

(BILLING CODE: 4810-02-P)

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506-AA43

Financial Crimes Enforcement Network; Imposition of Special Measures Against the Country of Nauru

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of the Treasury and FinCEN are issuing this proposed rule, pursuant to the provisions of section 311 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Public Law 107-56), to impose “special measures” against Nauru. Nauru was previously designated as a country of primary money laundering concern pursuant to section 311 on December 20, 2002, a pre-requisite for the imposition of special measures.

DATES: Written comments may be submitted on or before [INSERT DATE THAT IS 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Commenters are encouraged to submit comments by electronic mail because paper mail in the Washington, DC, area may be delayed. Comments submitted by electronic mail may be sent to regcomments@fincen.treas.gov with the caption in the body of the text, “Attention: Section 311 Special Measures Regulations.” Comments may also be submitted by paper mail to FinCEN, P.O. Box 39, Vienna, VA 22183, Attn: Section 311 Special Measures Regulations. Comments should be sent by one method only. 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 the General Counsel, Department of the Treasury, (202) 622-1925; Office of the Assistant General Counsel for Banking and Finance (Treasury), (202) 622-0480; or the Office of Chief Counsel (FinCEN), (703) 905-3590 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

I. Background

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 (USA PATRIOT Act) (Public Law 107-56) (the Act). Title III of the Act makes a number of amendments to the anti-money laundering provisions of the Bank Secrecy Act (BSA) that are codified in subchapter II of chapter 53 of title 31, United States Code. These amendments are intended to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism.

Section 311 of the Act added section 5318A to the BSA. Section 5318A gives the Secretary of the Treasury (Secretary) the authority to designate a foreign jurisdiction, institution(s), class(es) of transactions, or type(s) of account(s) as a “primary money laundering concern” and to impose certain “special measures” with respect to such jurisdiction, institution(s), class(es) of transactions, or type(s) of account(s). On December 20, 2002, the Secretary designated Nauru as a jurisdiction of primary money laundering concern pursuant to section 5318A.¹

Section 5318A identifies the factors that the Secretary must consider and the agencies with which he must consult before designating a primary money laundering

¹ 67 FR 78859 (December 26, 2002).

concern. Upon designation, section 5318A sets forth five potential special measures, the factors to be considered in selecting these measures, and the agencies with which the Secretary must consult before imposing special measures on the designee.

Section 5318A gives the Secretary the authority to bring additional and useful pressure on those jurisdictions and institutions that pose money laundering concerns to encourage them to eliminate the bases for these concerns. 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 institutions, transactions, and accounts, and can protect U.S. financial institutions from involvement with jurisdictions, institutions, transactions, or accounts that pose a money laundering concern.

A. Required Consultations, and Statutory Factors to Consider, Prior to Designating a Primary Money Laundering Concern

Prior to making a finding that a foreign jurisdiction, institution(s), class(es) of transactions, or type(s) of account(s) is a 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 is required by the statute to consider “such information as the Secretary determines to be relevant,” including the following “potentially relevant [jurisdictional] factors”:

- Evidence that organized criminal groups, international terrorists, or both, have transacted business in the jurisdiction;

- The extent to which the jurisdiction or financial institutions operating in the jurisdiction offer bank secrecy or special regulatory advantages to non-residents or non-domiciliaries of the jurisdiction;
- The substance and quality of administration of the bank supervisory and counter-money laundering laws of the jurisdiction;
- The relationship between the volume of financial transactions occurring in the jurisdiction and the size of the economy of the jurisdiction;
- The extent to which the jurisdiction is characterized as an offshore banking or secrecy haven by credible international organizations or multilateral expert groups;
- Whether the United States has a mutual legal assistance treaty with the jurisdiction, and the experience of United States law enforcement officials and regulatory officials in obtaining information about transactions originating in or routed through or to such jurisdiction; and
- The extent to which the jurisdiction is characterized by high levels of official or institutional corruption.

Once the Secretary, after having consulted with the Secretary of State and the Attorney General and having considered the factors set forth immediately above, has made a finding that reasonable grounds exist for concluding that a jurisdiction, etc., is a primary money laundering concern, one or more of the five statutorily permitted “special measures” may be imposed following the appropriate consultations as described below.²

² For the purposes of this action, the required consultation was performed at the staff level.

B. Special Measures

There are five specific “special measures” that can be imposed, either individually, jointly, or in any combination:

1. Recordkeeping and reporting of certain financial transactions.

The Secretary may require domestic financial institutions and domestic financial agencies to maintain and/or to file reports concerning the aggregate amount of transactions or the specifics of each transaction with the primary money laundering concern. The records and reports shall include whatever information the Secretary deems to be relevant, including, but not limited to:

- The identity and address of the participants in a transaction or relationship;
- The legal capacity in which the participant is acting;
- The identity of the beneficial owner of the funds involved; and
- A description of the transaction.

2. Information relating to beneficial ownership.

The Secretary may require domestic financial institutions and domestic financial agencies “to take such steps as the Secretary may determine to be reasonable and practicable to obtain and retain information concerning the beneficial ownership of any account opened or maintained in the United States by a foreign person (other than a foreign entity whose shares are subject to public reporting requirements or are listed and traded on a regulated exchange or trading market)” involving the primary money laundering concern.

3. Information relating to certain payable-through accounts.

The Secretary may require domestic financial institutions and domestic financial agencies that open or maintain a payable-through account in the United States involving the primary money laundering concern to: (1) identify each customer (and representative) who is permitted to use the account or whose transactions are routed through the account; and (2) obtain information about each such customer (and representative) that is substantially comparable to that which a U.S. depository institution obtains in the ordinary course of business with respect to its customers residing in the United States.

4. Information relating to certain correspondent accounts.

The Secretary can require domestic financial institutions and domestic financial agencies that open or maintain a correspondent account in the United States involving the primary money laundering concern to: (1) identify each customer (and representative) who is permitted to use the account or whose transactions are routed through the account; and (2) obtain information about each such customer (and representative) that is substantially comparable to that which a U.S. depository institution obtains in the ordinary course of business with respect to its customers residing in the United States.

5. Prohibitions or conditions on opening or maintaining certain correspondent or payable-through accounts.

The Secretary, after the respective consultations, can prohibit, or can impose conditions on, domestic financial institutions and financial agencies opening or maintaining in the United States any correspondent account or payable-through account for or on behalf of a foreign financial institution if the account involves the primary money laundering concern.

C. Additional Required Consultations, and Statutory Factors to be Considered, in Advance of Imposing Any of the Special Measures

Prior to determining which special measure(s) to impose, the Secretary must consult with the Chairman of the Board of Governors of the Federal Reserve, 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.”

In determining generally which special measures to select and to impose, the Secretary, in consultation with the agencies and “interested parties” set forth above, must consider the following 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 jurisdiction, institution, or class of transactions ; and
- The effect of the action on United States national security and foreign policy.

In addition to (1) the consultations for the designation of a primary money laundering concern, and (2) the consultations with the larger group of agencies for determining which of the special measures to impose, the Secretary, in determining specifically whether to impose the fifth special measure, must consult with the Secretary of State, the Attorney General, and the Chairman of Board of Governors of the Federal Reserve.

Last, the Secretary, in determining whether to apply one or more special measures only to a foreign institution(s), transaction(s), class(es) of transactions, or type(s) of account(s) within a particular jurisdiction – as opposed to applying the special measure more generally to the foreign jurisdiction itself – must consult with the Secretary of State and the Attorney General, and shall take into consideration the following “institutional factors”:

- The extent to which such financial institution(s), transaction(s), class(es) of transactions, or type(s) of account(s) are used to facilitate or promote money laundering in or through the jurisdiction;
- The extent to which such institutions, transaction(s), class(es) of transaction(s), or type(s) of account(s) are used for legitimate business purposes in the jurisdiction;
and
- The extent to which such action is sufficient to ensure, with respect to transactions involving the jurisdiction and institutions 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.

D. Procedures for Imposing Special Measures

Pursuant to section 5318A, any of the first four “special measures” can be imposed by order, regulation, or as otherwise “permitted by law.” If an order is issued, it can remain in effect for 120 days, unless authorized by a regulation promulgated before the end of the 120-day period. The fifth “special measure” can only be imposed through the issuance of a regulation.

II. Nauru

A. Background

Nauru is a small island of approximately 10 square miles that has a population of only approximately 12,000 people. At one point in time, the island had one of the highest per capita incomes in the developing world due to the mining and export of phosphates, a funding source expected to be completely depleted within five to ten years. As a result of the phosphate mining, the central part of the island, once thriving with vegetation and wildlife, has become uninhabitable and only the perimeter of the island remains available for habitation. This perimeter itself is vulnerable to storms and the movement of the ocean.

Although Nauru at one point in time was relatively wealthy, most of the funds emanating from the phosphate mining and originally contained in the country’s trust funds have been depleted through waste, poor investments, and fraud. As a result, the country has been borrowing heavily to finance fiscal deficits. Currently, the basic infrastructure of the island is so poor that electric, water, and phone service is available only on a limited and sporadic basis.

B. Offshore Shell Banks in Nauru

In an effort to raise funds, the island has resorted to the selling of passports (or “economic citizenships”) to non-resident foreigners, and, of greater concern, the selling of offshore banking licenses. Nauru is notorious for permitting the establishment of offshore shell banks with no physical presence in Nauru or in any other country. The evidence indicates that the entities that obtain these offshore banking licenses are subject to cursory and wholly inadequate review by the country’s officials, lack any credible ongoing supervision, and maintain no banking records that Nauru or any other jurisdiction can review. In addition, one of the common requirements imposed by Nauru on these offshore banks is that they not engage in economic transactions involving either the currency of Nauru (currently the Australian dollar) or its citizens or residents. Consequently, these offshore shell banks have no apparent legitimate connection with the economy or business activity of Nauru. Indeed, only one bank appears to be physically located in Nauru, the “Bank of Nauru.” It is a local community bank that also serves as the Central Bank.

In 2000, FinCEN reported that 400 offshore banks had been granted licenses by Nauru.³ It has been verified by on-site reports that a 1,000 square foot wooden structure is “home” to these banks that have no physical or legal residence anywhere in the world. The United States Government has been able to verify the names of 161 of the institutions licensed by Nauru.⁴ These are institutions for which the limited information available indicates that there is a strong likelihood that they are shell banks that are not subject to effective banking supervision.

³ FinCEN Advisory Issue 21 (July 2000).

⁴ A list of these institutions was presented as Appendix A to the December 20, 2002, designation of Nauru as a jurisdiction of primary money laundering concern.

C. FATF Designation

As a consequence of the current practices of Nauru, the Financial Action Task Force on Money Laundering (FATF) placed Nauru on the “Non-Cooperative Countries and Territories” (NCCT) list in June 2000 for maintaining an inadequate anti-money laundering regime. According to FATF, Nauru’s anti-money laundering weaknesses included, but were not limited to, the following: money laundering was not a criminal offense; offshore banks licensed by Nauru were not required to maintain customer identification or transaction records; Nauruan financial institutions were under no obligation to report suspicious transactions; and Nauru maintained strong bank secrecy laws. In July 2000, FinCEN issued an advisory to U.S. financial institutions, warning them to give enhanced scrutiny to all financial transactions originating in or routed to or through Nauru, or involving entities organized or domiciled, or persons maintaining accounts, in Nauru. In addition, the Office of the Comptroller of the Currency has issued 15 Alerts concerning offshore shell banks located in Nauru that were potentially attempting to engage in the business of banking in the United States without authority.

In June of 2001, FATF determined that Nauru had made insufficient progress towards remedying deficiencies in its anti-money laundering regime and warned Nauru that FATF would impose countermeasures by September 30, 2001, if Nauru failed to address these deficiencies.

On August 28, 2001, Nauru passed the Anti-Money Laundering Act of 2001 (the AML Act). On September 7, 2001, however, FATF indicated that the AML Act was not consistent with international standards because it did not apply to the numerous offshore banks licensed by Nauru. In response to FATF pressure, on December 6, 2001, Nauru

passed amendments to its AML Act. Nonetheless, according to FATF, the revised anti-money laundering law that now exists provides for a wholly inadequate anti-money laundering (AML) legislative and regulatory regime. In addition, Nauru has not yet addressed the remaining and most important deficiency of its AML legislation, that is, the inadequate procedures for licensing, regulating, and supervising its offshore banks. Thus, despite repeated warnings by FATF of its concern with Nauru's practices, and the clear consequences of not amending its practices, Nauru has not shouldered its responsibility to establish a sufficient AML regime.

On July 22, 2002, FATF wrote Nauruan officials to express FATF's concern about the practice in Nauru of issuing licenses to offshore shell banks and asked Nauru to cease licensing such entities. Nauru, however, has not ceased this activity.

D. Designation of Nauru as a Primary Money Laundering Concern and Imposition of Counter-measures

After reviewing Nauru in light of the statutory factors set forth above, on December 20, 2002, the Treasury designated Nauru as a country of primary money laundering concern under section 5318A of the BSA.⁵ As a result of this designation, and based upon an analysis of the entirety of circumstances in Nauru, Treasury has determined that grounds exist for the imposition of a special measure upon Nauru. Based upon its consideration of the following factors, Treasury intends to impose on Nauru the fifth special measure authorized by section 5318A.

E. Factors to Consider in Imposing Special Measures under Section 5318A

1. Whether similar action has been or is being taken by other nations or multilateral groups.

⁵ Supra n1.

As a result of FATF's call on December 5, 2001, for the imposition of counter-measures against Nauru, 27 FATF member countries, including all G-7 countries, have taken action against Nauru.⁶

2. 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.

Imposing sanctions against Nauru under section 5318A should not result in any competitive disadvantage, including any undue compliance cost or burden, to financial institutions in the United States. First, FATF member countries and the G-7 countries have already responded to FATF's call for the imposition of counter-measures against Nauru. Second, BSA section 5318(j) already requires the termination of correspondent accounts maintained by U.S. depository institutions and securities broker-dealers for foreign shell banks.⁷ As a result, since we understand that most, if not all, Nauru-licensed banks are shells (other than the Central Bank of Nauru), most transactions between Nauru and U.S. financial institutions have or should already have ceased.

3. 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 jurisdiction, institution, or class of transactions.

⁶ Specifically, the countries have imposed stringent requirements for identifying clients and beneficial owners before business relationships are established with individuals or companies from Nauru. In addition, the countries have required enhanced and systematic reporting of financial transactions involving Nauru. Also, the countries have required that, in considering requests for approving the establishment in FATF member countries of subsidiaries or branches or representative offices of banks from Nauru, the country take into account the fact that the applicant bank is from an NCCT. Last, the countries have issued warnings to non-financial sector businesses that transactions with entities within NCCTs might run the risk of money laundering. (Source: FATF Reports).

⁷ See Part III.A. infra.

The action against Nauru should have no significant adverse systemic impact on the international payment system or on legitimate business activities because of the small size of the economy and the absence of any meaningful, legitimate international business.

4. The effect of the action on United States national security and foreign policy.

The action is expected to have virtually no effect on United States national security or foreign policy.

The Secretary intends to impose the fifth special measure against Nauru pursuant to section 5318A. That special measure will prohibit covered U.S. financial institutions from opening or maintaining in the United States any correspondent account, or payable-through account, for a foreign financial institution if that account is maintained for, or on behalf of, a Nauru financial institution.

III. Section-by-Section Analysis

A. Overview

This proposed rule is designed to deny Nauru financial institutions access to the U.S. financial system through correspondent accounts. The proposed rule would prohibit certain U.S. financial institutions from maintaining correspondent accounts for, or on behalf of, a Nauru financial institution. Furthermore, if a U.S. financial institution covered by this proposed rule learns that a correspondent account that it maintains for a foreign bank is being used to provide services indirectly to a Nauru financial institution, the U.S. financial institution must terminate the correspondent account of the foreign bank.

On September 26, 2002, Treasury published in the Federal Register a final rule implementing sections 313 and 319(b) of the Act (the Section 313/319 Rule).⁸ That rule, among other things, prohibits certain financial institutions from providing correspondent accounts to foreign shell banks, and requires such financial institutions to take reasonable steps to ensure that correspondent accounts provided to foreign banks are not being used to provide banking services indirectly to foreign shell banks. There will be significant overlap between the Section 313/319 Rule and this proposed rule for those financial institutions covered by the Section 313/319 Rule, although they are quite distinct, as described below.

B. Section 103.184 Definitions

Correspondent account. Section 103.184(a)(1) of the proposed rule's definition of correspondent account is the definition contained in 31 U.S.C. 5138A(e) (as added by section 311 of the Act). Section 5138A(e) defines the term to mean an account established to receive deposits from, make payments on behalf of, a foreign financial institution, or handle other financial transactions related to such institution. 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 financial institution, including payable-through accounts. In the case of securities broker-dealers, futures commission merchants, introducing brokers, and mutual funds, a correspondent account would include any account that permits the foreign financial institution to engage in: trading in securities and futures, funds transfers, or other types of financial transactions. Treasury is using the same definition for purposes of the proposed rule as that established in the Section 313/319 Rule with two notable exceptions: (1) the term also applies to

⁸ 67 FR 60562 (September 26, 2002) (codified at 31 CFR 103.177).

such accounts maintained by futures commission merchants and introducing brokers as well as mutual funds; and (2) the definition applies to such accounts maintained for any Nauru financial institution, as opposed to just Nauru banks.

Covered financial institution. Section 103.184(a)(2) of the proposed rule defines covered financial institution to include those financial institutions included in the definition under the Section 313/319 Rule, as well as futures commission merchants, introducing brokers, and mutual funds. The term is therefore defined 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 be registered with the SEC under the 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 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 pursuant to that Act. Futures commission merchants, introducing brokers, and mutual funds are being added in recognition of their offering of correspondent accounts within the meaning of 31 U.S.C. 5318A(e).

Nauru financial institution. Section 103.184(a)(3) of the proposed rule defines Nauru financial institution to include all foreign banks licensed by Nauru (other than the Central Bank of Nauru) and any other person organized under the law of Nauru who

conducts as a business one or more of the following activities or operations on behalf of customers: trading in (1) money market instruments; (2) exchange, interest rate, and index instruments; (3) transferable securities; and (4) commodity futures. The definition of foreign bank is that contained in 31 CFR 103.11(o). The inclusion in this definition of financial institutions other than depository institutions is done in recognition that these activities are alternate viable routes for money laundering activity.

C. Requirements for covered financial institutions

Prohibition on correspondent accounts. Section 103.184(b)(1) of the proposed rule would prohibit all covered financial institutions from establishing, maintaining, administering, or managing a correspondent account in the United States for, or on behalf of, a Nauru financial institution. Based on Treasury's understanding that the only banks in Nauru (other than the Central Bank) are shell banks, depository institutions and securities broker-dealers are already subject to essentially this same prohibition under the Section 313/319 Rule, subject to the inclusion in the proposed rule of certain additional Nauru financial institutions. The prohibition would require the additional covered financial institutions to review their account records to determine that they have no customers that are Nauru financial institutions.

Termination of known indirect accounts. In addition, section 103.184(b)(2) of the proposed rule would require a covered financial institution to terminate immediately any correspondent account which it currently establishes, maintains, administers, or manages for, or on behalf of, a foreign bank, if it obtains actual knowledge that the foreign bank is using this account to provide banking services indirectly to a Nauru financial institution. The proposed rule would not require covered financial institutions to review or

investigate every account they maintain for foreign banks to ascertain whether such foreign banks are providing services to Nauru financial institutions. Instead, covered financial institutions must terminate such an account only if they become aware that a foreign bank is using its correspondent account to provide banking services indirectly to a Nauru financial institution. This distinction is significant and in contrast to the obligation under the Section 313/319 Rule, which imposed a new due diligence requirement on covered financial institutions to take reasonable steps to ensure that their foreign bank customers were not providing services to shell banks. This proposed rule would rely on existing due diligence procedures and not require covered financial institutions to make a separate inquiry of their foreign bank customers concerning Nauru financial institutions.

Reporting and recordkeeping not required. Section 103.184(b)(3) of the proposed rule states that nothing in the proposed rule imposes any reporting or recordkeeping requirement upon any covered financial institution that is not otherwise required by applicable law or regulation. If a covered financial institution that is subject to the Section 313/319 Rule (depository institution or securities broker-dealer) has previously received a certification or other information from a Nauru bank pursuant to that Rule in which it purports not to be a shell bank, this proposed rule would still require the termination of the account. More specifically, the safe harbor provisions of the Section 313/319 Rule will have no application to the measures that would be imposed under this proposed rule.

Section 5318A authorizes Treasury to prohibit a broad range of financial dealings with a country of primary money laundering concern. Indeed, the statute affords Treasury the authority to require the termination of any correspondent account that

involves the primary money laundering concern. In the proposed rule, Treasury has taken a relatively conservative approach to this countermeasure by requiring only the termination of direct correspondent accounts with a Nauru financial institution and the termination of accounts for other foreign banks only when the U.S. institution has actual knowledge that the account is being used to provide services to a Nauru financial institution indirectly. In view of all the facts and circumstances, this more limited application is appropriate. Treasury notes, however, that the circumstances surrounding future designations may warrant the imposition of countermeasures that reach much further into nested financial relationships with the primary money laundering concern.

IV. Public Comments Requested

The Department of the Treasury invites comments from all interested persons, on all aspects of this rulemaking, and specifically seeks comments from the financial sector, including domestic financial institutions and domestic financial agencies, concerning the appropriateness and effectiveness of this particular special measure, the ability to comply with special measure five on Nauru, and any competitive disadvantage, cost, or burden associated with compliance.

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. Financial institutions described in section 103.175(f)(2) are currently prohibited from establishing or maintaining correspondent accounts in the United States for, or on behalf of, a foreign shell bank. This rule would make it clear that all banks licensed by Nauru (other than the Central

Bank of Nauru) are shell banks notwithstanding that such a bank may have provided a certification that it is not a shell bank.

With respect to futures commission merchants, introducing brokers, and open-end investment companies, Treasury and FinCEN believe that few, if any, such businesses are likely to maintain a correspondent relationship with a bank licensed by Nauru. Treasury and FinCEN specifically request comments on the extent to which the prohibition contained in the proposed rule would affect such businesses.

VI. Executive Order 12866

This final rule is not a “significant regulatory action” as defined in Executive Order 12866. Accordingly, a regulatory assessment is not required.

List of Subjects in 31 CFR Part 103

Banks and banking, Brokers, Counter-money laundering, Counter-terrorism, Currency, Foreign banking, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 31 CFR part 103 is proposed to be amended as follows:

PART 103-FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN 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 and 5316-5332; title III, secs. 311, 312, 313, 314, 319, 326, 352, Pub. L. 107-56, 115 Stat. 307, 12 U.S.C. 1818, 12 U.S.C. 1786(q).

2. Subpart I of part 103 is proposed to be amended by adding § 103.184 under the undesignated centerheading “SPECIAL DUE DILIGENCE FOR CORRESPONDENT ACCOUNTS AND PRIVATE BANKING ACCOUNTS” to read as follows:

§ 103.184 Special measures against Nauru.

(a) Definitions. For purposes of this section:

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

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

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

(3) Nauru financial institution means the following:

(i) Any foreign bank, as that term is defined in § 103.11(o), licensed by Nauru, but does not include the Central Bank of Nauru: and

(ii) Any other person organized under the law of Nauru who conducts as a business one or more of the following activities or operations on behalf of customers:

(A) Trading in money market instruments;

(B) Trading in exchange, interest rate, and index instruments;

(C) Trading in transferable securities; or

(D) Trading in commodity futures trading.

(b) Requirements for covered financial institutions.

(1) Prohibition on correspondent accounts. A covered financial institution shall not establish, maintain, administer, or manage a correspondent account in the United States for, or on behalf of, a Nauru financial institution.

(2) Termination of correspondent accounts. A covered financial institution shall terminate any correspondent account established, maintained, administered, or managed by that covered financial institution in the United States for a foreign bank upon actual knowledge that the correspondent account is being used by the foreign bank to provide banking services indirectly to a Nauru financial institution.

(3) Reporting and recordkeeping not required. Nothing in this section shall require a covered financial institution to maintain any records, obtain any certification, or to report any information not otherwise required by applicable law or regulation.

Dated: _____

James F. Sloan
Director,
Financial Crimes Enforcement Network