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DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Part 1010

RIN 1506-AB27

Imposition of Special Measure against FBME Bank Ltd., formerly known as the Federal Bank of the Middle East Ltd., as a Financial Institution of Primary Money Laundering Concern

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

ACTION: Final rule.

SUMMARY: In a Notice of Finding (NOF) published in the Federal Register on July 22, 2014, the Director of FinCEN found that reasonable grounds exist for concluding that FBME Bank Ltd. (FBME), formerly known as the Federal Bank of the Middle East, Ltd., is a financial institution of primary money laundering concern pursuant to the United States Code (U.S.C.). On the same date, FinCEN also published in the Federal Register a Notice of Proposed Rulemaking (NPRM) to propose the imposition of a special measure authorized by the U.S.C. against FBME. FinCEN is issuing this final rule imposing the fifth special measure against FBME.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: The FinCEN Resource Center at (800) 767-2825.

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 Act of 2001, Public Law 107-56 (the USA PATRIOT Act). 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 chapter X. The authority of the Secretary of the Treasury (the 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), codified at 31 U.S.C. 5318A, grants the Director of FinCEN the authority, upon finding that reasonable grounds exist for concluding that a foreign jurisdiction, financial institution, class of transaction, or type of account is of “primary money laundering concern,” to require domestic financial institutions and financial agencies to take certain “special measures” to address the primary money laundering concern. This rulemaking imposes the fifth special measure, codified at 31 U.S.C. 5318A(b)(5), against FBME. The fifth special measure allows the Director to prohibit or impose conditions on the opening or

maintaining of correspondent or payable-through accounts for the identified institution by U.S. financial institutions.

B. FBME

FBME was established in 1982 in Cyprus as the Federal Bank of the Middle East, Ltd., a subsidiary of the private Lebanese bank, the Federal Bank of Lebanon. Both FBME and the Federal Bank of Lebanon are owned by Ayoub-Farid M. Saab and Fadi M. Saab. In 1986, FBME changed its country of incorporation to the Cayman Islands, and its banking presence in Cyprus was re-registered as a branch of the Cayman Islands entity. In 2003, FBME left the Cayman Islands and incorporated and established its headquarters in Tanzania. At the same time, FBME's Cypriot operations became a branch of FBME Tanzania Ltd. In 2005, FBME changed its name from the Federal Bank of the Middle East, Ltd. to FBME Bank Ltd.

FBME's headquarters in Tanzania is widely regarded as the largest bank in Tanzania based on its \$2 billion asset size, but it has only four Tanzania-based branches. While FBME is presently headquartered in Tanzania, FBME transacts over 90 percent of its global banking business and holds over 90 percent of its assets in its Cyprus branch. FBME has always maintained a significant presence in Cyprus. FBME has stated, however, that it is not in direct competition with local retail banks in Cyprus for several reasons, including that it does not issue checks, it has no retail counters there, and its Cypriot customers are limited mainly to staff, contractors, and professionals providing services to FBME.

II. The 2014 Finding and Subsequent Developments

A. The 2014 Finding

In a NOF published in the Federal Register on July 22, 2014, the Director of FinCEN explained her finding that reasonable grounds exist for concluding that FBME is a financial institution of primary money laundering concern pursuant to 31 U.S.C. 5318A.¹ FinCEN's NOF identified two main areas of concern: (1) FBME's facilitation of money laundering, terrorist financing, transnational organized crime, fraud schemes, sanctions evasion, weapons proliferation, corruption by politically-exposed persons, and other financial crime, and (2) FBME's weak anti-money laundering (AML) controls, which allow its customers to perform a significant volume of obscured transactions and activities through the U.S. financial system. In particular, the Director found that FBME is used to facilitate money laundering, terrorist financing, transnational organized crime, fraud, sanctions evasion, and other illicit activity internationally and through the U.S. financial system and has systemic failures in its AML controls that attract high-risk shell companies (i.e., companies formed for the sole purpose of holding property or funds and that do not engage in any legitimate business activity). FBME performs a significant volume of transactions and activities that have little or no transparency and often no apparent legitimate business purpose.

As detailed in the NOF, these activities have included (1) an FBME customer receiving a deposit of hundreds of thousands of dollars from a financier for Lebanese Hezbollah; (2) providing financial services to a financial advisor for a major transnational organized crime figure; (3) FBME's facilitation of the transfers to an FBME account involved in fraud against a U.S. person, with the FBME customer operating the alleged fraud scheme later being indicted in the United States District Court for the Northern

¹ See 79 FR 42639 (July 22, 2014).

District of Ohio; and (4) FBME's facilitation of U.S. sanctions evasion through its extensive customer base of shell companies, including at least one FBME customer that was a front company for a U.S.-sanctioned Syrian entity, the Scientific Studies and Research Center (SSRC) and which used its FBME account to process transactions through the U.S. financial system.

On the same date it published the NOF, FinCEN also published in the Federal Register a related NPRM to propose the imposition of the fifth special measure against FBME and to seek comment.²

B. FBME Subsequent Developments

On July 21, 2014, the Central Bank of Cyprus (CBC) issued a decree announcing that it would formally place FBME's Cyprus branch "under resolution," allowing the CBC to take numerous unilateral measures to protect FBME's depositors. On July 24, 2014, the Bank of Tanzania took over management of FBME's headquarters in Tanzania because of the potential effects of the CBC's actions on the Tanzanian banking system.

After considering all relevant comments and other information available to the agency, including both public and non-public reporting, FinCEN is issuing this final rule imposing the fifth special measure against FBME, which prohibits the opening or maintaining of correspondent or payable-through accounts for FBME by U.S. financial institutions. This information continues to provide reason to believe that FBME's AML compliance efforts are not adequate to address the risks faced by FBME, and that FBME facilitates illicit financial activity. As described below, audits performed by third parties in 2013 and 2014 that were provided to FinCEN by FBME to demonstrate the

² See 79 FR 42486 (July 22, 2014) (RIN 1506-AB27).

effectiveness of its AML compliance program instead identified significant, recurring weaknesses in FBME's compliance program. Several deficiencies were identified by one of the third party auditors as being of "high or medium significance." These deficiencies, which FinCEN has reason to believe continue to exist following the issuance of the NOF, facilitate the illicit financial activities of FBME's customers.

III. FBME's September 22, 2014 Comment and Other Comments

FBME, through outside counsel, submitted comments, dated September 22, 2014, during the comment period. FBME made six additional submissions of information related to comments made during the comment period after the close of the comment period. FBME's September 22, 2014, comments were received during the comment period and accordingly made a part of the public record. The six additional submissions were not made a part of the public record, based in part on FBME's claim that these additional submissions contained sensitive commercial and business information and FBME's corresponding request that the additional submissions be afforded confidential treatment. However, FinCEN reviewed and considered each of these submissions in drafting this final rule.

FBME's September 22, 2014 comment consists of an introduction followed by two major sections. In its introduction, FBME makes six key points. First, FBME states that its AML compliance program policies are in line with applicable requirements, including the requirements of the European Union's Third Money Laundering Directive and the CBC's Fourth Directive. FBME contends that this alignment has been the case since at least 2013, according to third party audits. Second, FBME states that, in response to recommendations made as a result of audits conducted by Ernst & Young

(EY) in 2011 and KPMG in 2013, FBME has substantially strengthened its compliance program over the last two years. Third, FBME states that FBME and its officers and directors do not condone the use of FBME for illicit purposes and strive to prevent such misuse. Fourth, FBME contends that some of the statements made in the NOF are incorrect or are based on incomplete information, which FBME also describes in the second section of its comment. Fifth, FBME states that, in some cases, FBME filed Suspicious Transaction Reports (STRs) with the Cypriot Financial Intelligence Unit (MOKAS) on activity described in the NOF and NPRM. Sixth, FBME claims that the NOF and NPRM have had a significant adverse impact on FBME and its customers.

The first section of FBME's September 22, 2014 comment then describes aspects of its AML compliance program, and the second section responds to statements made in the NOF that FBME asserts are inaccurate or based on incomplete information.

In this final rule, FinCEN is focusing its response on the six points in the introduction, which summarize FBME's concerns with the NOF and the NPRM. In responding to the first three points of FBME's introduction, FinCEN also refutes the first section of FBME's comment because the first three points of FBME's introduction and the first section of FBME's comment all refer to FBME's AML compliance program, its policies, audits conducted by third parties, and FBME's management. In responding to the fourth point of FBME's introduction, FinCEN is also addressing the second section of FBME's comment because both the fourth point of the introduction and the second section of the comment refer to the same statements in the NOF that FBME asserts are inaccurate or based on incomplete information.

With regard to FBME's first and second points, the information provided by FBME on the audits conducted by KPMG and EY in 2013 and 2014, respectively, show a pattern of recurring AML deficiencies at the bank. These included failures to maintain adequate customer identification files, along with other customer due diligence weaknesses, failure to ensure that third parties the bank relied on to establish new customer relationships employed appropriate AML controls with regard to such persons, and issues with sanctions-related screening.

According to FBME's comment, EY conducted an audit in 2011 (the 2011 EY Audit). During that audit, according to FBME, EY found that FBME's due diligence procedures with respect to obtaining information from new clients met the requirements of the CBC Directive at the time, but also noted that some customer information requirements of the Directive had not been fully met by FBME in previous iterations of its AML procedures and policies. According to FBME's comment, EY subsequently conducted another audit in 2014 (the 2014 EY Audit), which found that, although FBME had an AML compliance program in place that incorporated the requirements of both the CBC Fourth Directive and the European Union Third Directive, FBME nevertheless had deficiencies in its customer due diligence, automated alerts system, and AML training areas.

According to FBME's September 22, 2014 comment, KPMG also conducted an audit in 2013 (the 2013 KPMG Audit) which found that FBME "basically fulfills" its AML regulatory requirements set forth by the CBC and the European Union, but also identified issues of "high or medium" significance with FBME's use of Approved Third Parties and FBME's sanction screening procedures. As FBME stated in its September

22, 2014 comment, FBME uses its relationships with Approved Third Parties, some of which are in foreign jurisdictions, to develop potential new customer relationships. According to the KPMG 2013 Audit, FBME had never attempted to ensure the adequacy of its Approved Third Parties' AML measures. In addition, the 2013 KPMG Audit found that FBME only screened the related parties of its Approved Third Parties when the customers were initially onboarded.

The 2013 KPMG Audit also found FBME's customer due diligence deficient. As FBME disclosed in its September 22, 2014 comment, in its 2013 audit, KPMG "recommended better presentation of ownership information to demonstrate links between group entities for older customers, in line with a new structure that had been introduced for new customers. KPMG also found that certain customer files reviewed did not have sufficient information to gain a complete understanding of the customers' activities or business rationale." In its 2013 audit, KPMG further found that FBME's use of hold-mail accounts and post office boxes managed by Approved Third Parties should be reconsidered by FBME in order to "avoid potential anonymisation."

The 2014 EY Audit identified numerous deficiencies in FBME's compliance program. Specifically, the 2014 EY Audit found that the following recommendations were necessary for FBME's compliance program: consistently documenting the efforts taken to verify the sources of funds and business purpose of accounts from prospective customers; more thoroughly investigating relationships among FBME customers, especially when inordinate volumes of internal transfers are identified; modifying FBME's periodic customer due diligence process to align with industry practices (e.g., moving to a rolling 12 or 36-month review cycle, depending on the customer's risk);

implementing an automated case management system to record the alerts generated, stage of investigation, and ultimate disposition of the alerts generated by FBME's screening software, as opposed to the current process of manually entering the alerts/outcome on several different spreadsheets; and more thoroughly documenting the AML/sanctions training given for new hires and providing general awareness training to all employees on an annual basis.

The numerous AML compliance program deficiencies described in the 2013 KPMG Audit and the 2014 EY Audit in particular are similar to AML deficiencies FinCEN identified in the NOF. All of these findings follow action against FBME by the CBC for similar issues. As FBME acknowledged in its September 22, 2014 comment, in 2010, the CBC fined FBME 80,000 euros for customer identification, due diligence, and automated monitoring deficiencies. According to the 2013 KPMG Audit, FBME also undertook an extensive Know Your Customer (KYC) remediation project from 2009 through 2011 that was ordered by the CBC and resulted in the closure of thousands of FBME accounts.

Finally, FBME's argument that its AML compliance program is now adequate is weakened by the list of illicit actors identified in the NOF that have continued to make use of FBME as recently as 2014, including narcotics traffickers, terrorist financiers, and organized crime figures.

With regard to FBME's third point, information available to FinCEN makes it reasonable to conclude that FBME's management facilitated, either actively or passively, the illicit activities of its customers, as FinCEN set forth in the NOF.

With regard to FBME's fourth point, in which FBME has argued that portions of the eight statements in the NOF were incorrect or based on incomplete information, FinCEN believes that it is appropriate in two cases to amend the NOF based on these comments. In the first case, FBME stated that it was not fined by the CBC in 2008, but that the CBC imposed an administrative fine on FBME in 2010. FinCEN agrees that the fine in question was imposed in 2010, not in 2008.

In the second case, FBME argued that the report that FBME may be subject to a fine of up to 240 million euros is from a November 2013 article in the Cypriot press that relied on anonymous sources at the CBC. FinCEN agrees that the source of this statement was an article that appeared in the Cypriot press that referenced statements by a CBC official speaking anonymously. Neither these two cases nor any of FBME's remaining claims of incompleteness and factual inaccuracy presents any new information or in any way cause FinCEN to doubt the accuracy of the information presented in the NOF.

With regard to FBME's fifth point, FinCEN notes that the filing of STRs on suspicious activities or transactions by a financial institution is not, taken in isolation, an adequate indicator of the robustness and comprehensiveness of a compliance program. Although the filing of STRs is a critical component of any financial institution's AML compliance program, if STRs are filed in an incomplete, inaccurate, or untimely manner, their usefulness to authorities responsible for investigating money laundering and other illicit activities is greatly diminished. Moreover, filing STRs does not excuse a financial institution's failure to adequately implement other areas of its AML program, such as, for example, customer due diligence procedures.

With regard to FBME's sixth point, as part of FinCEN's consideration of the statutory factors supporting its selection of the fifth special measure, FinCEN has considered "the extent to which the action or the timing of the action would have a significant adverse systemic impact on . . . legitimate business activities involving" FBME. This is discussed in Part IV, section A below.³

In addition to its public comment, FBME has submitted a substantial volume of supplemental information regarding FBME's policies and procedures, and reports of the audits conducted by KPMG in 2013 and EY in 2014. FinCEN has carefully considered these materials, which outline some of the steps that FBME has taken to strengthen its compliance program. However, after a thorough review of these materials, FinCEN believes that, except as acknowledged above, the statements made in the NOF remain true and accurate, and that FBME is of "primary money laundering concern."

FinCEN continues to have serious concerns regarding FBME's potential to be used wittingly or unwittingly for illicit purposes. As FinCEN explained in its NOF, FBME customers continue to exhibit shell company attributes and many are located in high-risk jurisdictions. FinCEN continues to have concerns with FBME's AML compliance program, in particular with the aforementioned customer due diligence deficiencies, which were identified over a number of years and which enable FBME customers to conduct financial activity in relative obscurity.

FinCEN also considered a comment received from the American Bankers' Association (ABA), dated September 22, 2014; a joint comment received from the Securities Industry and Financial Markets Association (SIFMA) and The Clearing House

³ 31 U.S.C. 5318A(a)(4)(B)(iii).

(TCH), dated September 22, 2014; and a separate comment received from SIFMA, dated September 22, 2014. FinCEN notes that these comments were procedural in nature and did not address the underlying conclusion surrounding the risk of money laundering through FBME.

FinCEN appreciates the thoughtful comments that were submitted and has addressed these comments, as appropriate, in the section-by-section analysis below.

IV. Imposition of Special Measure against FBME as a Financial Institution of Primary Money Laundering Concern

As described in the NOF and this final rule, the Director of FinCEN found that reasonable grounds exist for concluding that FBME is a financial institution of primary money laundering concern. Based upon that finding, the Director of FinCEN is authorized to impose one or more special measures. Following the required consultations and the consideration of all relevant factors discussed in the NOF, the Secretary, through the Director of FinCEN, proposed the imposition of the fifth special measure in an NPRM published on July 22, 2014. The fifth special measure authorizes a prohibition against the opening or maintaining of correspondent accounts by any domestic financial institution or agency for, or on behalf of, a financial institution found to be a primary money laundering concern.

Consistent with the finding that FBME is a financial institution of primary money laundering concern and in consideration of additional relevant factors, this final rule imposes the fifth special measure with regard to FBME. The prohibition on the maintenance of correspondent accounts imposed by the fifth special measure will help to guard against the money laundering risks that FBME presents to the U.S. financial system as identified in the NOF, NPRM, and this final rule.

A. Discussion of Section 311 Factors

In determining which special measure to implement to address the primary money laundering concern posed by FBME, FinCEN has considered the following factors.

1. Whether Similar Actions Have Been or Will Be Taken by Other Nations or Multilateral Groups against FBME

Other countries or multilateral groups have not yet taken action similar to those proposed in this rulemaking that would prohibit domestic financial institutions and agencies from opening or maintaining a correspondent account for, or on behalf of, FBME and that would require those domestic financial institutions and agencies to screen their correspondents in a manner that is reasonably designed to guard against indirect use by FBME, including access through the use of nested correspondent accounts held by FBME.

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 imposed by this rulemaking prohibits covered financial institutions from opening and maintaining correspondent accounts for, or on behalf of, FBME. As a corollary to this measure, covered financial institutions also are required to take reasonable steps to apply special due diligence, as set forth below, to all of their correspondent accounts to help ensure that no such account is being used indirectly to provide services to FBME. FinCEN does not expect the burden associated with these requirements to be significant. Additionally, there is only a minimal burden involved in transmitting a one-time notice to correspondent account holders concerning the prohibition on indirectly providing services to FBME. U.S. financial institutions generally apply some level of transaction and account screening, often through the use of

commercially available software. As explained in more detail in the section-by-section analysis below, financial institutions should, if necessary, be able to easily adapt their current screening procedures to support compliance with this final rule. Thus, the prohibition on the maintenance of correspondent accounts 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 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 Involving FBME

FBME 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 FBME will not have a significant adverse systemic impact on the international payment, clearance, and settlement system. In light of the underlying money laundering risks posed by FBME, FinCEN does not believe that the rule will impose an undue burden on legitimate business activities involving FBME. There are other banks in both Cyprus and Tanzania that could alleviate potential impact on legitimate business activities within those jurisdictions.⁴ On July 21, 2014, the CBC, under the authority of the Cyprus Resolution Act, issued a decree announcing that it would formally place FBME's Cyprus branch "under resolution," allowing the CBC to take numerous unilateral measures regarding FBME, including selling off Cyprus-based FBME branch locations, to protect FBME's depositors. On July 24, 2014, the Bank of Tanzania took over management of FBME's

⁴ See Central Bank of Cyprus (website: <http://www.centralbank.gov.cy/>) and Bank of Tanzania (website: <http://www.bot-tz.org/>) for lists of banks in Cyprus and Tanzania, respectively.

headquarters in Tanzania because of the potential effects of the CBC's actions on the Tanzanian banking system. The control of FBME branches by state authorities in both jurisdictions also offers a means to support legitimate business activity involving FBME. Finally, FinCEN anticipates that its identification of the money laundering risks associated with FBME will assist banks in appropriately policing legitimate business involving FBME to guard against the use of their institutions for financial crime.

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

The exclusion from the U.S. financial system of banks that, like FBME, serve as conduits for money laundering activity and other financial crimes will enhance U.S. national security by making it more difficult for terrorists, sanctions evaders, and money launderers to access the substantial resources of the U.S. financial system. More generally, the imposition of the fifth special measure will complement the U.S. Government's worldwide foreign policy efforts to expose and disrupt international money laundering, and to encourage other nations to do the same. The United States has played a leadership role in combating money laundering and terrorist financing not only through action with regard to specific institutions but also through participation in international operational and standard-setting bodies such as the Egmont Group and the Financial Action Task Force.

V. Section-by-Section Analysis for Imposition of the Fifth Special Measure

A. 1010.658(a) – Definitions

1. FBME

Section 1010.658(a)(1) of the rule defines FBME to include all branches, offices, and subsidiaries of FBME operating in any jurisdiction, including Tanzania and Cyprus.

Financial institutions should take commercially reasonable measures to determine whether a customer is a branch, office, or subsidiary of FBME. Currently, FBME's bank branches are located in Tanzania and Cyprus, with a representative office in Moscow, Russian Federation.

SIFMA, TCH, and the ABA noted that it would be useful for FinCEN to provide a list of FBME's subsidiaries; however, because subsidiary relationships can change frequently, covered financial institutions should use commercially-reasonable tools to determine the current subsidiaries of FBME.

2. Correspondent Account

Section 1010.658(a)(2) of the rule defines the term "correspondent account" by reference to the definition contained in 31 CFR 1010.605(c)(1)(ii). Section 1010.605(c)(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 to handle other financial transactions related to the foreign bank. Under this definition, "payable through accounts" are a type of correspondent account.

In the case of a U.S. depository institution, this broad definition includes most types of banking relationships between a U.S. depository institution and a foreign bank that are established to provide regular services, dealings, and other financial transactions, including a demand deposit, savings deposit, or other transaction or asset account, and a credit account or other extension of credit. FinCEN is using the same definition of "account" for purposes of this rule as was established for depository institutions in the final rule implementing the provisions of section 312 of the USA PATRIOT Act

requiring enhanced due diligence for correspondent accounts maintained for certain foreign banks.⁵

In the case of securities broker-dealers, futures commission merchants, introducing brokers-commodities, and investment companies that are open-end companies (mutual funds), FinCEN is also using the same definition of “account” for purposes of this rule as was established for these entities in the final rule implementing the provisions of section 312 of the USA PATRIOT Act requiring enhanced due diligence for correspondent accounts maintained for certain foreign banks.⁶

3. Covered Financial Institution

Section 1010.658(a)(3) of the rule defines “covered financial institution” with the same definition used in the final rule implementing section 312 of the USA PATRIOT Act,⁷ which, in general, includes the following:

- An insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h));
- A commercial bank;
- An agency or branch of a foreign bank in the United States;
- A Federally insured credit union;
- A savings association;
- a corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611);
- A trust bank or trust company;
- A broker or dealer in securities;

⁵ See 31 CFR 1010.605(c)(2)(i).

⁶ See 31 CFR 1010.605(c)(2)(ii)-(iv).

⁷ See 31 CFR 1010.605(e)(1).

- A futures commission merchant or an introducing broker-commodities;
and
- A mutual fund.

4. Subsidiary

Section 1010.658(a)(4) of the rule defines “subsidiary” as a company of which more than 50 percent of the voting stock or analogous equity interest is owned by another company.

B. 1010.658(b) – Requirements for Covered Financial Institutions with
Regard to the Fifth Special Measure

For purposes of complying with the final rule’s prohibition on the opening or maintaining in the United States of correspondent accounts for, or on behalf of, FBME, covered financial institutions should take such steps as a reasonable and prudent financial institution would take to protect itself from loan or other fraud or loss based on misidentification of a person’s status.

1. Prohibition on Opening or Maintaining Correspondent Accounts

Section 1010.658(b)(1) of the rule imposing the fifth special measure prohibits all covered financial institutions from establishing, maintaining, administering, or managing a correspondent account in the United States for, or on behalf of, FBME. The prohibition requires all covered financial institutions to review their account records to ensure that they maintain no accounts directly for, or on behalf of, FBME.

2. Special Due Diligence of Correspondent Accounts to Prohibit Indirect Use

As a corollary to the prohibition on maintaining correspondent accounts directly for FBME, § 1010.658(b)(2) of the rule imposing the fifth special measure requires a

covered financial institution to apply special due diligence to its correspondent accounts that is reasonably designed to guard against processing transactions involving FBME. As part of that special due diligence, covered financial institutions must notify those foreign correspondent account holders that covered financial institutions know or have reason to know provide services to FBME that such correspondents may not provide FBME with access to the correspondent account maintained at the covered financial institution. Covered financial institutions should implement appropriate risk-based procedures to identify transactions involving FBME.

A covered financial institution may satisfy the notification requirement by transmitting the following notice to its foreign correspondent account holders that it knows or has reason to know provide services to FBME:

Notice: Pursuant to U.S. regulations issued under Section 311 of the USA PATRIOT Act, see 31 CFR 1010.658, we are prohibited from establishing, maintaining, administering, or managing a correspondent account for, or on behalf of, FBME Bank, Ltd., or any of its branches, offices or subsidiaries. The regulations also require us to notify you that you may not provide FBME Bank, Ltd., or any of its branches, offices or subsidiaries with access to the correspondent account you hold at our financial institution. If we become aware that the correspondent account you hold at our financial institution has processed any transactions involving FBME Bank, Ltd., or any of its branches, offices or subsidiaries, we will be required to take appropriate steps to prevent such access, including terminating your account.

A covered financial institution may, for example, have knowledge through transaction screening software that a correspondent account processes transactions for FBME. The purpose of the notice requirement is to aid cooperation with correspondent account holders in preventing transactions involving FBME from accessing the U.S. financial system. However, FinCEN would not require or expect a covered financial

institution to obtain a certification from any of its correspondent account holders that access will not be provided 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 appropriate correspondent account holders of the covered financial institution, informing them that they may not provide FBME 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 those correspondent account holders.

In its comment to the NPRM, SIFMA requested reconsideration of the notice provision, specifically regarding the meaning of "one-time notice," and further objected to the requirement to send such a notice as overly burdensome and possibly duplicative. SIFMA also requested further clarification with regard to the timing of the required notice. FinCEN emphasizes that the scope of notice requirement is targeted toward those correspondent account holders that the covered financial institution knows or has reason to know provide services to FBME, not to all correspondent account holders. The term "one-time notice" means that a financial institution should provide notice to all existing correspondent account holders who the covered financial institution knows or has reason to know provide services to FBME, within a reasonably short time after this final rule is published, and to new correspondent account holders during the account opening process who the covered financial institution knows or has reason to know provide services to FBME. It is not necessary for the notice to be provided in any particular form. It may be provided electronically, orally (with documentation), or as part of the standard paperwork involved in opening or maintaining a correspondent account. Given the limited nature of

FBME's correspondent relationships, FinCEN does not expect this requirement to be burdensome.

A covered financial institution is also required to take reasonable steps to identify any indirect use of its correspondent accounts by FBME, 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. Covered financial institutions are expected to apply an appropriate screening mechanism to be able to identify a funds transfer order that on its face lists FBME as the financial institution of the originator or beneficiary, or otherwise references FBME. An appropriate screening mechanism could be the mechanism used by a covered financial institution to comply with various legal requirements, such as the commercially available software programs used to comply with the economic sanctions programs administered by the Office of Foreign Assets Control (OFAC).

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

Under this rule imposing the fifth special measure, a covered financial institution that obtains knowledge that a correspondent account is being used by a foreign bank to

provide indirect access to FBME must take all appropriate steps to prevent such indirect access, including the notification of its correspondent account holder per § 1010.658(b)(2)(i)(A) and, 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 available to FBME, the covered financial institution must terminate the account within a commercially reasonable time. This means that the covered financial institution may 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 rule if it determines that the account will not be used to provide banking services indirectly to FBME.

3. Reporting Not Required

Section 1010.658(b)(3) of the rule imposing the fifth special measure 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 those correspondent account holders that the covered financial institution knows or has reason to know provide services to FBME, that such correspondents may not process any transaction involving FBME through the correspondent account maintained at the covered financial institution.

VI. Regulatory Flexibility Act

When an agency issues a final rule, the Regulatory Flexibility Act (RFA) requires the agency to “prepare and make available for public comment an initial regulatory flexibility analysis” that will “describe the impact of the Final Rule on small entities.” (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the final rule is not expected to have a significant economic impact on a substantial number of small entities.

A. Proposal to Prohibit Covered Financial Institutions from Opening or Maintaining Correspondent Accounts with Certain Foreign Banks under the Fifth Special Measure

1. Estimate of the Number of Small Entities to Whom the Proposed Fifth Special Measure Will Apply

For purposes of the RFA, both banks and credit unions are considered small entities if they have less than \$500,000,000 in assets.⁸ Of the estimated 7,000 banks, 80 percent have less than \$500,000,000 in assets and are considered small entities.⁹ Of the estimated 7,000 credit unions, 94 percent have less than \$500,000,000 in assets.¹⁰

Broker-dealers are defined in 31 CFR 1010.100(h) as those broker-dealers required to register with the Securities and Exchange Commission (SEC). Because FinCEN and the SEC regulate substantially the same population, for the purposes of the RFA, FinCEN relies on the SEC’s definition of small business as previously submitted to the Small Business Administration (SBA). The SEC has defined the term small entity to

⁸ *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, Small Business Administration Size Standards (SBA Jan. 22, 2014) [hereinafter “*SBA Size Standards*”].

⁹ Federal Deposit Insurance Corporation, *Find an Institution*, <http://www2.fdic.gov/idasp/main.asp>; select Size or Performance: Total Assets, type Equal or less than \$: “500000” and select Find.

¹⁰ National Credit Union Administration, *Credit Union Data*, <http://webapps.ncua.gov/customquery/>; select Search Fields: Total Assets, select Operator: Less than or equal to, type Field Values: “500000000” and select Go.

mean a broker or dealer that: (1) had total capital (net worth plus subordinated liabilities) of less than \$500,000 on the date in the prior fiscal year as of which its audited financial statements, were prepared pursuant to Rule 17a–5(d) or, if not required to file such statements, a broker or dealer that had total capital (net worth plus subordinated debt) of less than \$500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business if shorter); and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in this release.¹¹ Based on SEC estimates, 17 percent of broker-dealers are classified as small entities for purposes of the RFA.¹²

Futures commission merchants (FCMs) are defined in 31 CFR 1010.100(x) as those FCMs that are registered or required to be registered as a FCM with the Commodity Futures Trading Commission (CFTC) under the Commodity Exchange Act (CEA), except persons who register pursuant to section 4f(a)(2) of the CEA, 7 U.S.C. 6f(a)(2). Because FinCEN and the CFTC regulate substantially the same population, for the purposes of the RFA, FinCEN relies on the CFTC’s definition of small business as previously submitted to the SBA. In the CFTC’s “Policy Statement and Establishment of Definitions of ‘Small Entities’ for Purposes of the Regulatory Flexibility Act,” the CFTC concluded that registered FCMs should not be considered to be small entities for purposes of the RFA.¹³ The CFTC’s determination in this regard was based, in part, upon the obligation of registered FCMs to meet the capital requirements established by the CFTC.

¹¹ 17 CFR 240.0-10(c).

¹² 76 FR 37572, 37602 (June 27, 2011) (the SEC estimates 871 small broker-dealers of the 5,063 total registered broker-dealers).

¹³ 47 FR 18618, 18619 (Apr. 30, 1982).

For purposes of the RFA, an introducing broker-commodities dealer is considered small if it has less than \$35,500,000 in gross receipts annually.¹⁴ Based on information provided by the National Futures Association (NFA), 95 percent of introducing brokers-commodities dealers have less than \$35.5 million in adjusted net capital and are considered to be small entities.

Mutual funds are defined in 31 CFR 1010.100(gg) as those investment companies that are open-end investment companies that are registered or are required to register with the SEC. Because FinCEN and the SEC regulate substantially the same population, for the purposes of the RFA, FinCEN relies on the SEC's definition of small business as previously submitted to the SBA. The SEC has defined the term "small entity" under the Investment Company Act to mean "an investment company that, together with other investment companies in the same group of related investment companies, has net assets of \$50 million or less as of the end of its most recent fiscal year."¹⁵ Based on SEC estimates, seven percent of mutual funds are classified as "small entities" for purposes of the RFA under this definition.¹⁶

As noted above, 80 percent of banks, 94 percent of credit unions, 17 percent of broker-dealers, 95 percent of introducing brokers-commodities, no FCMs, and seven percent of mutual funds are small entities. The limited number of foreign banking institutions with which FBME maintains or will maintain accounts will likely limit the number of affected covered financial institutions to the largest U.S. banks, which actively engage in international transactions. Thus, the prohibition on maintaining correspondent

¹⁴ SBA Size Standards at 28.

¹⁵ 17 CFR 270.0-10.

¹⁶ 78 FR 23637, 23658 (April 19, 2013).

accounts for foreign banking institutions that engage in transactions involving FBME under the fifth special measure would not impact a substantial number of small entities.

2. Description of the Projected Reporting and Recordkeeping Requirements of the Fifth Special Measure

The fifth special measure would require covered financial institutions to provide a notification intended to aid cooperation from foreign correspondent account holders in preventing transactions involving FBME from accessing the U.S. financial system. FinCEN estimates that the time it takes institutions to provide this notice is one hour. Covered financial institutions would also be required to take reasonable measures to detect use of their correspondent accounts to process transactions involving FBME. All U.S. persons, including U.S. financial institutions, currently must exercise some degree of due diligence to comply with OFAC sanctions and suspicious activity reporting requirements. The tools used for such purposes, including commercially available software used to comply with the economic sanctions programs administered by OFAC, can easily be modified to identify correspondent accounts with foreign banks that involve FBME. Thus, the special due diligence that would be required by the imposition of the fifth special measure – *i.e.*, the one-time transmittal of notice to certain correspondent account holders, the screening of transactions to identify any use of correspondent accounts, and the implementation of risk-based measures to detect use of correspondent accounts – would not impose a significant additional economic burden upon small U.S. financial institutions.

B. Certification

For these reasons, FinCEN certifies that this final rulemaking would not have a significant impact on a substantial number of small businesses.

VII. Paperwork Reduction Act

The collection of information contained in the final rule has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), and has been assigned OMB Control Number 1506–AB19. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

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

Estimated Number of Affected Financial Institutions: 5,000.

Estimated Average Annual Burden in Hours Per Affected Financial Institution:

The estimated average burden associated with the collection of information in this rule is one hour per affected financial institution.

Estimated Total Annual Burden: 5,000 hours.

VIII. Executive Order 12866

Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It has been determined that the Final Rule is not a “significant regulatory action” for purposes of Executive Order 12866.

List of Subjects in 31 CFR Part 1010

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

Authority and Issuance

For the reasons set forth in the preamble, chapter X of title 31 of the Code of Federal Regulations is amended as follows:

PART 1010—GENERAL PROVISIONS

1. The authority citation for part 1010 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 F of chapter X is amended by adding § 1010.658 to read as follows:

§ 1010.658 Special measures against FBME Bank, Ltd.

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

- (1) FBME Bank, Ltd. means all branches, offices, and subsidiaries of FBME Bank, Ltd. operating in any jurisdiction.

- (2) Correspondent account has the same meaning as provided in § 1010.605(c)(1)(ii).

- (3) Covered financial institution has the same meaning as provided in § 1010.605(e)(1).

- (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) Prohibition on accounts and due diligence requirements for covered financial institutions--(1) Prohibition on 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, FBME Bank, Ltd.
- (2) Special due diligence of correspondent accounts to prohibit use--(i) A covered financial institution shall apply special due diligence to its foreign correspondent accounts that is reasonably designed to guard against their use to process transactions involving FBME Bank, Ltd. At a minimum, that special due diligence must include:
- (A) Notifying those correspondent account holders that the covered financial institution knows or has reason to know provide services to FBME Bank, Ltd., that such correspondents may not provide FBME Bank, Ltd. with access to the correspondent account maintained at the covered financial institution; and
 - (B) Taking reasonable steps to identify any use of its foreign correspondent accounts by FBME Bank, Ltd., to the extent that such 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, other due diligence measures it reasonably must adopt to guard against the use of its foreign

correspondent accounts to process transactions involving FBME Bank, Ltd.

(iii) A covered financial institution that obtains knowledge that a foreign correspondent account may be being used to process transactions involving FBME Bank, Ltd. shall take all appropriate steps to further investigate and prevent such access, including the notification of its correspondent account holder under paragraph (b)(2)(i)(A) of this section and, where necessary, termination of the correspondent account.

(iv) A covered financial institution required to terminate a correspondent account pursuant to paragraph (b)(2)(iii) of this section:

(A) Should do so within a commercially reasonable time, and should not permit the foreign bank to establish any new positions or execute any transaction through such correspondent account, other than those necessary to close the correspondent account; and

(B) May reestablish a correspondent account closed pursuant to this paragraph if it determines that the correspondent account will not be used to provide banking services indirectly to FBME Bank Ltd.

(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 paragraph (b) shall require a covered financial institution to report any information not otherwise required to be reported by law or regulation.

Dated: July 23, 2015.

Jennifer Shasky Calvery,
Director,
Financial Crimes Enforcement Network.

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