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FinCEN Action Against Macau Bank Represents Novel Use of Patriot Act, Experts Say

By Matt Squire

When the U.S. Treasury Department barred U.S. financial institutions from doing business with a Macau bank, it broke new ground by relying on the Patriot Act to gain a bargaining chip in nuclear discussions with North Korea, international law and banking experts say.

The Treasury's Financial Crimes Enforcement Network (FinCEN) on Wednesday formerly declared Banco Delta Asia a prime money laundering concern 18 months after the agency cited evidence that the bank was involved in laundering money for the North Korean government.

The Treasury ruling will allow Macau authorities to release a portion of \$25 million in frozen North Korean accounts at the bank and help to finalize a deal between six countries including the U.S., North Korea and China that would result in North Korea disarming its nuclear weapons program, according to an article in the New York Times. North Korea has pledged to honor its agreement to disarm only after the sanctions on its funds frozen at BDA were lifted, according to the Times.

"It's hard to compare it to any other situation," said Bruce Zagaris a Partner with Berliner Corcoran & Rowe LLP in Washington, D.C. "It was definitely an outcome of the last round of negotiations [with North Korea]."

Section 311 of the USA Patriot Act, passed in 2001, granted FinCEN the power to take special measures, including prohibiting U.S. banks from providing correspondent banking and other services with foreign jurisdictions and financial institutions designated as a primary money laundering concerns.

That provision has primarily been used in cases involving money laundering by traditional criminal operations, such as drug dealers. FinCEN, for example, designated Latvian banks VEF Banka and Multibanka as primary money laundering concerns in April 2005 for their alleged involvement in money laundering for criminal elements. VEF Banka's designation was finalized July 2006, but the designation against Multibanka was dropped in July 2006.

In August 2004, FinCEN proposed designating Infobank in Minsk, Belarus, as a prime money laundering concern and in the same month proposed the designation for First Merchant Bank OSH Ltd. In both cases, the agency alleged that the banks were involved in money laundering for criminal elements.

FinCEN has used Section 311 once to deter terrorism, another stated goal of the provision. In May 2004, the agency designated Syrian-controlled Commercial Bank of Syria in Damascus and its subsidiary in Beirut for their alleged involvement in money laundering for terrorists. The designation was finalized in March 2006.

“Commercial bank of Syria took years to finalize,” said Judith Lee, a partner with the law firm of Gibson Dunn & Crutcher LLP in Washington, D.C. “And during that time there were a lot of negotiations with Syria, which were not fruitful in the end, which is why they finalized the rule.”

The sanctions against Banco Delta Asia have drawn much more media attention because they were directly attuned to national security issues, said **David Caruso**, managing director of **Dominion Advisory Group**, a consulting firm specializing in anti-money laundering issues.

“It’s specifically part of a much larger strategy of the U.S. government to deal with a rogue state,” said **Caruso**. “[the BDA designation has been] a political tool available to the President of the United States, and my view is that he used it well.”

The final rule issued Wednesday by FinCEN officially bars U.S. financial institutions from opening or maintaining correspondent accounts for Banco Delta Asia. But Lee said Banco Delta Asia was effectively blacklisted when FinCEN issued its proposed designation in September 2005.

“It’s really the initial designation, the preliminary notice, that is the kiss of death,” said Lee, “Because once that happens there is no U.S. financial institution that would do anything with that bank.”

Lee and others said FinCEN’s actions put Banco Delta Asia’s future in doubt. FinCEN’s action preliminary action in September 2005 led to an exodus of depositors and business at the bank and spurred the Macao government to take control of the family-owned institution and freeze \$25 million in North Korean assets.

“The government of Macau has to decide how much money to release to North Korea and then I think Banco Delta Asia is done,” said Lee.

Other FinCEN designations have not resulted in the failure of the targeted banks. Commercial Bank of Syria continues and had the equivalent of roughly \$16.4 billion of total assets at the end of 2005. VEF Banka also continues to function, however, saw its total assets drop by 66 percent during 2005 to around \$22.2 million at the end of the year, which the bank has attributed to FinCEN’s actions.