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DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Part 1010-

RIN - 1506-AB39

Proposal of Special Measure against ABLV Bank, as a Financial Institution of Primary Money Laundering Concern

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: FinCEN is issuing a notice of proposed rulemaking (NPRM), pursuant to Section 311 of the USA PATRIOT Act, to prohibit the opening or maintaining of a correspondent account in the United States for, or on behalf of, ABLV Bank, AS.

DATES: Written comments on the notice of proposed rulemaking must be submitted on or before [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by **RIN - 1506-AB39**, by any of the following methods:

- *Federal E-rulemaking Portal:* http://www.regulations.gov. Follow the instructions for submitting comments. Include Docket Number FinCEN-2017-0013 and RIN - 1506-AB39 in the submission.
- Mail: The Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Include RIN - 1506-AB39 in the body of the text. Any comments

submitted by mail must be postmarked by the due date for comments indicated above. Please submit comments by one method only.

- Comments submitted in response to this NPRM will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

- *Inspection of comments:* FinCEN uses the electronic, Internet-accessible dockets at Regulations.gov as its complete docket; all hard copies of materials that should be in the docket, including public comments, are electronically scanned and placed there. *Federal Register* notices published by FinCEN are searchable by docket number, RIN, or document title, among other things, and the docket number, RIN, and title may be found at the beginning of such notices. In general, FinCEN will make all comments publicly available by posting them on *http://www.regulations.gov*.

FOR FUTHER INFORMATION CONTACT: The FinCEN Resource Center at (800) 949-2732.

SUPPLEMENTARY INFORMATION:

I. Statutory Provisions

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Public Law 107-56 (the USA PATRIOT Act). Title III of the USA PATRIOT Act amends the anti-money laundering (AML) provisions of the Bank Secrecy Act (BSA), codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314, 5316-5332, to promote the prevention, detection, and prosecution of international money

laundering and the financing of terrorism. Regulations implementing the BSA appear at 31 CFR Chapter X. The authority of the Secretary of the Treasury (the Secretary) to administer the BSA and its implementing regulations has been delegated to FinCEN.

Section 311 of the USA PATRIOT Act (Section 311), codified at 31 U.S.C. 5318A, grants FinCEN the authority, upon finding that reasonable grounds exist for concluding that a jurisdiction outside of the United States, one or more financial institutions operating outside of the United States, one or more classes of transactions within or involving a jurisdiction outside of the United States, or one or more types of accounts is of primary money laundering concern, to require domestic financial institutions and domestic financial agencies to take certain "special measures." The five special measures enumerated in Section 311 are prophylactic safeguards that defend the U.S. financial system from money laundering and terrorist financing. FinCEN may impose one or more of these special measures in order to protect the U.S. financial system from these threats. Special measures one through four, codified at 31 U.S.C. 5318A(b)(1)–(b)(4), impose additional recordkeeping, information collection, and reporting requirements on covered U.S. financial institutions. The fifth special measure, codified at 31 U.S.C. 5318A(b)(5), allows FinCEN to prohibit, or impose conditions on, the opening or maintaining in the United States of correspondent or payable-through accounts for, or on behalf of, a foreign banking institution, if such correspondent account or payable-through account involves the foreign financial institution found to be of primary money laundering concern.

Before making a finding that reasonable grounds exist for concluding that a foreign financial institution is of primary money laundering concern, the Secretary is

required to consult with both the Secretary of State and the Attorney General.[1] The Secretary shall also consider such information as the Secretary determines to be relevant, including the following potentially relevant factors:

- the extent to which such a financial institution is used to facilitate or promote money laundering in or through the jurisdiction, including any money laundering activity by organized criminal groups, international terrorists, or entities involved in the proliferation of weapons of mass destruction (WMD) or missiles;
- the extent to which such a financial institution is used for legitimate business purposes in the jurisdiction; and
- the extent to which such action is sufficient to ensure that the purposes of Section 311 are fulfilled, and to guard against international money laundering and other financial crimes.[2]

Upon finding that a foreign financial institution is of primary money laundering concern, the Secretary may require covered financial institutions to take one or more special measures. In selecting which special measure(s) to take, the Secretary "shall consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency (as defined in Section 3 of the Federal Deposit Insurance Act), the Secretary of State, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the National Credit Union Administration Board, and in the sole discretion of the Secretary, such other agencies and interested

[1] 31 U.S.C. 5318A(c)(1).
[2] 31 U.S.C. 5318A(c)(2)(B).

parties as the Secretary [of the Treasury] may find appropriate."[3] In imposing the fifth special measure, the Secretary must do so "in consultation with the Secretary of State, the Attorney General, and the Chairman of the Board of Governors of the Federal Reserve System."[4]

In addition, in selecting which special measure(s) to take, the Secretary shall consider the following factors:

- whether similar action has been or is being taken by other nations or multilateral groups;
- whether the imposition of any particular special measure would create a significant competitive disadvantage, including any undue cost or burden associated with compliance, for financial institutions organized or licensed in the United States;
- the extent to which the action or the timing of the action would have a significant adverse systemic impact on the international payment, clearance, and settlement system, or on legitimate business activities involving the particular jurisdiction, institution, class of transactions, or type of account; and
- the effect of the action on United States national security and foreign policy.[5]

[3] 31 U.S.C. 5318A(a)(4)(A).
[4] 31 U.S.C. 5318A(b)(5).
[5] 31 U.S.C. 5318A(a)(4)(B).

II. Summary of Notice of Proposed Rulemaking

This NPRM sets forth (i) FinCEN's finding that ABLV Bank, AS (ABLV), a commercial bank located in Riga, Latvia, is a foreign financial institution of primary money laundering concern pursuant to Section 311, and (ii) FinCEN's proposal of a prohibition under the fifth special measure on the opening or maintaining in the United States of a correspondent account for, or on behalf of, ABLV. As described more fully below,[6] FinCEN has reasonable grounds to believe that ABLV executives, shareholders, and employees have institutionalized money laundering as a pillar of the bank's business practices. As described in further detail below, ABLV management permits the bank and its employees to orchestrate and engage in money laundering schemes; solicits the high-risk shell company activity that enables the bank and its customers to launder funds; maintains inadequate controls over high-risk shell company accounts; and seeks to obstruct enforcement of Latvian anti-money laundering and combating the financing of terrorism (AML/CFT) rules in order to protect these business practices. In addition, illicit financial activity at the bank has included transactions for parties connected to U.S. and UN-designated entities, some of which are involved in North Korea's procurement or export of ballistic missiles.

III. Background on Latvia's Non-Resident Deposit Sector and ABLV Bank

1. Latvia's Non-Resident Deposit Banking Sector

Due to geography, linguistic profile, and a stable and developed banking system, Latvia serves as a financial bridge between the Commonwealth of Independent States

[6] FinCEN has relied on a variety of sources including nonpublic information in preparing this proposed rule. When a statement is sourced in publicly available information, FinCEN will post an exhibit containing the public source. These exhibits will be posted with this proposed rule at https://www.regulations.gov.

(CIS),[7] European Union (EU) and U.S. financial systems. While it lacks a legal framework that formally separates domestic banking business and non-resident banking, most Latvian banks conduct the majority of their business in either domestic retail/commercial banking or non-resident banking services, not both. Non-resident banking in Latvia allows offshore companies, including shell companies, to hold accounts and transact through Latvian banks. CIS-based actors often transfer their capital via Latvia, frequently through complex and interconnected legal structures, to various banking locales in order to reduce scrutiny of transactions and lower the transactions' risk rating.

According to Latvia's Financial Capital and Market Commission (FCMC), the primary banking regulator, non-resident banking services contribute between 0.8 and 1.5 percent to Latvia's gross domestic product (GDP). Non-resident deposits (NRDs) in Latvia are equal to roughly $13 billion. Latvian NRD banking activity transiting the U.S. financial system is estimated in recent years to have reached billions of dollars annually.

The Latvian banking system's reliance on NRD funds for capital exposes it to increased illicit finance risk. A 2014 report by the European Commission's Directorate General for Economic and Financial Affairs (ECFIN) singled out Latvia's reliance on NRD banking as a risk to Latvia's private sector, for a variety of reasons, including the fact that ensuring compliance with anti-money laundering rules may be more challenging for non-resident banks as verifying clients' background and business activities could

[7] The Commonwealth of Independent States (CIS) is a loose confederation of states making up most of the former Soviet Union. *See* http://www.cisstat.com/eng/cis.htm. For the purposes of this notice, the CIS region encompasses all members, associate members, and former members of the CIS.

prove difficult. Criminal groups and corrupt officials may use elaborate offshore services to hide true beneficiaries or create fraudulent business transactions.

In a positive development, since 2015, the FCMC has led significant efforts to reform Latvia's AML/CFT regulations and enforcement regime. However, as noted in the aforementioned 2014 ECFIN report, positive changes need to be consistently implemented jointly with the banks. The need to improve the institutional capacity remains a long-term challenge due to the complexities of investigating and prosecuting money laundering.

2. ABLV Bank

Established in 1993, ABLV Bank, AS (ABLV) is headquartered in Riga, Latvia. According to data provided by the Association of Latvian Commercial Banks, ABLV is the second largest bank in Latvia by assets, with the equivalent of roughly $4.6 billion as of March 31, 2017. ABLV is Latvia's largest NRD bank by assets. As further described below, the majority of ABLV's customers are high-risk shell companies registered outside of Latvia.

ABLV offers banking, investment, and advisory services. ABLV currently does not maintain correspondent accounts directly with U.S. banks, but instead accesses the U.S. financial system through nested U.S. dollar correspondent relationships with other foreign financial institutions. Those foreign financial institutions, in turn, hold direct U.S. correspondent accounts.

ABLV holds several subsidiary entities, including a subsidiary bank, ABLV Bank, Luxembourg, S.A., located in Luxembourg. The beneficial owners of ABLV are Ernests Bernis and Oleg Fils. Bernis holds 4.93 percent of shares in the bank directly, and 43.12

percent of shares indirectly via Cassandra Holding Company, SIA. Fils holds 43.13 percent of shares in ABLV indirectly through SIA "OF Holding." Unspecified "other shareholders" own the remaining equity.

IV. Finding ABLV to be a Foreign Financial Institution of Primary Money Laundering Concern

Based on information available to the agency, including both public and nonpublic reporting, and after performing the requisite interagency consultations and considering each of the factors discussed below, FinCEN finds that reasonable grounds exist for concluding that ABLV is a financial institution operating outside the United States of primary money laundering concern.

1. The Extent to Which ABLV Has Been Used to Facilitate or Promote Money Laundering, Including by Entities Involved in the Proliferation of Weapons of Mass Destruction or Missiles

According to information available to FinCEN, ABLV executives, shareholders, and employees have institutionalized money laundering as a pillar of the bank's business practices. ABLV management orchestrates, and permits the bank and its employees to engage in, money laundering schemes. Management solicits the high-risk shell company activity that enables the bank and its customers to launder funds, maintains inadequate controls over high-risk shell company accounts, and is complicit in the circumvention of AML/CFT controls at the bank. As a result, multiple actors have exploited the bank in furtherance of illicit financial activity, including transactions for parties connected to U.S. and UN-designated entities, some of which are involved in North Korea's procurement or export of ballistic missiles. In addition, ABLV management seeks to obstruct enforcement of Latvian AML/CFT rules. Through 2017, ABLV executives and

management have used bribery to influence Latvian officials when challenging enforcement actions and perceived threats to their high-risk business.

ABLV's business practices enable the provision of financial services to clients seeking to evade financial regulatory requirements. Bank executives and employees are complicit in their clients' illicit financial activities, including money laundering and the use of shell companies to conceal the true nature of illicit transactions and the identities of those responsible. ABLV is considered innovative and forward leaning in its approaches to circumventing financial regulations. The bank proactively pushes money laundering and regulatory circumvention schemes to its client base and ensures that fraudulent documentation produced to support financial schemes, some of which is produced by bank employees themselves, is of the highest quality.

In 2014, ABLV was involved in the theft of over $1 billion in assets from three Moldovan banks, BC Unibank S.A., Banca Sociala S.A., and Banca de Economii S.A., in which criminals took over the three Moldovan banks using a non-transparent ownership structure, partly financed by loans from offshore entities banking at ABLV. Separately, ABLV previously developed a scheme to assist customers in circumventing foreign currency controls, in which the bank disguised illegal currency trades as international trade transactions using fraudulent documentation and shell company accounts.

As referenced in Section III of this notice, Latvian NRD banks cater to offshore shell companies, and ABLV is Latvia's largest NRD bank. Offshore shell company business poses inherent money laundering risks because of its lack of transparency, and financial institutions must manage the risks associated with providing financial services to shell companies. As described in detail below, ABLV's continuing failure to

implement adequate AML controls commensurate with this high risk has caused the bank to facilitate transactions for shell companies owned or controlled by illicit actors engaged in transnational organized criminal activity, corruption, and sanctions evasion. Oftentimes, these actors take advantage of ABLV's propensity to facilitate high-risk shell company business, using shell company accounts to obscure the transparency of their illicit activities.

ABLV does not mitigate these risks effectively. ABLV does not adequately conduct know-your-customer (KYC) checks or customer due diligence (CDD) on a number of its customers, does not collect or update supporting documentation from its customers to justify transactional activity, and uses fraudulent documentation in some of its CDD files. Furthermore, the bank has had deficiencies in its internal control system, including insufficient customer due diligence and monitoring of transactions.

In an example demonstrative of ABLV's failures to mitigate these risks, ABLV received a substantial amount of funds from a Russia-based bank in a manner consistent with an illicit transfer of assets. FinCEN assesses that ABLV should have known that the shell companies receiving the Russian bank-sourced funds in their ABLV accounts were related to the ultimate beneficial owners of the Russia-based bank. Such a pattern is a hallmark of asset-stripping. In addition, ABLV has facilitated public corruption through the provision of shell company accounts for corrupt CIS-based politically exposed persons (PEPs) and other corrupt actors. Through 2014, for example, Ukrainian tycoon Serhiy Kurchenko funneled billions of dollars through his ABLV shell company accounts. Treasury's Office of Foreign Assets Control (OFAC) designated Kurchenko in 2015, finding that he was responsible for, complicit in, or had engaged in, directly or

indirectly, the misappropriation of state assets of Ukraine or of an economically significant entity in Ukraine. ABLV maintained at least nine shell company accounts linked to Kurchenko. In another example, an Azerbaijani PEP engaged in large-scale corruption and money laundering used a shell company account at ABLV to make a payment.

ABLV's business practice of banking high-risk shell companies without appropriate risk mitigation policies and procedures has also caused the bank to facilitate transactions for parties connected to U.S.- and UN-designated Democratic People's Republic of Korea (DPRK or North Korea) entities. These designated entities include Foreign Trade Bank (FTB), Koryo Bank, Koryo Credit Development Bank, Korea Mining and Development Trading Corporation (KOMID), and Ocean Maritime Management Company (OMM), some of which are involved in North Korea's procurement or export of ballistic missiles. ABLV facilitated transactions related to North Korea after the bank's summer 2017 announcement of a North Korea "No Tolerance" policy.

Widely available public documents describe North Korean sanctioned entities' use of front and shell companies and financial representatives to evade international sanctions. As early as 2014, the UN Panel of Experts (UN POE) noted in its report that sanctioned North Korean entities used front companies to evade international sanctions by hiding the sources of funds. Subsequent UN POE reports expanded on these findings, highlighting specific examples and methodologies used by North Korea-related entities to evade sanctions. Since 2011, the Financial Action Task Force (FATF) has called upon its members and urged all countries to apply effective countermeasures to protect their

financial systems from the money laundering, terrorist financing, and proliferation financing threat emanating from the DPRK. More recently, the FATF has highlighted the DPRK's frequent use of front companies, shell companies, and opaque ownership structures for the purpose of evading international sanctions.

FinCEN has found that the DPRK is a foreign jurisdiction of "primary money laundering concern."[8] In its finding, FinCEN highlighted North Korea's propensity to use front companies and agents to evade U.S. and international sanctions. Finally, nongovernmental research organizations have provided in-depth case studies of DPRK-linked entities' use of front companies and representatives to evade international sanctions.

FinCEN assesses that the public nature of these reports, advisories, and actions should have provided ABLV the necessary guidance to apply appropriate due diligence to accounts and transactions that fit the typologies described in these public documents. However, ABLV's pursuit of high-risk shell company business and its failure to heed these public warnings and implement an appropriate risk-mitigating CDD and KYC program enabled certain customers to exploit ABLV's weaknesses to conduct transactions with parties connected to designated entities. Certain customers' counterparties have also been designated by OFAC, further demonstrating their links to the DPRK.

Ninety percent of ABLV's customers are high-risk per ABLV's own risk rating methodology and are primarily high-risk shell companies registered in secrecy jurisdictions. FinCEN assesses that, beginning in 2012 and continuing into 2017, ABLV

[8] 81 FR 78715; November 9, 2016.

conducted a high volume of transactions for shell companies registered outside of Latvia in offshore secrecy jurisdictions totaling tens of billions of dollars. FinCEN is aware that ABLV frequently fails to respond to other financial institutions' questions concerning the nature of the transactions that ABLV is processing. Multiple U.S. financial institutions have proactively closed ABLV's U.S. correspondent accounts. Nonetheless, ABLV's indirect correspondent activity with the U.S. financial system and its business model of facilitating non-transparent transactions for shell companies both continue.

While publicly stating that it is implementing plans to reform its AML/CFT compliance program, ABLV owners and executives have privately expressed an unwillingness to meaningfully alter ABLV's high-risk business practices. This fact, combined with ABLV's AML/CFT compliance issues to date raise serious concerns about the entity's commitment to implementing these plans. These concerns are further supported by the fact that ABLV management seeks to obstruct enforcement of Latvian AML/CFT rules and has used bribery to influence Latvian officials. Any institution that undermines enforcement actions through such corrupt acts presents a significant risk that it will continue practices which facilitate illicit activity.

2. The Extent to Which ABLV is Used for Legitimate Business Purposes

As an NRD bank catering to non-Latvian customers, the majority of ABLV's customers are not based in Latvia and do not conduct business in Latvia outside of holding a bank account at ABLV. As described above, Latvia's NRD banking sector is a financial bridge between the CIS region's financial systems and the West. ABLV provides entities, typically controlled by CIS region-based actors, access to U.S. dollar, euro, pound sterling, and Swiss franc accounts, and ABLV's correspondent relationships

enable its customers to transact with counterparties holding accounts at banks across the globe, including U.S. and EU financial institutions. Oftentimes, NRD customers are shell companies registered in corporate secrecy jurisdictions that are owned or controlled by parties in third jurisdictions, typically in the CIS region.

ABLV may be used for some legitimate purposes. However, the high number of shell company customers banking at ABLV, some of which are themselves engaged in money laundering or illicit activity, as described above, indicates that ABLV is extensively used for illicit purposes.

While it may carry certain risks or an additional AML/CFT compliance burden, non-resident banking is not inherently suspicious or illicit. For example, any non-Latvian entity banking in Latvia would maintain a "non-resident" account. Such non-Latvian clients may include lower-risk entities, such as publicly traded companies in the United States or other well-regulated jurisdictions. While such entities may be engaged in non-proximate banking, the customers' lines of business, ownership, and activity would be transparent, and the customers may be considered low-risk pursuant to the bank's internal policies and procedures and the relevant regulatory framework.

However, 90 percent of ABLV's customers are high-risk per ABLV's own risk rating methodology, and are primarily high-risk shell companies registered in secrecy jurisdictions, as discussed previously. FinCEN assesses that ABLV's shell company customers' involvement in a wide range of illicit and suspicious activity through ABLV indicates that ABLV does not properly control NRD accounts to ensure they are used primarily to conduct legitimate business

As noted above, FinCEN does not believe that ABLV, or its shareholders and executives, plan to meaningfully implement AML/CFT reforms. While publicly stating that it is implementing plans to reform its AML/CFT compliance program, ABLV owners and executives have privately expressed an unwillingness to meaningfully alter ABLV's high-risk business practices. ABLV's ineffective reform measures are exemplified by its facilitation of transactions related to North Korea after the bank's summer 2017 announcement of a North Korea "No Tolerance" policy, as previously mentioned. Another illustration of ineffective reform measures is the facilitation of the aforementioned illicit transfers from a Russian bank, which occurred while ABLV was under an AML/CFT compliance audit.

2. The Extent to Which This Action is Sufficient to Guard against International Money Laundering and Other Financial Crimes

FinCEN assesses that ABLV is used to facilitate money laundering, illicit financial schemes and other illicit activity conducted by its customers and other illicit actors, including actors associated with transnational organized crime, North Korea's procurement or export of ballistic missiles, sanctions evasion, and large-scale corruption. Given the national security threat posed by such activity, FinCEN believes that imposing a prohibition under the fifth special measure would be sufficient and necessary to prevent ABLV from continuing to access the U.S. financial system. This action would guard against international money laundering activity and other financial crimes involving ABLV.

Although U.S. financial institutions have proactively closed direct U.S. correspondent relationships with ABLV, many U.S. financial institutions continue to

process transactions for or on behalf of ABLV through indirect correspondent banking relationships. This action, if finalized, would sever ABLV's access to U.S. correspondent accounts, direct or otherwise.

V. Proposed Prohibition on Covered Financial Institutions from Opening or Maintaining Correspondent Accounts in the United States for ABLV

After performing the requisite interagency consultations, considering the relevant factors, and making a finding that ABLV is a foreign financial institution of primary money laundering concern, FinCEN proposes a prohibition under the fifth special measure. A prohibition under the fifth special measure is the most effective and practical measure to safeguard the U.S. financial system from the illicit finance risks posed by ABLV.

1. Factors Considered in Proposing a Prohibition under the Fifth Special Measure

Below is a discussion of the relevant factors FinCEN considered in proposing a prohibition under the fifth special measure with respect to ABLV.

A. Whether Similar Action Has Been or Will Be Taken by Other Nations or Multilateral Groups against ABLV

FinCEN is not aware of an action by another nation or multilateral group that would prohibit or place conditions on ABLV's correspondent banking relationships. However, according to press reports, the National Bank of Ukraine issued an advisory on August 28, 2016 to Ukrainian banks warning that ABLV, among other foreign banks, was suspected of being related to risky financial operations, including laundering the revenues of criminal activities. In addition, the FCMC has conducted examinations of

ABLV and issued a fine and reprimand of a board member in May of 2016. None of these actions, however, sufficiently protect the U.S. financial system from the illicit finance risk posed by ABLV.

B. Whether the Imposition of the Fifth Special Measure Would Create a Significant Competitive Disadvantage, Including Any Undue Cost or Burden Associated with Compliance, for Financial Institutions Organized or Licensed in the United States

While ABLV is a large bank among Latvian financial institutions, it is not large by international standards and is not a major participant in the international payment system. Therefore, FinCEN does not believe that imposing a prohibition under the fifth special measure would cause a significant competitive disadvantage or place an undue burden or cost on U.S. financial institutions.

The special due diligence obligations proposed in this rulemaking would not create undue costs or burden on U.S. financial institutions. U.S. financial institutions already generally have systems in place to screen transactions in order to identify and report suspicious activity and comply with the sanctions programs administered by OFAC. Institutions can modify these systems to detect transactions involving ABLV. ABLV does not currently hold U.S. correspondent bank accounts. While there may be some additional burden on U.S. financial institutions in conducting due diligence on foreign correspondent account holders and notifying them of the prohibition, FinCEN believes that any such burden will likely be minimal, and certainly not undue, given the threats posed by ABLV's facilitation of money laundering.

C. The Extent to Which the Proposed Action or Timing of the Action Will Have a Significant Adverse Systemic Impact on the International Payment, Clearance, and Settlement System, or on Legitimate Business Activities of ABLV

As noted previously, although ABLV is a large bank among Latvian financial institutions, it is not large by international standards, is not a major participant in the international payment system, and is not relied upon by the international banking community for clearance or settlement services. Thus, the imposition of a prohibition under the fifth special measure against ABLV will not have an adverse systemic impact on the international payment, clearance, and settlement system. FinCEN also considered the extent to which this action could have an impact on the legitimate business activities of ABLV and concludes that the need to protect the U.S. financial system from ABLV, a bank that facilitates illicit financial activity, strongly outweighs any such impact.

FinCEN notes that ABLV as of July 2017 maintained euro, Japanese yen, Hong Kong dollar, pound sterling, and Australian dollar correspondent accounts, according to a commercial database, and thus is not necessarily limited to U.S. dollar transactions in its international wire transfer activity. A prohibition on the opening or maintaining of U.S. correspondent accounts under the fifth special measure would not prevent ABLV from conducting legitimate business activities in foreign currencies as long as such activity does not involve a correspondent account maintained in the United States.

D. The Effect of the Proposed Action on United States National Security and Foreign Policy

As described in detail above, financial activity that ABLV has conducted through the U.S. financial system has consisted largely of international funds transfers between shell entities registered in offshore secrecy jurisdictions. FinCEN assesses that this

financial activity includes money laundering and other transactions conducted by a range of illicit actors that threaten the national security of the United States. Furthermore, ABLV's business practice of banking high-risk shell companies without adequate risk mitigation policies and procedures has caused the bank to facilitate transactions for entities linked to North Korea. Ensuring the effectiveness of the North Korea sanctions program is a top national security and foreign policy priority of the United States.

Prohibiting covered financial institutions from maintaining a correspondent account for ABLV, and preventing ABLV's indirect access to a U.S. correspondent account, will enhance national security. The proposed action serves as a measure to prevent illicit actors from accessing the U.S. financial system. It will further the U.S. national security and foreign policy goals of thwarting sanctions evasion and preventing other illicit financial activity from transiting the U.S. financial system. The imposition of a prohibition under the fifth special measure would also complement the U.S. government's worldwide efforts to expose and disrupt international money laundering.

2. Consideration of Alternative Special Measures

Under Section 311, special measures one through four enable FinCEN to impose additional recordkeeping, information collection, and information reporting requirements on covered financial institutions. The fifth special measure also enables FinCEN to impose conditions as an alternative to a prohibition on the opening or maintaining of correspondent accounts. FinCEN considered alternatives to a prohibition under the fifth special measure, including the imposition of one or more of the first four special measures, as well as imposing conditions on the opening or maintaining of correspondent accounts under the fifth special measure. For the reasons explained below, FinCEN

believes that a prohibition under the fifth special measure would most effectively safeguard the U.S. financial system from the illicit finance risks posed by ABLV.

Given ABLV's apparent disregard of regulatory reform and enforcement measures, FinCEN does not believe that any condition, additional recordkeeping requirement, or reporting requirement would be an effective measure to safeguard the U.S. financial system. Such measures would not prevent ABLV from accessing directly or indirectly the correspondent accounts of U.S. financial institutions, thus leaving the U.S. financial system vulnerable to processing the types of illicit transfers that pose a national security and money laundering risk. In addition, no recordkeeping requirement or conditions on correspondent accounts would be sufficient to guard against the risks posed by a bank that processes transactions that are designed to obscure the transactions' true nature and are ultimately for the benefit of illicit actors or activity. Therefore, a prohibition under the fifth special measure is the only special measure that can adequately protect the U.S. financial system from the illicit financial risk posed by ABLV.

VI. Section-by-Section Analysis for the Proposal of a Prohibition Under the Fifth Special Measure

1010.661(a) - Definitions

1. ABLV Bank, AS

The proposed rule defines "ABLV" to mean all subsidiaries, branches, and offices of ABLV Bank, AS operating as a bank in any jurisdiction. As noted above, FinCEN is aware of one subsidiary bank, ABLV Bank, Luxembourg, S.A., located in Luxembourg.

2. Correspondent account

The proposed rule defines "Correspondent account" to have the same meaning as the definition contained in 31 CFR 1010.605(c)(l)(ii). In the case of a U.S. depository institution, this broad definition includes most types of banking relationships between a U.S. depository institution and a foreign bank that are established to provide regular services, dealings, and other financial transactions, including a demand deposit, savings deposit, or other transaction or asset account, and a credit account or other extension of credit. FinCEN is using the same definition of "account" for purposes of this proposed rule as was established for depository institutions in the final rule implementing the provisions of Section 312 of the USA PATRIOT Act requiring enhanced due diligence for correspondent accounts maintained for certain foreign banks.[9] Under this definition, "payable through accounts" are a type of correspondent account.

In the case of securities broker-dealers, futures commission merchants, introducing brokers-commodities, and investment companies that are open-end companies ("mutual funds"), FinCEN is also using the same definition of "account" for purposes of this proposed rule as was established for these entities in the final rule implementing the provisions of Section 312 of the USA PATRIOT Act requiring enhanced due diligence for correspondent accounts maintained for certain foreign banks.[10]

[9] *See* 31 CFR 1010.605(C)(2)(i).
[10] *See* 31 CFR 1010.605(c)(2)(ii)-(iv).

3. Covered financial institution

The proposed rule defines "covered financial institution" with the same definition used in the final rule implementing the provisions of Section 312 of the USA PATRIOT Act, which in general includes the following:

- an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h));
- a commercial bank;
- an agency or branch of a foreign bank in the United States;
- a Federally insured credit union;
- a savings association;
- a corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611);
- a trust bank or trust company;
- a broker or dealer in securities;
- a futures commission merchant or an introducing broker-commodities; and
- a mutual fund.

4. Foreign banking institution

The proposed rule defines "foreign banking institution" to mean a bank organized under foreign law, or an agency, branch, or office located outside the United States of a bank. The term does not include an agent, agency, branch, or office within the United States of a bank organized under foreign law. This is consistent with the definition of "foreign bank" under 31 CFR 1010.100.

5. Subsidiary

The proposed rule defines "subsidiary" to mean a company of which more than 50 percent of the voting stock or analogous equity interest is owned by another company.

1010.661(b) - Prohibition on Accounts and Due Diligence Requirements for Covered Financial Institutions

1. Prohibition on Opening or Maintaining Correspondent Accounts

Section 1010.661(b)(1) and (2) of this proposed rule would prohibit covered financial institutions from opening or maintaining in the United States a correspondent account for, or on behalf of, ABLV. It would also require covered financial institutions to take reasonable steps to not process a transaction for the correspondent account of a foreign banking institution in the United States if such a transaction involves ABLV. Such reasonable steps are described in 1010.661(b)(3), which sets forth the special due diligence requirements a covered financial institution would be required to take when it knows or has reason to believe that a transaction involves ABLV.

2. Special Due Diligence for Correspondent Accounts

As a corollary to the prohibition set forth in section 1010.661(b)(1) and (2), section 1010.661(b)(3) of the proposed rule would require covered financial institutions to apply special due diligence to all of their foreign correspondent accounts that is reasonably designed to guard against such accounts being used to process transactions involving ABLV. As part of that special due diligence, covered financial institutions would be required to notify those foreign correspondent account holders that the covered financial institutions know or have reason to believe provide services to ABLV that such correspondents may not provide ABLV with access to the correspondent account

maintained at the covered financial institution. A covered financial institution may satisfy this notification requirement using the following notice:

> Notice: Pursuant to U.S. regulations issued under Section 311 of the USA PATRIOT Act, see 31 CFR 1010.661, we are prohibited from opening or maintaining in the United States a correspondent account for, or on behalf of, ABLV. The regulations also require us to notify you that you may not provide ABLV, including any of its subsidiaries, branches, and offices with access to the correspondent account you hold at our financial institution. If we become aware that the correspondent account you hold at our financial institution has processed any transactions involving ABLV, including any of its subsidiaries, branches, and offices we will be required to take appropriate steps to prevent such access, including terminating your account.

The purpose of the notice requirement is to aid cooperation with correspondent account holders in preventing transactions involving ABLV from accessing the U.S. financial system. FinCEN does not require or expect a covered financial institution to obtain a certification from any of its correspondent account holders that access will not be provided to comply with this notice requirement.

Methods of compliance with the notice requirement could include, for example, transmitting a notice by mail, fax, or e-mail. The notice should be transmitted whenever a covered financial institution knows or has reason to believe that a foreign correspondent account holder provides services to ABLV.

Special due diligence also includes implementing risk-based procedures designed to identify any use of correspondent accounts to process transactions involving ABLV. A covered financial institution would be expected to apply an appropriate screening mechanism to identify a funds transfer order that on its face listed ABLV as the financial institution of the originator or beneficiary, or otherwise referenced ABLV in a manner detectable under the financial institution's normal screening mechanisms. An appropriate

screening mechanism could be the mechanisms used by a covered financial institution to comply with various legal requirements, such as the commercially available software programs used to comply with the economic sanctions programs administered by OFAC.

3. Recordkeeping and Reporting

Section 1010.661(b)(4) of the proposed rule would clarify that the proposed rule does not impose any reporting requirement upon any covered financial institution that is not otherwise required by applicable law or regulation. A covered financial institution must, however, document its compliance with the notification requirement described above.

VII. Request for Comments

FinCEN invites comments on all aspects of the proposed rule, including the following specific matters:

1. FinCEN's proposal of a prohibition under the fifth special measure under 31 USC 5318A(b), as opposed to special measures one through four or imposing conditions under the fifth special measure;
2. The form and scope of the notice to certain correspondent account holders that would be required under the rule; and
3. The appropriate scope of the due diligence requirements in this proposed rule.

VIII. Regulatory Flexibility Act

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" that will "describe the impact of the proposed rule on

small entities." (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

1. Proposal to Prohibit Covered Financial Institutions from Opening or Maintaining Correspondent Accounts with Certain Foreign Banks Under the Fifth Special Measure

A. Estimate of the Number of Small Entities to Whom the Proposed Fifth Special Measure Will Apply

For purposes of the RFA, both banks and credit unions are considered small entities if they have less than $550,000,000 in assets.[11] Of the estimated 6,192 banks, 80 percent have less than $550,000,000 in assets and are considered small entities.[12] Of the estimated 6,021 credit unions, 92.5 percent have less than $550,000,000 in assets.[13]

Broker-dealers are defined in 31 CFR 1010.100(h) as those broker-dealers required to register with the Securities and Exchange Commission (SEC). For the purposes of the RFA, FinCEN relies on the SEC's definition of small business as previously submitted to the Small Business Administration (SBA). The SEC has defined the term small entity to mean a broker or dealer that: (1) had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule l7a-5(d) or, if not required to file such statements, a broker or dealer that had total capital (net worth plus

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[11] *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, Small Business Administration Size Standards (SBA Oct1, 2017) [hereinafter "*SBA Size Standards*"]. .) (https://www.sba.gov/sites/default/files/files/Size_Standards_Table_2017.pdf)

[12] Federal Deposit Insurance Corporation, *Find an Institution*, http://www2.fdic.gov/idasp/main.asp; *select* Size or Performance: Total Assets, *type* Equal or less than $: "550000" and *select* Find.

[13] National Credit Union Administration, *Credit Union Data*, http://webapps.ncua.gov/customquery/; *select* Search Fields: Total Assets, *select* Operator: Less than or equal to, *type* Field Values: "550000000" and *select* Go.

subordinated debt) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business if shorter); and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in this release.[14] Based on SEC estimates, 17 percent of broker-dealers are classified as small entities for purposes of the RFA.[15]

Futures commission merchants (FCMs) are defined in 31 CFR1010.l00(x) as those FCMs that are registered or required to be registered as a FCM with the Commodity Futures Trading Commission (CFTC) under the Commodity Exchange Act (CEA), except persons who register pursuant to section 4f(a)(2) of the CEA, 7 U.S.C. 6f(a)(2). Because FinCEN and the CFTC regulate substantially the same population, for the purposes of the RFA, FinCEN relies on the CFTC's definition of small business as previously submitted to the SBA. In the CFTC's "Policy Statement and Establishment of Definitions of 'Small Entities' for Purposes of the Regulatory Flexibility Act," the CFTC concluded that registered FCMs should not be considered to be small entities for purposes of the RFA.[16] The CFTC's determination in this regard was based, in part, upon the obligation of registered FCMs to meet the capital requirements established by the CFTC.

For purposes of the RFA, an introducing broker-commodities dealer is considered small if it has less than $38,500,000 in gross receipts annually.[17] Based on information provided by the National Futures Association (NFA), 95 percent of introducing brokers-

[14] 17 CFR 240.0-10(c).
[15] 76 FR 37572, 37602 (June 27, 2011) (the SEC estimates 871 small broker-dealers of the 5,063 total registered broker-dealers).
[16] 47 FR 18618, 18619 (Apr. 30, 1982).
[17] SBA, Size Standards to Define Small Business Concerns, 13 CFR 121.201 (2016), at 28.

commodities dealers have less than $38.5 million in adjusted net capital and are considered to be small entities.

Mutual funds are defined in 31 CFR 1010.100(gg) as those investment companies that are open-end investment companies that are registered or are required to register with the SEC. For the purposes of the RFA, FinCEN relies on the SEC's definition of small business as previously submitted to the SBA. The SEC has defined the term "small entity" under the Investment Company Act to mean "an investment company that, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year."[18] Based on SEC estimates, seven percent of mutual funds are classified as "small entities" for purposes of the RFA under this definition.[19]

As noted above, 80 percent of banks, 92.5 percent of credit unions, 17 percent of broker-dealers, 95 percent of introducing broker-commodities dealers, no FCMs, and seven percent of mutual funds are small entities.

B. Description of the Projected Reporting and Recordkeeping Requirements of a Prohibition Under the Fifth Special Measure

The proposed prohibition under the fifth special measure would require covered financial institutions to provide a notification intended to aid cooperation from foreign correspondent account holders in preventing transactions involving ABLV from being processed by the U.S. financial system. FinCEN estimates that the burden on institutions providing this notice is one hour.

[18] 17 CFR 270.0-10.
[19] 78 FR 23637, 23658 (April 19, 2013).

Covered financial institutions would also be required to take reasonable measures to detect use of their correspondent accounts to process transactions involving ABLV. All U.S. persons, including U.S. financial institutions, currently must comply with OFAC sanctions, and U.S. financial institutions have suspicious activity reporting requirements. The systems that U.S. financial institutions have in place to comply with these requirements can easily be modified to adapt to this proposed rule. Thus, the special due diligence that would be required under the proposed rule – *i.e.,* preventing the processing of transactions involving ABLV and the transmittal of notice to certain correspondent account holders – would not impose a significant additional economic burden upon small U.S. financial institutions.

2. Certification:

For these reasons, FinCEN certifies that the proposals contained in this rulemaking would not have a significant impact on a substantial number of small businesses.

FinCEN invites comments from members of the public who believe there would be a significant economic impact on small entities from the imposition of a prohibition under the fifth special measure regarding ABLV.

IX. Paperwork Reduction Act

The collection of information contained in this proposed rule is being submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, D.C. 20503 (or by e-mail to

oirasubmission@omb.eop.gov) with a copy to FinCEN by mail or e-mail at the addresses previously specified. Comments should be submitted by one method only. Comments on the collection of information should be received by [INSERT DATE THAT IS 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. In accordance with the requirements of the Paperwork Reduction Act and its implementing regulations, 5 CFR 1320, the following information concerning the collection of information as required by 31 CFR 1010.661 is presented to assist those persons wishing to comment on the information collection.

The notification requirement in section 1010.661(b)(3)(i)(A) is intended to aid cooperation from correspondent account holders in denying ABLV access to the U.S. financial system. The information required to be maintained by that section would be used by federal agencies and certain self-regulatory organizations to verify compliance by covered financial institutions with the provisions of 31 CFR 1010.661. The collection of information would be mandatory.

Description of Affected Financial Institutions: Banks, broker-dealers in securities, futures commission merchants and introducing brokers-commodities, and mutual funds.

Estimated Number of Affected Financial Institutions: 5,787.

Estimated Average Annual Burden in Hours Per Affected Financial Institution: The estimated average burden associated with the collection of information in this proposed rule is one hour per affected financial institution.

Estimated Total Annual Burden: 5,787 hours.

FinCEN specifically invites comments on: (a) whether the proposed collection of information is necessary for the proper performance of the mission of FinCEN, including

whether the information would have practical utility; (b) the accuracy of FinCEN's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information required to be maintained; (d) ways to minimize the burden of the required collection of information, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to report the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

X. Executive Order 12866

Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It has been determined that the proposed rule is not a "significant regulatory action" for purposes of Executive Order 12866.

List of Subjects in 31 CFR Part 1010

Administrative practice and procedure, banks and banking, brokers, counter money laundering, counter-terrorism, foreign banking.

Authority and Issuance

For the reasons set forth in the preamble, part 1010, chapter X of title 31 of the Code of Federal Regulations, is proposed to be amended as follows:

Part 1010-GENERAL PROVISIONS

1. The authority citation for part 1010 continues to read as follows: Authority: 12 U.S.C. 1829b and 1951-1959; 31U.S.C.5311-5314, 5316- 5332; Title III, sec. 314 Pub. L. 107-56, 115 Stat. 307; sec. 701 Pub. L. 114-74, 129 Stat. 599.
2. Add § 1010.661 to read as follows:

§ 1010.661 Special measures against ABLV

(a) Definitions. For purposes of this section:

(1) ABLV means all subsidiaries, branches, and offices of ABLV Bank, AS operating as a bank in any jurisdiction.

(2) Correspondent account has the same meaning as provided in § 1010.605(c)(l)(ii).

(3) Covered financial institution has the same meaning as provided in § 1010.605(e)(l).

(4) Foreign banking institution means a bank organized under foreign law, or an agency, branch, or office located outside the United States of a bank. The term does not include an agent, agency, branch, or office within the United States of a bank organized under foreign law.

(5) Subsidiary means a company of which more than 50 percent of the voting stock or analogous equity interest is owned by another company.

(b) Prohibition on accounts and due diligence requirements for covered financial institutions-

(1) Opening or maintaining correspondent accounts for ABLV. A covered financial institution shall not open or maintain in the United States a correspondent account for, or on behalf of, ABLV.

(2) Prohibition on use of correspondent accounts involving ABLV. A covered financial institution shall take reasonable steps not to process a transaction for the correspondent account in the United States of a foreign banking institution if such a transaction involves ABLV.

(3) Special due diligence of correspondent accounts to prohibit use.

(i) A covered financial institution shall apply special due diligence to its foreign correspondent accounts that is reasonably designed to guard against their use to process transactions involving ABLV. At a minimum, that special due diligence must include:

(A) Notifying those foreign correspondent account holders that the covered financial institution knows or has reason to believe provide services to ABLV that such correspondents may not provide ABLV with access to the correspondent account maintained at the covered financial institution; and

(B) Taking reasonable steps to identify any use of its foreign correspondent accounts by ABLV, to the extent that such use can be determined from transactional records maintained in the covered financial institution's normal course of business.

(ii) A covered financial institution shall take a risk-based approach when deciding what, if any, other due diligence measures it reasonably

must adopt to guard against the use of its foreign correspondent accounts to process transactions involving ABLV.

(iii) A covered financial institution that knows or has reason to believe that a foreign bank's correspondent account has been or is being used to process transactions involving ABLV shall take all appropriate steps to further investigate and prevent such access, including the notification of its correspondent account holder under paragraph (b)(3)(i)(A) of this section and, where necessary, termination of the correspondent account.

(4) Recordkeeping and reporting.

(i) A covered financial institution is required to document its compliance with the notice requirement set forth in this section.

(ii) Nothing in paragraph (b) of this section shall require a covered financial institution to report any information not otherwise required to be reported by law or regulation.

Dated: February 12, 2018

/s/

Jamal El-Hindi
Deputy Director
Financial Crimes Enforcement Network