

Legal Sidebar

FinCEN's Money Laundering Death Penalty Temporarily Blocked

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On August 27, 2015, the U.S. District Court for the District of Columbia, [issued a preliminary injunction](#) in *FBME Bank Ltd. v. Lew*, enjoining Treasury's Financial Crimes Enforcement Network (FinCEN) from implementing a regulation that cuts off FBME Bank Ltd. (FBME) from the U.S. financial system. FBME, formerly known as the Bank of the Middle East, is headquartered in Tanzania and operates primarily in Cyprus. The regulation, [proposed](#) on July 22, 2014, and [finalized](#) on July 29, 2015, was scheduled to go into effect on August 29, 2015. It subjects FBME to the most powerful of five "special measures" (sanctions) that FinCEN can levy on a financial institution found to be "of primary money laundering concern" under [Section 311 of the USA PATRIOT Act](#). It prohibits all U.S. financial institutions from opening or maintaining [correspondent or payable-through accounts](#) for FBME and to exercise due diligence to prevent other foreign correspondent accounts from being used to process FBME transactions. The ruling is the first judicial decision on FinCEN's exercise of its power under Section 311. In response to the preliminary injunction, the government moved for a voluntary remand for FinCEN to reopen the rulemaking. After FBME objected, on September 18, 2015, the court ordered a full hearing on the issue, requiring the government's brief by October 5, and FBME's reply brief by October 13.

Under Section 311, FinCEN has authority to require U.S. financial institutions to take any or all of five "special measures" against a foreign jurisdiction or a financial institution operating outside the United States if FinCEN determines that there is a reasonable basis for finding the jurisdiction or the institution to be of "primary money laundering concern." The statute requires consultation with the Secretary of State and the Attorney General and consideration of various factors as prerequisites to requiring a "special measure." Among the factors that must be considered in connection with subjecting a foreign financial institution to a special measure are use of the institution to promote "money laundering by organized criminal groups, international terrorists, or entities involved in the proliferation of mass destruction or missiles." The use of the institution for legitimate business purposes must also be considered. In imposing "special measures," FinCEN may rely on confidential information from "suspicious activity reports (SARs)" filed pursuant to the [Bank Secrecy Act and its implementing regulations](#) and classified information, both of which may not be disclosed to the sanctioned institution, but in a judicial proceeding, may be disclosed ex parte to the court. Any of the first four "special measures" may be imposed by order or regulation. The fifth "special measure" requires notice and comment rulemaking. The first four "special measures" involve reporting, recordkeeping, or information requirements relating to transactions or types of accounts. Under the fifth "special measure," FinCEN may prohibit or impose conditions on opening or maintaining [correspondent or payable-through accounts](#) for the jurisdiction or financial institution found to be "of primary money laundering concern."

FinCEN's [finding](#) that FBME is "of primary money laundering concern" includes specifics that link FBME to transactions associated with cybercrime and fraud, nuclear sanctions violations, and terrorist financing. There are also references to more general failings in FBME's anti-money laundering regime. There is a mention of wire transactions "that exhibited indicators of high risk money laundering typologies, including widespread shell company activity." In considering the factors specified in the statute, FinCEN concluded that imposing the "special measure" against FBME will enhance national security. It also concluded that, because of the limited nature of FBME's operations, sanctioning FBME will have no significant adverse impact on the international payment system. Moreover, FinCEN found that, since FBME operates in jurisdictions in which there are other banks, there will be no undue burden on legitimate

businesses.

In granting the preliminary injunction, the court did not undermine FinCEN's basic finding. The court took care to state that it was rejecting the claim that FinCEN acted arbitrarily and capriciously in designating FBME for the "special measure." The court opinion cites procedural defects in the FinCEN rulemaking rather than a defect in "FinCEN's exercise of its broad discretion in finding that FBME poses a primary money laundering concern, or its resulting imposition of the fifth special measure." It granted the preliminary injunction on the basis of the likelihood of finding that FinCEN violated the Administrative Procedure Act (APA) by failing to provide FBME "with all the public information upon which FinCEN relied and [not] explaining in the rule why potentially viable but less drastic alternative penalties were not chosen." The court also found that FBME would likely suffer irreparable harm because, although U.S. banks have already closed FBME correspondent accounts, FBME would lose access to funds denominated in dollars being held by European banks. Citing [American Medical Association v. Reno](#), the court held that FinCEN's failure to disclose all the public information it relied on violated the APA's requirement that the agency disclose sufficient evidence to permit meaningful comments. The opinion may signify that, in the case of a regulation such as the one at issue, which affects only one entity and which is based partially on classified and protected information, there is an enhanced obligation to provide "all the non-classified, non-protected material on which FinCEN relied."

According to at least one recent [Banking Law Journal article](#) and one [article](#) in *The Economist*, FinCEN's invocation of Section 311 may be accelerating. To date, Section 311 has been used against 18 financial institutions and 4 countries as indicated in a [FinCEN chart](#). The FinCEN Section 311 process has been operating since 2001. Judicial oversight has been scant. The FBME case is the first judicial decision addressing a Section 311 sanction, although there is at least one other pending case, [Banco Delta Asia, S.A.R.L. v Financial Crimes Enforcement Network](#). That case was filed in 2013 by a small Macau bank which was subject to a FinCEN sanction in 2005 that was rescinded in 2007. The Macau bank now claims that FinCEN violated due process; that it designated the small bank as a means of warning large banks to end transactions with North Korea; and that the procedure was arbitrary and capricious, inadequately substantiated, and lacking proper notice. FinCEN has also received some criticism from financial services trade associations in [comments](#) in connection with the proposed FBME sanction. In addition to claims that FinCEN has underestimated the costs and burdens of the Section 311 sanctions, one trade association raised issues with respect to the burdens associated with FinCEN's proposing some sanctions and then not finalizing or withdrawing them.

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