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# US Terminates Burma Sanctions Program, Accompanied by Limited FinCEN Relief

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On October 7, 2016, President Obama signed an Executive Order terminating the national emergency with respect to Burma (Myanmar), revoking the Burma sanctions Executive Orders, and waiving other statutory blocking and financial sanctions on Burma.

As a result, the economic and financial sanctions administered by the US Department of the Treasury's Office of Foreign Assets Control ("OFAC") since 1997 are no longer in effect. In addition, the Financial Crimes Enforcement Network ("FinCEN") announced the issuance of an administrative exception to suspend the prohibition on US financial institutions from maintaining correspondent accounts for Burmese banks to permit US financial institutions to provide these services to Burmese banks, subject to appropriate due diligence requirements.<sup>1</sup>

President Obama's actions follow the announcement the President made in September 2016 during the visit of the Burmese State Counsellor Aung San Suu Kyi. The Treasury Department's Acting Under Secretary for Terrorism and Financial Intelligence Adam Szubin stated that, "[l]ifting economic and financial sanctions will further support trade and economic growth, and Treasury will continue to work with Burma to implement a robust anti-money laundering regime that will help to ensure the security of its financial system."<sup>2</sup>

This update provides an overview of the actions taken by OFAC and FinCEN related to the termination of the Burma Sanctions Program.

## OFAC Update

Although the United States has long maintained comprehensive sanctions on Burma, these sanctions have been increasingly liberalized in recent years. As recently as May 17, 2016, sanctions on Burma largely had been suspended under a number of general licenses that authorized most transactions with Burma, except for certain sanctions relating to parties on OFAC's List of Specially Designated Nationals and Blocked Persons ("SDN List") as well as sanctions on certain activities involving the Burmese Ministry of Defense or any state or non-state armed group. The measures also prohibited the importation into the United States of any jadeite or rubies mined or extracted from Burma and any articles of jewelry containing jadeite or rubies mined or extracted from Burma.

<sup>1</sup> See FinCEN Exception [here](#).

<sup>2</sup> *Id.*

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As a result of the Executive Order terminating the Burma sanctions:

- Parties blocked under the Burmese sanctions have been removed from the SDN List;
- Any property that was blocked under the Burmese sanctions is now unblocked;
- The ban on the importation into the United States of Burmese-origin jadeite and rubies, and all jewelry containing them, has been lifted;
- All OFAC-administered restrictions regarding banking or financial transactions with Burma are no longer in effect, although see discussion below regarding FinCEN-administered restrictions; and
- Compliance with the State Department's Reporting Requirements is no longer required and is now voluntary.

Although transactions involving Burma are now generally broadly permitted, it is important to note that certain parties in Burma remain designated on OFAC's SDN List under the authority of other sanctions programs, such as the counter-narcotics sanctions. These sanctions were not altered by the termination of the Burmese sanctions program, and direct or indirect transactions by US persons<sup>3</sup> or the United States involving such parties, or entities owned 50% or greater in the aggregate by such parties, remain prohibited.<sup>4</sup>

OFAC has stated in a fact sheet that any pending or future OFAC enforcement actions related to apparent violations of the Burmese sanctions while they were still in effect may still be carried out.<sup>5</sup> The termination of sanctions therefore will only provide relief for conduct occurring after October 7, 2016.

## FinCEN Update

In connection with the Obama Administration's announcement of its termination of the Burma Sanctions Program, FinCEN announced its issuance of an "administrative exception" to suspend (but not rescind) the prohibition on US financial institutions from maintaining correspondent accounts for Burmese banks<sup>6</sup> by reason of FinCEN's designation in 2003 of Burma as a "jurisdiction of primary money laundering concern" for purposes of imposing special measures against Burma under Section 311 of the USA PATRIOT Act.<sup>7</sup> Specifically, FinCEN declined to rescind its designation of Burma pursuant to Section 311 and instead chose to issue the exception to suspend the prohibition, with the intended effect of such action to ensure that the agency's 2003 finding remains in place. With the prohibition suspended, however, US financial institutions may now provide correspondent services to Burmese banks, subject to the appropriate due diligence requirements. In particular, US financial institutions processing transactions that involve correspondent Burmese banks must still conduct appropriate scrutiny to guard against the flow of illicit proceeds by complying with the due diligence program requirements set forth under Section 312 of the USA PATRIOT Act and its implementing regulation 31 C.F.R. § 1010.610.<sup>8</sup>

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<sup>3</sup> US persons are defined to include US citizens or permanent residents, wherever located, entities organized under US law (including foreign branches), and individuals and entities located in the United States. See, e.g., 31 C.F.R. §§ 510.311, 536.317, 598.318, etc.

<sup>4</sup> Under the "50% Rule," maintained by OFAC, all entities owned 50% or greater in the aggregate by one or more designated parties is itself considered blocked. See OFAC's Guidance on Entities Owned by Blocked Persons [here](#).

<sup>5</sup> See Treasury Fact Sheet on termination of Burma sanctions program [here](#).

<sup>6</sup> See 31 C.F.R. § 1010.651(b).

<sup>7</sup> Section 311 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, *codified at* 31 USC. § 5318A.

<sup>8</sup> 31 C.F.R. § 1010.610 requires a covered financial institution to establish a due diligence program that includes appropriate, specific, risk-based, and, where necessary, enhanced policies, procedures, and controls that are reasonably designed to enable the covered financial institution to detect and report, on an ongoing basis, any known or suspected money laundering activity conducted through or involving any correspondent account established, maintained, administered, or managed by such covered financial institution in the United States for a foreign financial institution. Such program must include enhanced due diligence procedures with respect to certain types of foreign banks that present greater risk.

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FinCEN's cautious approach in dealing with Burma with respect to anti-money laundering matters may be explained by the considerations that gave rise to the agency's 2003 designation of Burma under Section 311 as a "jurisdiction of primary money laundering concern" in the first place. Such designation was premised on the Treasury Secretary's determination that Burma poses an unacceptable risk of money laundering and other financial crimes, due to its failure to implement an effective anti-money laundering regime.<sup>9</sup> The goals of the designation under Section 311 included protecting the US financial system and encouraging Burma to make the necessary changes to its anti-money laundering regime.<sup>10</sup> In connection with the Obama administration announcement made on October 7, 2016, FinCEN explained that its action to issue the exception was taken in recognition of Burma's progress in improving its anti-money laundering regime and its commitment to continue making progress to address money laundering, corruption, and narcotics-related activities. However, as such progress is still in its early phases and "significant work remains,"<sup>11</sup> FinCEN declined to rescind the designation altogether at this time. To encourage continuing progress by Burma, FinCEN indicated that it intends to rescind its action in its entirety when Burma has made sufficient progress in addressing the issues.

From a broader perspective, it is also notable that FinCEN's approach to facilitate the ability of US correspondent banks to process transactions with correspondent Burmese banks comes less than six weeks after issuance of a joint statement by the Treasury Department – on behalf of itself, FinCEN and OFAC – and the federal banking regulators in support of foreign correspondent banking.<sup>12</sup> The joint statement highlighted the importance of correspondent banking to "[t]he global financial system, trade flows, and economic development." Similar to the cautionary reminder for institutions to conduct appropriate due diligence in working with Burmese banks, in the joint statement the regulators reminded banks on the importance of "appropriate, specific, and risk-based due diligence policies, procedures, and processes that are reasonably designed to assess and manage the risks inherent with [correspondent banking] relationships." Signaling perhaps a subtle policy shift now evident in the Burma sanctions action, US regulators stressed in the joint statement that they will not interfere with correspondent banking relationships so long as banks do not intentionally or recklessly put themselves at risk for compliance breaches. In effect, FinCEN kept its Section 311 designation of Burma as a "jurisdiction of primary money laundering concern" in place but then found a way to neutralize the impact via an exception to facilitate correspondent banking services for Burmese banks. It remains to be seen whether US policy in the correspondent banking context will continue to evolve in favor of a carrot versus stick approach. In the meantime, while the US sanctions against Burma have been lifted, US financial institutions would be well-served to proceed with caution when providing banking services to Burmese banks to ensure that they remain alert for additional risks that are attendant in the provision of these services.

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<sup>9</sup> See 70 Fed. Reg. 19093, 19095 (Apr. 12, 2004).

<sup>10</sup> *Id.* By contrast, the sanctions that were imposed pursuant to Executive Order 13310 and other executive action were imposed for different reasons, in particular to take additional steps with respect to the government of Burma's continued repression of the democratic opposition.

<sup>11</sup> See FinCEN Exception [here](#).

<sup>12</sup> US Department of the Treasury and Federal Banking Agencies Joint Fact Sheet on Foreign Correspondent Banking: Approach to BSA/AML and OFAC Sanctions Supervision and Enforcement (Aug. 30, 2016). The fact sheet is available [here](#).