

## SPECIAL MEASURES

**Objective:** *Assess the bank's compliance with the BSA regulatory requirements for special measures issued under section 311 of the USA PATRIOT Act.*

### Regulatory Requirements for Special Measures

This section outlines the regulatory requirements for banks in 31 CFR Chapter X regarding special measures under Section 311 of the USA PATRIOT Act. Specifically, this section covers:

- [31 USC 5318A](#)
- [31 CFR 1010, Subpart F - Special Measures Under Section 311 of the USA PATRIOT Act and Law Enforcement Access to Foreign Bank Records](#)

Section 311 of the USA PATRIOT Act added 31 USC 5318A to the BSA, which authorizes the Secretary of the Treasury to require domestic financial institutions and domestic financial agencies to take certain special measures against foreign jurisdictions, foreign financial institutions, classes of international transactions, or types of accounts that are of primary money laundering concern. Section 311 provides the Secretary of the Treasury with a range of options that can be adapted to target specific ML/TF concerns, given that correspondent bank accounts have been used to facilitate illicit enterprises. Section 311 is implemented through various orders and regulations that are incorporated into 31 CFR 1010, Subpart F.<sup>1</sup>

### Types of Special Measures

The following five special measures can be imposed, individually, jointly, or in any combination. For any of these special measures to be imposed, the Secretary of the Treasury must deem a jurisdiction outside of the United States, a financial institution operating outside of the United States, a class of transactions within, or involving, a jurisdiction outside of the United States, or one or more types of accounts to be of primary money laundering concern.<sup>2</sup>

### Recordkeeping and Reporting of Certain Financial Transactions

Under the first special measure, banks in the United States may be required to maintain records, file reports, or both, concerning the aggregate amount of transactions, or concerning each transaction.<sup>3</sup> The statute contains minimum information requirements for these records and reports and permits the Secretary of the Treasury to impose additional information requirements.<sup>4</sup>

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<sup>1</sup> Certain documents related to section 311 of the [USA PATRIOT Act](#), including determinations of “primary money laundering concern,” notices of proposed rulemaking, and final rules imposing special measures are on the [FinCEN website](#).

<sup>2</sup> [31 USC 5318A\(a\)\(1\)](#).

<sup>3</sup> [31 USC 5318A\(b\)\(1\)\(A\)](#).

<sup>4</sup> [31 USC 5318A\(b\)\(1\)\(B\)](#).

When banks are required to maintain records and file reports under this special measure, the implementing regulation or order will detail how banks must comply and for how long. Information required may include:<sup>5</sup>

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

### **Information Relating to Beneficial Ownership**

Under the second special measure, in addition to any other requirement under any other provision of law, banks may be required to take reasonable and practicable steps to obtain and retain information concerning the beneficial ownership of any account opened or maintained in the United States by a foreign person or a representative of such foreign person. This special measure cannot be applied to a foreign entity whose shares are subject to public reporting requirements or are listed and traded on a regulated exchange or trading market.<sup>6</sup>

### **Information Relating to Certain Payable-Through Accounts**

Under the third special measure, banks that open or maintain a payable-through account (PTA)<sup>7</sup> in the United States for a foreign financial institution may be required (1) to identify each customer (and representative) who is permitted to use the account or whose transactions are routed through the account, and (2) to obtain information about each customer (and representative) that is substantially comparable to that which the bank obtains in the ordinary course of business with respect to its customers residing in the United States.<sup>8</sup>

### **Information Relating to Certain Correspondent Accounts**

Under the fourth special measure, banks that open or maintain a correspondent account<sup>9</sup> in the United States for a foreign financial institution may be required (1) to identify each customer (and representative) who is permitted to use the account or whose transactions are routed through the account, and (2) to obtain information about each such customer (and representative) that is substantially comparable to that which the bank obtains in the ordinary course of business with respect to its customers residing in the United States.<sup>10</sup>

### **Prohibitions or Conditions on Opening or Maintaining Certain Correspondent or Payable-Through Accounts**

Under the fifth and strongest special measure, regulations may prohibit, or impose conditions on, the opening or maintaining in the United States of a correspondent account or PTA by any bank

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<sup>5</sup> *Id.*

<sup>6</sup> [31 USC 5318A\(b\)\(2\)](#).

<sup>7</sup> [31 USC 5318A\(e\)\(1\)\(C\)](#).

<sup>8</sup> [31 USC 5318A\(b\)\(3\)](#). Also refer to the [Payable-Through Accounts](#) section for more information.

<sup>9</sup> [31 USC 5318A\(e\)\(1\)\(B\)](#).

<sup>10</sup> [31 USC 5318A\(b\)\(4\)](#). Also refer to the [Foreign Correspondent Account Recordkeeping, Reporting, and Due Diligence](#) section for more information.

for, or on behalf of, a foreign banking institution if the correspondent account or PTA involves the jurisdiction, institution, or transaction that was deemed to be of primary money laundering concern, or if any such transaction may be conducted through the correspondent or PTA.<sup>11</sup> FinCEN can prohibit U.S. banks from establishing, maintaining, administering, or managing in the United States correspondent accounts or PTAs for, or on behalf of, all financial institutions from a specific foreign jurisdiction, and may apply the special measure to specific foreign financial institutions and their subsidiaries.

FinCEN may require banks to review their account records to determine whether they maintain accounts directly for, or on behalf of, such entities. In addition to the direct prohibition, banks may also be:

- Prohibited from knowingly providing indirect account access.
- Required to notify correspondent account holders that they must not provide access to accounts maintained at the U.S. bank.
- Required to take reasonable steps to identify any indirect use of accounts.

## Form and Duration of Orders

As set forth in section 311, special measures one through four may be imposed by regulation, order, or otherwise as permitted by law without prior public notice and comment, but such orders must be of limited duration and must be issued together with a Notice of Proposed Rulemaking (NPRM). Special measure five may be imposed only by regulation. It is important to note that while a jurisdiction, financial institution, class of transactions, or type of account may be designated of primary money laundering concern in an order issued together with an NPRM, special measures of unlimited duration can only be imposed by a final rule.<sup>12</sup>

## Process for Selecting Special Measures

Section 311 establishes a process for the Secretary of the Treasury to follow, and identifies federal agencies to consult, before the Secretary of the Treasury may conclude that a jurisdiction, financial institution, class of transactions, or type of account is of primary money laundering concern. The statute also provides similar procedures, including factors and consultation requirements, for selecting the specific special measures to be imposed against a jurisdiction, financial institution, class of transactions, or type of account that is of primary money laundering concern.<sup>13</sup>

## Examiner Assessment of Compliance with Special Measures

Orders and regulations implementing specific special measures taken under section 311 of the USA PATRIOT Act are not static; they can be issued or rescinded over time as the Secretary of the Treasury determines that a jurisdiction, financial institution, class of transactions, or type of account is no longer of primary money laundering concern. In addition, special measures imposed against one jurisdiction, financial institution, class of transactions, or type of account

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<sup>11</sup> [31 USC 5318A\(b\)\(5\)](#).

<sup>12</sup> [31 USC 5318A\(a\)\(2\) and \(3\)](#).

<sup>13</sup> [31 USC 5318A\(a\)\(4\)](#).

may vary from those imposed in other situations. Examiners should be aware that an order or rule imposing a special measure may establish a standard of due diligence requirements that banks must apply in order to comply with the particular special measure.

Examiners should only examine for those special measures that apply to the bank during the examination period and should not review banks for special measures that were not finalized (by order or rulemaking) during the examination period. As noted above, special measures one through four may be imposed by order (in conjunction with the issuance of an NPRM). While such an order is pending, any banks with accounts covered by that order would be required to comply with the order's information collection requirements. Examiners reviewing compliance with this section should visit the [FinCEN website](#) for current information on final special measures.

Examiners should assess the adequacy of the bank's policies, procedures, and processes (internal controls) related to the bank's compliance with special measures. Examiners may review information, such as independent testing or audit reports, to aid in their assessment of the bank's compliance with special measures.

Examiners should determine whether the bank's internal controls for complying with special measures are designed to assure ongoing compliance with the requirements and are commensurate with the bank's risk profile. Refer to the [Assessing the BSA/AML Compliance Program - BSA/AML Internal Controls](#) section for more information.

## SPECIAL MEASURES EXAMINATION AND TESTING PROCEDURES

**Objective:** *Assess the bank's compliance with the BSA regulatory requirements for special measures issued under section 311 of the USA PATRIOT Act.*

1. Determine the extent of the bank's international banking activities and the foreign jurisdictions in which the bank conducts transactions and activities, with particular emphasis on foreign correspondent banking and payable-through accounts (PTAs).
2. Determine which final special measures issued by FinCEN under section 311 (including special measures implemented by active orders) apply to the bank. Current information on final special measures can be found on [FinCEN's website](#); final measures are subject to change.
3. Review the bank's policies, procedures, and processes for responding to specific special measures imposed by FinCEN that are applicable to the bank's operations. Evaluate the adequacy of the policies, procedures, and processes for detecting accounts or transactions with jurisdictions or financial institutions subject to final special measures, or involving classes of transactions or types of accounts subject to final special measures.
4. Determine whether the bank's internal controls are designed to assure ongoing compliance with special measures and are commensurate with the bank's risk profile.
5. Through discussions with management and review of the bank's documentation, select a sample of accounts or transactions where the bank has taken action in response to final special measures.
6. For special measures one through four, determine whether the bank obtained, recorded, or reported the information required by each particular special measure.
7. For special measure five, determine whether the bank complied with the prohibitions, conditions, or any other actions required by the special measure.
8. As necessary, review the bank's information technology sources, systems, and processes used to monitor accounts or transactions with jurisdictions or financial institutions subject to final special measures, or involving classes of transactions or types of accounts subject to final special measures (including active orders).
9. Based on examination and testing procedures completed, form a conclusion about the adequacy of policies, procedures, and processes the bank has developed to meet the BSA statutory and regulatory requirements associated with special measures.