Financial Crimes Enforcement Network

### Ruling

**FIN-2010-R002**

**Issued: April 29, 2009**

**Subject: Application of a Section 311 Special Measure to the payment of current and future potential obligations of a US customer**

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Dear []:

We are responding to your letter of January 15, 2009 to the Financial Crimes Enforcement Network (“FinCEN”) requesting an administrative ruling on the application of section 311 of the USA PATRIOT Act to certain shareholder payments to [] (“the 311 Foreign Bank”), a bank found to be of primary money laundering concern. Specifically, you ask whether payments by [] (“the Bank”) by wire or draft on behalf of your customer [] (“the U.S. Customer”) to the 311 Foreign Bank for an initial public offering (“IPO”) redemption payment, and money potentially owed by the U.S. Customer to the 311 Foreign Bank for quarterly dividend payments are prohibited by FinCEN’s imposition of the fifth special measure against the 311 Foreign Bank.

You state that the U.S. Customer retained the Bank to perform such shareholder services as redemption and dividend payments. The U.S. Customer opened a deposit account with the Bank to fund these payments to its shareholders. The 311 Foreign Bank is a shareholder of the U.S. Customer.

The Bank issued two checks to the order of the 311 Foreign Bank, representing net redemption proceeds and refund of funds withheld for U.S. taxes. Subsequently, the 311 Foreign Bank and the U.S. Customer informed the Bank that the 311 Foreign Bank had been unable to cash the checks at any financial institution, and asked the Bank to resend payment to the 311 Foreign Bank by wire transfer or draft.

On [], FinCEN issued a final rule prohibiting U.S. financial institutions from opening or maintaining a correspondent account for the 311 Foreign Bank directly or indirectly (the “Special Measure”). The term “correspondent account” is defined as “an account established *for a foreign financial institution* <emphasis added> to receive

deposits from, or to make payments or other disbursements on behalf of, the foreign financial institution, or to handle other financial transactions related to such foreign financial institution.”<sup>1</sup> An “account” is defined as a “formal relationship” to provide “regular services.”<sup>2</sup> The account opened by the U.S. Customer with the Bank to fund payments to the U.S. Customer’s shareholders does not fall under the regulatory definition of “correspondent account” for purposes of the Special Measure.

In addition, the payments by the Bank to the 311 Foreign Bank on behalf of the U.S. Customer do not create a correspondent relationship between the Bank and the 311 Foreign Bank for purposes of the Special Measure. The Bank does not maintain a formal relationship with the 311 Foreign Bank nor does it provide regular services to the 311 Foreign Bank. The payment does not establish an account that the 311 Foreign Bank may utilize to receive deposits or make disbursements, or for the 311 Foreign Bank to receive extensions of credit. The only financial transactions conducted between the Bank and the 311 Foreign Bank are limited to the IPO redemption payment, and money potentially owed by the U.S. Customer to the 311 Foreign Bank for quarterly dividend payments. These payments to shareholders represent the discharge of an obligation by the Bank on behalf of the U.S. Customer and are made only at the request, and following the specific instructions, of the Bank’s U.S. Customer. Therefore, the payments made by the Bank on behalf of the U.S. Customer to satisfy such obligations, under the specific facts and circumstances described in your letter do not constitute a violation of the Special Measure.

We would caution that, although the payments by U.S. financial institutions of obligations incurred by their customers, do not represent an arrangement to provide ongoing services to the 311 Foreign Bank and therefore are not subject to the prohibitions on opening and maintaining correspondent accounts, contractual obligations may be vulnerable to money laundering or terrorist financing abuses.<sup>3</sup> Therefore, a U.S. financial institution should implement appropriate policies, procedures and controls<sup>4</sup> that include

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<sup>1</sup> 31 CFR § 103.175(d)(1).

<sup>2</sup> See 31 C.F.R. § 103.175 (d)(2)(i)-(iii) (defining the term “account,” respectively, for banks, broker-dealers in securities, and futures commission merchants).

<sup>3</sup> See FFIEC’s Bank Secrecy Act/Anti-Money Laundering Examination Manual, Expanded Examination Overview and Procedures for Products and Services, Trade Finance Activities-Overview, page 241 (August 24, 2007).

<sup>4</sup> As per the representations contained in its request letter, the Bank is directly involved in the transaction that generates its customer’s obligation to pay, and therefore has sufficient information on the nature of its customer’s obligation to the 311 Foreign Bank to determine to the Bank’s satisfaction that such obligation is legitimate. The type of due diligence expected from a U.S. financial institution to prevent indirect correspondent account services to an entity subject to a fifth special measure could be adapted to be used with payments ordered by customer’s other than financial institutions, when the U.S. financial institution is not directly involved in the transaction that generated the customer’s obligation (*See* 71 Fed. Reg. 13261,

monitoring payments made to the 311 Foreign Bank even when satisfied that such payments do not constitute the direct or indirect provision of correspondent account services to the 311 Foreign Bank, to detect and report suspicious activity.<sup>5</sup>

This ruling is provided in accordance with the procedures set forth at 31 C.F.R. § 103.81. In arriving at our conclusions in this letter, we have relied upon the accuracy and completeness of the representations made in your letter. Nothing precludes us from reaching a different conclusion or taking further action if circumstances change or any of that information provided is inaccurate or incomplete. We reserve the right, after redacting your name and address and the [names of the companies involved], to publish this letter as guidance to financial institutions in accordance with our regulations for requesting an administrative ruling.<sup>6</sup> You have fourteen days from the date of this letter to identify any other information you believe should be redacted and the legal basis for redaction.

If you have questions about this ruling, please contact FinCEN's regulatory helpline at (800) 949-2732.

Sincerely,

// signed //

**Jamal El-Hindi**  
**Associate Director**  
Regulatory Policy and Programs Division

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13265 March 15, 2006, 'V. Section-by-Section Analysis – Due Diligence of Correspondent Accounts To Prohibit Indirect Use').

<sup>5</sup> See, e.g., 31 C.F.R. 103.18 (A bank must file a suspicious activity report when it knows, suspects, or has reason to suspect that, among other things, a transaction is intended to circumvent any requirement under the Bank Secrecy Act, or any reporting requirement under federal law or regulation, or has no lawful or apparent business purpose.)

<sup>6</sup> 31 C.F.R. §§ 103.81-87.