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January 22, 2003

Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220
Attn: 311-Designation of Jurisdictions

Ladies and Gentlemen:

The American Bankers Association (ABA) appreciates this opportunity to comment on the proposed special measures that the Department plans to impose on the countries of Nauru and Ukraine. The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership – which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks – makes ABA the largest banking trade association in the country. For further information regarding the ABA, please consult the ABA on the Internet at <http://www.aba.com>.

On December 20, 2002, the Department of the Treasury, pursuant to 31 USC 5318A, has designated the countries of Nauru and Ukraine as “primary money laundering concerns.” This designation permits the Secretary of the Treasury to impose one or more of five (5) special measures with respect to the named jurisdiction, “institution, class of transactions, or type of account.”

The measures require: (1) keeping records and filing reports on particular transactions, including the identities of the participants in the transactions and the beneficial owners of the funds involved; (2) obtaining information on the beneficial ownership of any account opened or maintained in the United States by a foreign person or a foreign person’s representative; (3) identifying and obtaining information about customers permitted to use, or whose transactions are routed through a foreign bank’s “payable-through” account; or (4) identifying and obtaining information about customers permitted to use, or whose transactions are routed through, a foreign bank’s “correspondent” account. The fifth (5) measure permits the Treasury to prohibit a domestic financial institution or agency from opening or maintaining in the United States, a correspondent account or a payable-through account for or on behalf of a foreign financial institution if the account involves the designee.

According to the Treasury, the Department plans to impose the fifth special measure on Nauru and any or all of the first four measures against Ukraine. The Treasury Department will propose the rule prohibiting “financial dealings by U.S. financial institutions with any Nauru licensed institution, unless otherwise excepted” at some

time in the near future. For Ukraine, the Department intends to issue an order while simultaneously initiating a rulemaking to impose the special measures. According to the Treasury, Nauru and Ukraine have been designated as countries of primary money laundering concern and special measures are being considered as the result of the Financial Action task Force (FATF) requesting that member jurisdictions impose sanctions against these countries.

The Treasury Department is seeking comments on the ability of domestic financial institutions and agencies to comply with the special measures that can be put in place against financial institutions that do business with Ukraine and whether any institution should be excepted from the prohibitions imposed on Nauru-licensed institutions.

Use of 311 Authority

As this is the first time that the special measures provisions has been utilized by the Treasury, we should consider whether the ultimate goal of the section can be achieved by this or some alternative method. The House Financial Services Committee directed that when Treasury is deciding whether reasonable grounds exist to conclude that an institution, a class of transactions, or a type of account represent a primary money laundering concern, “the Secretary is to consider: (1) the extent to which the institution, transaction, or account facilitates money laundering; (2) the extent to which the institution, transaction, or account is used for legitimate business; and (3) the extent to which the Secretary’s finding will be effective in guarding against money laundering.”¹

In addition, the report went further and instructed Treasury that “the Committee expects that the Secretary will not routinely determine that reasonable grounds exist to conclude that a jurisdiction, financial institution, class of international transactions, or type of account is of primary money laundering concern, but instead will exercise this authority only to combat identified and significant money laundering threats.”

Finally, the Deputy Secretary Kenneth Dam told the Senate Banking Committee that “as the principal architect of these new regulations, Treasury is mindful of the need to craft rules that achieve the goals of the Act without unduly burdening legitimate business activities or our citizens' privacy.”²

It is important to assess whether use of special measures is an appropriate tool to sanction foreign governments for their non-compliance with international standards as opposed to using these special measures because there is an imminent threat to the United States or the government agencies in the United States are in need of additional information to make a determination as to whether a threat exists. It is

¹ H.Rept. 107-250

² Prepared Statement of the Honorable Kenneth W. Dam
Deputy Secretary of the Treasury, before the Senate Banking Committee (October 3, 2002)

equally important to assess whether the imposition of new obligations on the financial sector will unduly burden our business activities.

The American Bankers Association strongly believes that the specific use of the 311 authority in this situation should be modified since it appears that the special measures are being used to sanction foreign countries rather than address a need for additional information by government agencies in the United States and there exists alternative means to ensure that financial institutions in the United States are sufficiently addressing any identified or perceived money laundering risks.

Current Methods Addressing High-Risk Entities

Financial institutions in the United States have long been subjected to comprehensive oversight from regulated authorities in the area of money laundering and financial crime prevention. For example, the Bank Secrecy Act and federal money laundering laws, as modified by the USA PATRIOT Act, require institutions to perform proper due diligence regarding high risk entities. The Office of Foreign Assets Control (OFAC) administers and enforces sanctions programs that require financial institutions, in certain situations, to block transactions and freeze assets of designated individuals companies, countries or individuals.

Financial institutions must also have policies and procedures in place to detect and report possible violations of law. These procedures consider whether the government has characterized a jurisdiction as “high risk” and directs the institution to file a “suspicious activity report” (SAR) if the transaction in question appears to be violative of federal or state law. One of the more common means of communicating whether a jurisdiction is “high-risk” is through the issuing of guidance from FinCEN. Finally, section 5326 of the Bank Secrecy Act authorizes the Treasury to use “geographic targeting orders” and require certain institutions to record and report select transactions on a confidential basis.

ABA believes that the issuance of guidance that Ukraine and Nauru are “high-risk” jurisdictions should be sufficient to place U.S. financial institutions on notice that enhanced due diligence should be applied to transactions with individuals or entities in those countries. The Association is opposed to using any of the proposed special measures against Ukraine as those obligations would unduly burden U.S. institutions, have little impact on the Ukraine government and potentially act as a de facto prohibition to Ukraine transactions in the United States. Should this be the intention of the Department then Treasury should seek such a prohibition outright.

As Treasury considers actions regarding Ukraine as well as future use of section 311, ABA believes that the issuance of an advisory, OFAC sanctions or use of a geographic targeting order is more appropriate.

Conclusion

The American Bankers Association strongly supports the efforts of the Treasury Department to address the tremendous challenge of deterring and preventing money laundering and terrorist financing. We commend the Department's diligence in reaching out to their private sector partners to find the most efficient means of attacking the movement of criminal proceeds around the world. It is important to use the tools currently available before placing new and untested obligations on the financial sector.

Sincerely,

John J. Byrne