UNITED STATES DEPARTMENT OF THE TREASURY

FINANCIAL CRIMES ENFORCEMENT NETWORK

In the Matter of the Imposition of Special Measure Five Against Banco Delta Asia S.A.R.L.	)
(RIN 1506 — AA58)	)

PETITION OF MR. STANLEY AU AND DELTA ASIA GROUP (HOLDINGS) LTD. TO RESCIND FINAL RULE

May 3, 2007

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Stanley Au and Delta Asia Group (Holdings) Ltd. (the "Delta Asia Group") submit this petition, together with the attached Statement of Mr. Au, to rescind the Final Rule designating Banco Delta Asia S.A.R.L. ("BDA") as a financial institution of primary money laundering concern and imposing the fifth special measure authorized by Section 311 of the USA PATRIOT Act, 31 U.S.C. § 5318A(b)(5).[1]

Introduction

Following almost nineteen months of strenuous efforts by BDA to address concerns raised by the Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN"),[2] FinCEN issued a final rule imposing the fifth special measure on BDA and thereby barring U.S. banks from maintaining any correspondent account for or on behalf of BDA (the "Final Rule"). *See* 72 Fed. Reg. at 12739. The Final Rule was premised not on any failure by BDA to respond adequately to FinCEN's initial concerns, but rather on FinCEN's speculation—raised for the first time in FinCEN's Final Rule—that if control of BDA were to be returned to BDA's owners (Mr. Au and Delta Asia Group) and former management team, the corrective measures adopted by BDA while under the control of the government-appointed Administrative Committee might not be maintained and implemented. *Id.* at 12733 & n.18. Mr. Au's statement makes clear, however, that he has no intent to return the bank to control of its former managers, who were replaced in October 2005. Au Stmt. ¶ 35. Accordingly, the sole remaining "concern"

[1] The Delta Asia Group is the corporate parent of BDA, and Mr. Au is the chairman and majority shareholder of the Delta Asia Group. The Delta Asia Group and BDA are part of the Delta Asia Financial Group, a group of affiliated banking and financial services companies operating in Macau, Hong Kong, China and Japan, of which Mr. Au is also the chairman and chief executive officer. FinCEN's finding of primary money laundering concern and imposition of special measures "appl[ies] exclusively to Banco Delta Asia . . . and not to Delta Asia Group . . . or any of its other subsidiaries." 72 Fed. Reg. 12730, 12732 n.6 (Mar. 19, 2007).

[2] These efforts are detailed in BDA's Petition to Rescind the Final Rule and in correspondence which was sent by BDA's counsel to FinCEN and is included in the Appendices to BDA's Petition.

ostensibly justifying the Final Rule arises from the potential influence of BDA's owners, Mr. Au and the Delta Asia Group, who submit this petition to address in greater detail three reasons to rescind the Final Rule.[3]

First, FinCEN failed to provide adequate notice and an opportunity to respond to its concerns about the past and potential future conduct of BDA's owners and former managers. Had it done so, Mr. Au and the Delta Asia Group would have presented evidence demonstrating that FinCEN's concerns are unfounded.

Second, FinCEN's conclusion that BDA's owners and former senior management ignored, facilitated or encouraged counterfeiting and money laundering by North Korean entities is clearly wrong. Mr. Au and the Delta Asia Group have, historically, acted in good faith and had taken steps to address counterfeiting and money laundering concerns even before FinCEN's initial findings.

Third, there is also no evidentiary basis for FinCEN's belief that, when control of BDA is returned from the Administrative Committee to Mr. Au and the Delta Asia Group, BDA will either ignore FinCEN's concerns or retreat from the improvements recently put in place at BDA by the Administrative Committee. To the contrary, had FinCEN provided an opportunity to respond to its concerns, it would have learned that Mr. Au and the Delta Asia Group fully support and are willing to provide commitments to maintain *both* the anti-money laundering measures established by the Administrative Committee *and* BDA's current bar on all North Korean-related business.

[3] BDA has submitted a separate petition seeking rescission of the Final Rule, and Mr. Au and the Delta Asia Group incorporate by reference and join in full the arguments set forth therein. Mr. Au and the Delta Asia Group also request that BDA's Petition to Rescind the Final Rule, together with its Appendices, be included in the record for this Petition.

For these reasons, and others set forth in BDA's separately filed petition, the Final Rule should be rescinded.

Argument

I. FinCEN Failed To Provide Adequate Notice of Its Concerns About BDA's Owners

In justifying its imposition of the fifth special measure against BDA, FinCEN emphasized that its "primary concern" was an alleged "pattern of activity by the former senior management and owners of the bank to ignore, facilitate, or even encourage illicit activity." 72 Fed. Reg. at 12736. Noting that "no plan has been proffered to change permanently the management or ownership structure of the bank," *id.* at 12733, FinCEN concluded that "the possibility that the bank will be returned to its former management and primary shareholder in the future" created a "resultant likelihood of recidivism upon the dissolution of the administrative committee" and left FinCEN "concerned about the potential for the bank to continue to be used for money laundering and other illicit purposes." *Id.* at 12733, 12735.

As explained in BDA's petition, notwithstanding FinCEN's position that its concerns about BDA's owners were the "primary concern" motivating adoption of the fifth special measure, FinCEN failed to raise these issues either in FinCEN's notice of its initial finding that BDA was of primary money laundering concern, *see* 70 Fed. Reg. 55214 (Sept. 20, 2005), or in FinCEN's notice of proposed rulemaking, *see* 70 Fed. Reg. 55217 (Sept. 20, 2005). In fact, FinCEN's notice indicated to the contrary that BDA's ownership was not an issue of concern, noting that "designation of primary money laundering concern and imposition of special measures shall apply exclusively to Banco Delta Asia and . . . not to [its parent] Delta Asia Group (Holdings) Ltd., or any of its other subsidiaries." 70 Fed. Reg. at 55218 n.5. Nor did FinCEN identify these concerns during its discussions with BDA, despite BDA's repeated inquiries to FinCEN about additional steps it could take to convince FinCEN to revoke the notice

of proposed rulemaking. Indeed, the *first* time FinCEN identified these ownership issues as its "primary concern" was in the announcement and publication of the Final Rule itself.

This departure from the procedural requirements of the Administrative Procedure Act was significant because, had FinCEN raised these concerns earlier in the rulemaking process, Mr. Au and the Delta Asia Group would have addressed them to FinCEN's satisfaction. Specifically, Mr. Au and the Delta Asia Group would have (i) demonstrated that BDA's owners and managers acted in good faith and did not ignore, facilitate or encourage counterfeiting and money laundering by North Korean entities, and (ii) provided commitments to maintain or undertake any specific measures—including maintaining BDA's current bar on North Korean business—needed to allay FinCEN's concerns about potential recidivism. Having had no opportunity to raise these issues with FinCEN during the rulemaking process, Mr. Au and the Delta Asia Group address them herein and in the accompanying statement of Stanley Au.

II. BDA's Owners Did Not Ignore, Facilitate or Encourage Counterfeiting and Money Laundering by North Korean-Related Entities

The independent review conducted by Ernst & Young (the "E&Y Report") from which FinCEN claims to have "primarily" derived its conclusions (72 Fed. Reg. at 12733), together with Mr. Au's statement, make clear that BDA's owners and senior management did not ignore, facilitate or encourage counterfeiting and money laundering by North Korean-related entities, but took significant actions to prevent both before FinCEN's initial action in September 2005. While FinCEN's allegations of wrongdoing by BDA are often so vague and devoid of specificity that it is impossible to formulate specific responses, it is nevertheless apparent that many of FinCEN's principal assumptions are contradicted by available evidence.

A. Stanley Au and BDA Are Engaged in Legitimate Banking Activities

Contrary to FinCEN's doubts about the extent of "any legitimate business use" of BDA, 72 Fed. Reg. at 12732, both BDA and Mr. Au have long public records as legitimate and respected participants in the Asian financial markets.

Mr. Au is a well-known and well-regarded financier who, for decades, has played an instrumental role in developing Hong Kong as a major foreign-exchange center. *See* Au Stmt. ¶¶ 2, 5-6. Mr. Au has repeatedly been recognized for his achievements through appointment to various positions of trust and influence in Hong Kong and Macau. *See id.* ¶¶ 5-7. He has also played an important role as a civic, commercial and political leader in Macau. *Id.* ¶ 7.

In 1980, Mr. Au took over management of BDA from his father, who had founded BDA with Mr. Au's great uncle in Macau in 1935. *Id.* ¶¶ 3, 8. Although BDA is small by comparison to the larger multinational banks, it has a significant presence in Macau and offers a broad range of services, including trade financing, foreign exchange, investment banking and retail banking. *Id.* ¶ 9. Indeed, BDA had over 40,000 individual retail accounts in a jurisdiction with a population of approximately 500,000. *Id.* Like his father before him, Mr. Au has always declined to provide corporate banking services to Macau's casino operators for personal ethical reasons. *Id.* ¶ 10. North Korean-related business generated only a small part of BDA's overall revenue, estimated at 7% at the time the North Korean accounts were closed in September 2005. *Id.* ¶ 17.

B. BDA Appropriately Addressed Counterfeiting Concerns

Contrary to FinCEN's contention that BDA ignored currency counterfeiting concerns, s*ee* 72 Fed. Reg. at 12734, BDA has acted diligently and responsibly in confronting the problem. Most notably, since 1994, BDA has followed a policy of sending its wholesale dollar deposits to another bank in Hong Kong (now the Hong Kong branch of HSBC USA, N.A.) to be verified for

authenticity using advanced technology. Au Stmt. ¶¶ 18-19. Ernst & Young found that this "passing of all wholesale banknote deposits to HSBC . . . effectively extinguishes the possibility of wholesale banknotes being reintroduced into the economy without being thoroughly checked for counterfeits." E&Y Report at 43. In addition, BDA maintained a practice of scrutinizing smaller retail deposits with its own equipment and manual checking by experienced bank personnel. Au Stmt. ¶ 18. While Ernst & Young noted that this is a "lower standard of check" than that applied to the larger wholesale deposits, E&Y Report at 42, there is no reason to believe that this has not been fully effective in preventing the passage of counterfeit currency through BDA. Indeed, the Secretary of the Treasury has advised Congress that "hand examination of the notes is the most common and effective method used by clerks at commercial banks and money exchanges and enables them to detect even high-quality counterfeit U.S. currency."[4]

Nor is there merit to FinCEN's contention that BDA "[f]ail[ed] to consistently follow its own policies and procedures" regarding "screening for counterfeit currency." 72 Fed. Reg. at 12734. To the contrary, the E&Y Report noted only that BDA's files were missing some confirmation documents from HSBC confirming authentication. E&Y Report at 41. Ernst & Young made clear that this was only a technical deficiency that posed no risk because "it appears that the banknotes were accepted by HSBC, therefore removing the possibility of counterfeit

[4] U.S. Dep't of the Treasury, *The Use and Counterfeiting of United States Currency Abroad, Part 3*, at ix (Sept. 2006). Though the Treasury Department found the $100 counterfeit "supernotes" that North Korea is believed to produce to be "highly deceptive," it does not believe that large amounts of these counterfeits have successfully passed into circulation. *Id*. at 50. Although the Department noted that "a number of news stories suggested there might be significant international counterfeiting" of new $100 bills, it concluded that "since the release of the NCD [New Currency Design] $100 note in March 1996, however, the U.S. Secret Service has found no evidence to support the reports of large volumes of counterfeits in circulation." *Id*. at 83.

notes." *Id.* In other words, it was not necessary to get and retain separate confirmation because HSBC would have certainly alerted BDA if it found that any of the bills it was buying were counterfeit.

FinCEN's concerns about counterfeiting seem to be premised on the allegation that BDA maintained an uninterrupted banking relationship with a company whose head was charged with attempting to deposit large sums of counterfeit currency into BDA, *see* 72 Fed. Reg. at 12732, which appears to be a reference to a 1994 incident in which counterfeit funds were deposited into three of BDA's North Korean-related accounts. *See* E&Y Report at 23. But far from demonstrating any disregard for counterfeiting by BDA, the 1994 incident highlights BDA's vigilance in combating the problem. Specifically, after discovering the nature of the funds, BDA itself promptly reported the transactions to the Macau police and terminated the accounts of two customers who appeared to have had knowledge of the counterfeit nature of the funds. *See* Au Stmt. ¶ 19. A third customer, Zokwang Trade Co. Ltd., claimed that it had no knowledge that the funds were counterfeit, and BDA lacked any evidence to the contrary. *Id.* Accordingly, BDA adopted a "zero tolerance" policy with respect to any future incidents involving Zokwang by permitting Zokwang to retain its account with a warning that all business dealings would cease if any counterfeit currency was ever again deposited into Zokwang's accounts. *Id.* In addition, BDA adopted the screening policies described above. *Id.* To the best of Mr. Au's knowledge, Zokwang has never again been found to be the source of counterfeit funds. *Id.* It is therefore disingenuous to claim, as FinCEN does, that this 1994 incident, and BDA's response to it, justified a "concern" in 2005 about BDA's operations.

Indeed, FinCEN's assessment of this incident in 2005 conflicts sharply with the view expressed by agents of the United States government at the time it occurred. As Mr. Au relates,

after BDA reported the 1994 incident to the Macau police, it was contacted by U.S. government agents seeking information about the accounts. Au Stmt. ¶ 20. Mr. Au personally met and cooperated fully with these agents. *Id.* He offered at that time to refrain from conducting future cash business with North Korea, but the agents stated that they preferred Mr. Au to continue to do so because he was willing to cooperate in their investigation while another financial institution might not be so cooperative. *Id.*

C. BDA Believed in Good Faith That Its Korean Business Was Routine and Innocent

FinCEN's adverse judgment of BDA's owners and managers appears predicated largely on BDA's willingness to do business with North Korean entities at all, in light of publicly reported allegations that North Korea is engaged in drug dealing and other illicit activities. *See* 72 Fed. Reg. at 12734. But, there is no evidence that BDA ever ignored illegal activity or did not act in the good faith belief that its North Korean business was routine and innocent.

As an initial matter, the fact that BDA had business dealings with North Korean entities is not, in and of itself, evidence of improper behavior by BDA. Whether because of lack of sufficient evidence, *see, e.g.*, 1 U.S. Department of State, *International Narcotics Control Strategy Report* 274 (Mar. 2006) ("*it is likely, but not certain*, that the North Korean government sponsors criminal activities, including narcotics production and trafficking, in order to earn foreign currency for the state and its leaders" (emphasis added)), or because of humanitarian considerations, the United States has *not* seen fit to impose sanctions on North Korea that would isolate it from the international financial community.

Accordingly, whether or not state sponsorship of illegal activities exists, it is not deemed so pervasive that U.S. banks are forbidden from dealing with North Korean entities. To the contrary, on June 19, 2000, trade sanctions against North Korea were liberalized, permitting U.S.

banks to transact business with North Korea. *See* 31 C.F.R. § 500.586 (2006). Indeed, some banking transactions were permitted as early as 1995. 31 C.F.R. §§ 580-582 (2006). As a result, numerous other banks both in and out of Macau, including leading international banks, do business with North Korean entities. Au Stmt. ¶ 16. Like these other banks, BDA and its owners and managers had little reason, prior to FinCEN's initial designation of BDA in September 2005, to treat North Korean-related business as *per se* suspect.

Nor did BDA have reason to suspect that any of its specific North Korean-related customers were engaged in illegal activity. Only one of these customers was ever identified on any watch list promulgated by the Department's Office of Foreign Assets Control, and that customer was terminated when BDA discovered the listing.[5] *See* Alphabetical Listing of Blocked Persons, Specially Designated Nationals, Specially Designated Terrorists, Specially Designated Global Terrorists, Foreign Terrorist Organizations, and Specially Designated Narcotics Traffickers, 31 C.F.R. Ch. V, App. A (Mar. 30, 2007). A 1995 report on North Korean financial institutions, issued by the U.S. embassy in Seoul, reviewed many of BDA's primary customers (including the Trade Bank, Daesong Bank, Credit Bank and others, *see* E&Y Report at 39) without any suggestion that they were involved in money laundering or other illicit activities. *See* U.S. Embassy, Seoul, S. Korea, Flash Fax Doc. No. 5711, *North Korean Financial Institutions* (Apr. 1995), *available at* http://www.kimsoft.com/korea/96-0706a.htm. And FinCEN does not cite any evidence that any of BDA's North Korean customers has ever been charged with or implicated in illegal activities.[6]

[5] That customer was black-listed by OFAC on June 29, 2005, and terminated by BDA in September 2005, prior to FinCEN's initial notice. E&Y Report at 45.

[6] Though FinCEN alleges that BDA also "serviced the account of a known international drug trafficker," 72 Fed. Reg. at 12732, it fails to identify this party, who is not "known" to Mr. Au or the Delta Asia Group.

Moreover, as Mr. Au states, neither BDA's auditor, PricewaterhouseCoopers, nor its regulator has ever found any evidence that BDA was, in fact, being used for money laundering. Au Stmt. ¶ 30. More significantly, Ernst & Young and FinCEN both conducted exhaustive reviews of BDA's files, with FinCEN itself reviewing over 300,000 pages of documents. Ernst & Young did not find that any money laundering activities in fact occurred. *See* E&Y Report at 66. Similarly, FinCEN failed to cite a single specific example of BDA having been used as a vehicle for money laundering by a North Korean-related entity.[7] To the contrary, the United States recently requested that the Macau government release the $25 million in North Korean-related funds that had been frozen at BDA following FinCEN's initial action, which is inconsistent with any claim that the funds were actually the proceeds of illicit activities. Indeed, when asked about the release of these North Korean-related funds during a congressional hearing, Daniel Glaser, the FinCEN official responsible for the Department's anti-money laundering policies, refused to characterize the funds as "ill-gotten gains" of illegal activity, noting instead that "it's a more complicated question than that."[8]

Instead of pointing to specific illegal acts, FinCEN relied solely on generalized assertions of BDA's alleged tolerance of activities that FinCEN characterizes as "unusual or deceptive." *See* 72 Fed. Reg. at 12734. But FinCEN cites no evidence that any of these activities actually

[7] It is notable in this regard that indictments issued by the Department of Justice shortly before FinCEN's initial findings identify several money laundering transactions that went through other banks in Macau, but none that went through BDA. *See, e.g.*, Indictment, *United States v. Tang*, No. 1:05-cr-00612 (D.N.J. filed Aug. 16, 2005).

[8] *Isolating Proliferators and Sponsors of Terror: The Use of Sanctions and the International Financial System to Change Regime Behavior: J. Hearing of the Terrorism, Nonproliferation & Trade Subcomm. of the H. Foreign Affairs Comm. & the Domestic and International Monetary Policy, Trade & Technology Subcomm. of the H. Financial Servs. Comm.*, 110th Cong. (Apr. 18, 2007) (testimony of Daniel Glaser, Deputy Assistant Secretary for Terrorist Financing and Financial Crimes, Office of Terrorism and Financial Intelligence, Department of Treasury) [hereinafter *Sanctions Hearings*].

constituted laundering of illicit proceeds by North Korean customers, much less that BDA's owners or managers knew about or supported such activity. Indeed, Ernst & Young noted that practices of concern to FinCEN have benign explanations, stating, for instance, that the repeated intra-bank transfers identified by FinCEN, *see* 72 Fed. Reg. 12734, appeared to be foreign exchange speculation. E&Y Report at 61.[9]

Similarly, though FinCEN found the large cash deposits made by North Korean banks through couriers to be unusual or deceptive "in the absence of any credible explanation of the origin or purpose for the cash transactions," *see* 72 Fed. Reg. at 12734, the international banking community, including BDA, has been accepting such deposits for decades and had good reason to view them as routine. As Mr. Au explains in his Statement, North Korea has long received large amounts of foreign and especially U.S. currency from a variety of sources, including foreign governments, humanitarian organizations, business investors, North Korean expatriates, and family and friends of North Koreans living abroad.[10] Au Stmt. ¶ 14. Because North Korean banks are not integrated into the international banking system and are unable to make electronic transfers, and because North Korean *won* may not be legally exported and has little value outside the country, money is routinely brought into and taken out of North Korea in the form of hard foreign currency. North Korean banks rely on their ability to export foreign cash—using

[9] Similarly, although FinCEN identified as problematic the fact that BDA "handles the bulk of [North Korea's] precious metal sales," 70 Fed. Reg. at 55215, North Korea is a gold producing nation, and there was no reason for BDA to think these transactions were anything other than perfectly legitimate. *See* Au Stmt. ¶ 13; Donald Kirk, *Under bank sanctions, North Korea looks to gold exports*, Christian Sci. Monitor, Jan. 22, 2007; Robert Neff, *North Korea's Gold Mines*, OhmyNews Int'l, Apr. 16, 2007.

[10] North Korean expatriates send foreign cash, often through brokers, to relatives back home. *See* Norimitsu Onishi, *With Cash, Defectors Find North Korea's Cracks*, New York Times, Oct. 19, 2006; *Perilous Journeys: The Plight of North Koreans in China and Beyond*, Asia Report No. 122, International Crisis Group, Oct. 26, 2006, available at http://www.crisisgroup.org.

couriers—in order to meet overseas obligations.[11] Accordingly, Mr. Au had good reason to believe that the cash deposits accepted by his bank represented foreign currency arriving in North Korea for legitimate commercial and humanitarian purposes, fully consistent with the policy of the United States and the international community.[12]

Given the absence of evidence of bad-faith conduct or actual money laundering by BDA, it appears that FinCEN's decision to impose the fifth special measure on BDA was motivated largely by a desire to send a signal to the international financial community that FinCEN will view dealings with North Korea as inherently suspect and that banks who continue to deal with North Korea do so at their own peril. Indeed, Mr. Glaser admitted in his congressional testimony that FinCEN had singled out one small bank and imposed extraordinary sanctions with no warning in order to scare the financial community. The action against BDA was, he explained, "sort of a 'shot heard 'round the world' for national bankers who cut off relations with North Korea, fearing that something like what happened to [BDA] could happen to them"). *See Sanctions Hearings, supra*.

David Asher, a former senior State Department official and expert on North Korea, similarly noted that BDA "had never been the main offender in Macao," and that, even though the United States had uncovered "voluminous" evidence of money laundering at other Macau banks, BDA was chosen for sanctions because it was "an easy target in the sense that it was not so large that its failure would bring down the financial system." He stated that "Banco Delta

[11] *See* Gordon Fairclough, *North Korea's economy feels fallout of U.S. move*, Wall St. J. Asia, Feb. 14, 2006; Jay Solomon and Neil King, Jr., *Financial Leverage: How U.S. Used a Bank to Punish North Korea*, Wall St. J., Apr. 12, 2007.

[12] It is estimated that one to three million North Koreans died of malnutrition between 1995 and 2003. Larry A. Niksch, *Korea: U.S.-Korean Relations – Issues for Congress*, Congressional Research Service, April 14, 2006. By providing banking services for North Korean banks, BDA has played a role in enabling both legitimate commercial activity and humanitarian aid that help sustain North Korea's impoverished population.

may be a sacrificial lamb in some people's minds, but it is not about Banco Delta." Donald Greenlees & David Lange, *The Money Trail That Linked North Korea to Macao*, N.Y. Times, Apr. 11, 2007. Rather, as Mr. Asher colorfully put it, "[w]e decided to kill the chicken to scare the monkey." Jay Solomon & Neil King, *How U.S. Used a Bank To Punish North Korea*, Wall St. J., Apr. 12, 2007.

But BDA's owners and former managers had no reason to know, prior to FinCEN's September 2005 finding, that the United States now held the view that bank dealings with North Korea must be entirely avoided. Whether for geopolitical reasons or otherwise, the U.S. government chose not to avail itself of any of the formal mechanisms available to it to put banks on notice of this apparent change in policy. It did not revise OFAC sanctions to prohibit financial transactions; it did not designate North Korea or any North Korean bank as a "primary money laundering concern"; and it did not announce any other prohibition on dealing with North Korean entities or banks. Instead, it "announced" this new position by singling out for sanction one small Macau bank, apparently hoping to achieve by *in terrorem* effects what it did not wish to impose by straightforward regulation. Under these circumstances, neither BDA's past willingness to conduct business with North Korea nor its failure to anticipate the U.S. government's unannounced change in policy can fairly be viewed as evidence that BDA's owners would in the future be unwilling to cooperate with FinCEN's policies on doing business with North Korean customers. To the contrary, given Mr. Au's commitment to cooperate with FinCEN, *see infra* Part III, the United States' goals can be fully achieved through measures far less restrictive than those embodied in the Final Rule.

D. BDA's Owners Have Historically Been Responsive to Concerns About Money Laundering

Nor do past shortcomings in BDA's anti-money laundering procedures suggest that BDA's owners and managers ignored, facilitated or encouraged money laundering. While Ernst & Young did find that BDA's anti-money laundering and "know your customer" procedures "need[ed] improvement[s]," E&Y Report at 11—improvements that have since been implemented—it did not conclude, as FinCEN claims, *see* 72 Fed. Reg. at 12734, that those procedures were "grossly inadequate," *see* E&Y Report at 4-14. To the contrary, the procedures then in place were largely consistent with the regulatory requirements then in effect in Macau, Au Stmt. ¶ 21, with BDA closely monitoring the movements in its customer accounts and reporting suspicious transactions to Macau authorities, *id.* ¶ 22. More importantly, none of the inadequacies suggested that BDA's owners and managers acted in bad faith or were deliberately indifferent to the required procedures.

Indeed, the claim that BDA's owners and managers were historically unconcerned with potential money laundering ignores the steps taken by BDA to strengthen its anti-money laundering procedures even before FinCEN's initial findings. As Ernst & Young noted, after BDA appointed a new Group Head of Compliance in 2004 as part of an ongoing strategy to improve BDA's systems and internal procedures, five of the nine shortcomings identified by Ernst & Young either "ha[d] been, or are being" "addressed and rectified." E&Y Report at 12 n.*.

For instance, beginning in 2004, BDA took actions to improve its "know your customer" program. Au Stmt. ¶ 21. Among other things, BDA's Audit and Compliance Committee developed a new questionnaire which was sent to BDA's customers, including the North Korean banks in 2005, seeking information about those customers' anti-money laundering and internal

compliance procedures. *Id.*; *see also* E&Y Report at 13. In 2005 BDA also rejected applications of two North Korean entities to open accounts because those entities failed to supply sufficient information about their backgrounds and reasons for wanting to open the accounts. Au Stmt. ¶ 21; *see also* E&Y Report at 13.[13]

In sum, the prior state of BDA's anti-money laundering measures provides no evidence of a deliberate strategy by bank owners and management to ignore, facilitate or encourage money laundering. While FinCEN may believe that heightened concerns of wrongdoing by North Korea now support more intensive anti-money laundering procedures, BDA and its owners should not be uniquely faulted for having operated in the past in good faith and in a manner consistent with other banks in Macau and much of the world.

III. Mr. Au and the Delta Asia Group Would Have Been—and Still Are—Willing To Take Remedial Measures To Address FinCEN's Concerns About Money Laundering

As demonstrated above, there is no evidentiary basis for FinCEN's conclusion that BDA's owners and former management previously "ignored, facilitated or encouraged" illicit activity by BDA's North Korean-related clients. There is also no basis for FinCEN's conclusion that the return of control of BDA to its owners would create the risk that BDA would retreat from the substantial additional remedial measures that BDA has adopted since FinCEN's initial findings.[14]

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[13] In addition to these recent measures, Mr. Au has long maintained a policy of not providing corporate banking services to Macau's casino operators, *see* Au Stmt. ¶ 10, thereby reducing the risk that BDA could be unwittingly used for money laundering purposes; *see* U.S. Department of State, *The 2007 International Narcotics Control Strategy Report — Volume II: Money Laundering and Financial Crimes - Country Reports - Macau* (Mar. 1, 2007) (noting Macau casino industry's involvement with organized crime and the use of casinos to remit and launder money).

[14] As noted above, FinCEN's concerns about BDA's former management team cannot in any event justify the Final Rule because that management team was replaced in October 2005,

To the contrary, those remedial measures are the direct result of voluntary efforts by BDA's owners and former management to address FinCEN's concerns. Specifically, Mr. Au and BDA's Board of Directors *invited* the Macau government to assume temporary day-to-day managerial control over BDA. *See* Au Stmt. ¶¶ 25-28 & Ex. 1. And, from the beginning of that process, Mr. Au fully supported the Administrative Committee's efforts to adopt all necessary remedial measures. *Id.* ¶¶ 32-36.

Mr. Au is willing, moreover, to provide enforceable assurances that he will maintain and enforce the anti-money laundering procedures adopted by the Administrative Committee and will continue BDA's existing bar on North Korean business—for all or any part of this business—for as long as necessary to address FinCEN's concerns. Au Stmt. ¶ 34.[15] Mr. Au is also open to discussions with FinCEN over the need for any additional remedial measures above and beyond the substantial measures already taken by BDA and the Macau government since September 2005. There are, moreover, multiple ways that FinCEN could obtain assurances of BDA's compliance with these commitments, such as relying on inspections by Macau and Hong Kong regulators or reports by BDA's outside auditors.

Any concerns that Mr. Au might seek to undo the Administrative Committee's measures are also baseless because any such backsliding could not occur without regulatory approval by

(continued…)

Mr. Au intends to maintain the new management team, and he is willing to agree that he will not rehire any of the former senior managers to whom FinCEN or the Macau regulatory authority objected. *See supra* pp. 1-2; Au Stmt. ¶ 35.

[15] FinCEN cited as a concern Mr. Au's statement, immediately following FinCEN's initial determination, that BDA's cessation of North Korean business was only temporary. *See* 72 Fed. Reg. at 12734-35 & n.29. But this statement merely reflected Mr. Au's belief at the time that he would persuade FinCEN that BDA's North Korean business was routine and innocent. Au Stmt. ¶ 31. As noted above, however, Mr. Au is willing to accede to FinCEN's demand that BDA not resume its North Korean business. *Id.*

the Macau and Hong Kong governments. New directors can only be appointed with the approval of Macau regulatory authorities. *See* Financial System Act, Law No. 32/93/M art. 49 (1993) (Macau), *available at* http://www.imprensa.macau.gov.mo/bo/i/93/27/declei32_en.asp. Indeed, because BDA has a Hong Kong subsidiary, the replacement of directors would also require the approval of Hong Kong regulatory authorities. *See* Banking Ordinance § 71 (Hong Kong), *available at* http://www.legislation.gov.hk/blis_ind.nsf/e1bf50c09a33d3dc482564840019d2f4/c45ecef01d8ae9fd88256489000ae009.

Finally, the implementation of remedial measures of the sort which BDA has already adopted and which Mr. Au has committed to keeping in place, as opposed to the far more draconian fifth special measure, is consistent with the manner by which the United States, including FinCEN itself, resolves similar concerns about the sufficiency of anti-money laundering programs in both foreign and domestic banks. For example, as explained in BDA's petition to revoke the Final Rule, FinCEN withdrew findings of money laundering concern and a notice of proposed rulemaking involving Multibanka after it expressed a willingness to work with FinCEN to adopt necessary remedial measures. *See* BDA Petition at 4-5, 34. Similarly, FinCEN, the Board of Governors of the Federal Reserve System, and other U.S. agencies have exercised their authority under the Bank Secrecy Act to enter into agreements with domestic banks to remedy deficiencies in those banks' anti-money laundering programs. *See, e.g.*, U.S. General Accounting Office, *Anti-Money Laundering Issues Concerning Depository Institution Regulatory Oversight: Testimony Before the U.S. Senate Committee on Banking, Housing and Urban Affairs* 6-9 (June 3, 2004) (statement of Davi M. D'Agostino, Director Financial Markets and Community Investment) (describing agreements with Banco Popular de Puerto Rico and Riggs Bank, N.A). Even where such deficiencies are severe, U.S. regulators have not barred

these banks from continuing to do business with banks in the United States, but instead have imposed such measures as the adoption of compliance programs and periodic audits of their effectiveness, strengthened head-office oversight, and the development of improved management plans. *See, e.g.*, Order to Cease and Desist Issued Upon Consent, *In re ABN AMRO Bank N.V.*, FRB Dkt. No. 05-035-B-FB (Dec. 19, 2005). FinCEN's decision to impose the drastic sanction of isolating BDA from the international banking community, while ignoring BDA's and its owners' considerable efforts to address FinCEN's concerns, has no precedent.

Conclusion

As senior U.S. officials have admitted, FinCEN's decision to impose the fifth special measure "is not about Banco Delta [Asia]." It represents, rather, a political decision to send a signal to others in the international banking community that commercial dealings with North Korean-related entities are henceforth to be avoided. To make matters worse, from among the dozens of banks engaged in business with North Korea, FinCEN selected as the target of this extraordinary "shot heard 'round the world" none of the "main offender[s]" in Macau, but rather a 72-year-old family-run bank that is small enough that FinCEN's actions would not damage the international financial system.

This is a misuse of Section 311, which permits the imposition of special measures only to address legitimate money laundering concerns. BDA has taken the necessary steps to eliminate whatever concerns may have existed, and there are no grounds to think that BDA's owners would undo the improvements in the bank's anti-money laundering policies or resume business dealings with North Korea after they regain operational control of BDA. To the contrary, Mr. Au and the Delta Asia Group have provided assurances that they will maintain BDA's improved anti-money laundering measures as well as its bar on North-Korean related business.

For these reasons, and others set forth herein and in BDA's separate petition, Mr. Au and the Delta Asia Group urge FinCEN to act immediately to rescind the Final Rule. As BDA has explained in its petition, "the effect of the Final Rule has been devastating," threatening the Bank's very existence. BDA Petition at 25. In addition to preventing BDA from engaging in U.S. dollar transactions, the Final Rule has prompted numerous banks to close correspondent accounts in other foreign currencies, including Hong Kong dollars, thereby impeding a substantial portion of BDA's business. In addition, securities trading and investment activity has effectively ceased. Accordingly, Mr. Au and Delta Asia Group request that FinCEN act promptly on this petition.

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