

**CITY OF NEW YORK
DEPARTMENT OF FINANCE**

Pursuant to the power vested in me as Commissioner of Finance by sections 389(b) and 1043 of the New York City Charter, I hereby repeal the within Rules Relating to the Burma Classification of Banks.

Andrew S. Eristoff
Commissioner of Finance

Matter in brackets [] is to be deleted.

REPEAL OF RULES RELATING TO THE BURMA CLASSIFICATION OF BANKS

Section 1. Chapter 41 of Title 19 of the Rules of the City of New York (Rules Relating to the Burma Classification of Banks) is repealed as follows:

[§ 41-01. Purpose. Section 1523(3) of the Charter of the City of New York requires the Commissioner of Finance to establish by rule, criteria by which to evaluate whether banks are using the means at their disposal to comply with the embargo on trade and financial transactions with Burma and any other sanctions imposed by the United States government with regard to Burma.

(b) These rules establish such criteria and provide for hearings that offer to banks designated as depositories of City moneys pursuant to §1524 of the Charter and to the public an opportunity to be heard, before the Commissioner of Finance classifies such banks and publishes notice of such classification in the City Record. When choosing among banks offering comparable services at a comparable cost, City agencies are required, in a manner consistent with guidelines established by the Commissioner of Finance, to seek to deposit or invest funds at, and obtain services and obtain services from, the available banks that have received the highest classification.

§ 41-02 Definitions. When used in these rules:

(a) "Affiliate" of a bank or bank holding company shall mean an entity that, directly or indirectly, controls or is controlled by or is under common control with such bank or bank holding company.

(b) "Burma classification" shall mean the classification of a bank by the Commissioner in accordance with the criteria set forth in these rules as to how a bank is using the means at its disposal to comply with the embargo on trade and financial transactions with Burma and any other sanctions imposed by the United States government with regard to Burma.

(c) "Bank" shall mean a commercial bank or trust company or any other entity designated or applying to be designated by the Banking Commissioner pursuant to New York City Charter § 1524, except as expressly provided in subdivision (h) below.

(d) "Bank holding company" shall mean any entity that directly or indirectly controls either a bank or an entity directly or indirectly controlling a bank.

Notwithstanding the foregoing:

(1) No entity shall be deemed a bank holding company by virtue of its ownership or control of securities or interests in a fiduciary capacity, except where such securities or interests are owned, controlled or held with power to vote for the benefit of the stockholders, members or employees of such entities.

(2) nor shall any entity formed and operated for the sole purpose of participating in a proxy solicitation be deemed a bank holding company by virtue of its control of voting rights of securities or interests in any bank or bank holding company acquired in the course of each solicitation.

(3) nor shall any entity be deemed a bank holding company by virtue of its ownership or control of securities or interests acquired in securing or collecting a debt previously contracted in good faith, until two years after the date of acquisition.

(4) nor shall any entity be deemed a bank holding company by virtue of its ownership or control of securities or interests acquired by it in connection with its underwriting of securities or interests if such securities or interests are owned or controlled only for such period of time as will permit the sale thereof on a reasonable basis.

(e) "City" shall mean the City of New York.

(f) "Commissioner" shall mean the Commissioner of Finance of the City of New York.

(g) "Control" of an entity shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such entity.

Without limiting the generality of the foregoing, control

(1) exists when an entity directly or indirectly owns, controls or holds with power to vote at least 25% of any class of the voting securities or interests of another entity;

(2) exists if any of the following factors are present:

(i) ability to control in any manner the election of 25% of the board of directors, trustees or general partners (or individuals exercising similar functions) of an entity; or

(ii) ability to exercise a controlling influence over the policies or management of an entity;

(3) is rebuttably presumed not to exist when an entity directly or indirectly owns, controls or holds with power to vote less than 5% of each class of the voting securities or interests of another entity.

The presumption of lack of control (*i.e.*, ownership of or holding with power to vote less than 5% of each class of the voting securities or interests of an entity) may be rebutted if it is established to the satisfaction of the Commissioner that a "control" relationship exists. Determinations as to whether the indicia of control enumerated above are present shall be made by the Commissioner. Except as provided in the immediately succeeding sentence, in making such determinations, the Commissioner shall give due consideration to whether the entity whose control is in question is or would be viewed as a "controlled" entity by the Federal Reserve Board or other relevant regulatory agency. Notwithstanding the foregoing, even if the Federal Reserve Board or other relevant regulatory agency has determined that an entity does not have control over another entity because either or both such entities are not organized under the laws of or doing business in the United States, Puerto Rico, Guam, American Samoa or the Virgin Islands, the Commissioner may, consistent with the provisions of this subdivision, find control to exist for purposes of these rules if, in the Commissioner's judgment, such a determination would have been made by such regulator had such entities been organized under the laws of or been doing business in any such jurisdiction.

(h) "Correspondent banking services" shall mean banking services provided by one bank to another; provided, however, that for purposes of this subdivision, "bank" shall not be defined as provided in subdivision (c) above, but rather according to its general common usage in international finance.

(i) "Entity" shall mean any corporation, sole proprietorship, partnership, trust, joint venture, company, unincorporated association, joint stock association, limited liability company or partnership or any other form of doing business.

(j) "Indirect" shall mean through one or more intermediaries.

(k) "Investment" shall mean the beneficial ownership or control of a controlling interest in a Burmese entity, but shall not include the purchase of securities of a Burmese entity for a customer's account.

(l) "Known" shall mean the possession of actual knowledge, and shall not imply a duty of inquiry beyond the due diligence ordinarily exercised by an entity engaged in international finance.

(m) "Burma" shall include: the country of Burma otherwise known as Myanmar and any territory or area under its administration.

(n) "Burmese entity" shall mean:

- (1) an entity organized under the laws of Burma;
- (2) an entity known to the bank or its affiliates as having 25% or more of its equity directly or indirectly owned by one or more entities organized under the laws of Burma; or
- (3) a branch or office in Burma of an entity that is domiciled or organized outside of Burma.

(o) "Burmese government" shall include any agency of the Burmese government or Burma, any political subdivision of such government and any corporation owned or controlled by such government.

§ 41-03. Burma Questionnaire. (a) The Commissioner shall send to each bank a Burma Questionnaire, to elicit the information required for purposes of classifying banks in accordance with New York City Charter §1523(3) and these rules. Failure by a bank to respond timely and fully to any portion of the Questionnaire, to provide any of the documentation specified by the Commissioner or these rules or to provide such other information as may be sought by the Commissioner for purposes of such classification shall be grounds for a lower classification of the bank.

(b) Upon the first submission of the Burma Questionnaire to the Commissioner, each publicly owned bank shall also file with the Commissioner a copy of the most recent annual proxy statement to its shareholders that the bank filed with the Federal Reserve Board, the Office of the Comptroller of the Currency or the Federal Deposit Insurance Corporation, whichever is applicable.

(c) A bank affiliated with one or more bank holding companies as defined in the Bank Holding Company Act, 12 U.S.C. § 1841 shall, in addition, submit copies, with exhibits, of the most recent annual report filed by each affiliated bank holding company with the a Federal Reserve Board; provided, however, that the bank may omit from submission portions of such report for which confidential treatment by the Federal Reserve Board has been requested and has not been denied. A bank shall also promptly submit all portions of such report for which confidential treatment is denied subsequent to the submission of the main body of such report. In addition, a bank shall submit to the Commissioner copies of subsequent annual reports filed by the bank and by each affiliated bank holding company with the applicable state and federal regulatory agencies, with exhibits, within thirty days after the filing of the reports with such agencies.

(d) After the initial submission of the Questionnaire by a bank to the Commissioner, the Commissioner may request a bank to submit additional Questionnaires from time to time as specified by the Commissioner. The Commissioner shall notify the bank of such request a reasonable time before the Questionnaires are due.

§ 41-04 Burma classification; Criteria. (a) The Commissioner shall evaluate the record of performance of a bank designated pursuant to New York City Charter §1524 in complying with the embargo on trade and financial transactions with Burma and any other sanctions imposed by the United States government with regard to Burma, and shall classify such bank with a Burma classification. City agencies shall use such classification in their selection of banking service providers in a manner consistent with §41-06 of these rules and with guidelines established by the Commissioner.

(b) In classifying banks, the Commissioner shall first ascertain whether banks are providing any of the services prohibited under New York City Charter § 1524(2)(a)(3). Banks found to be violating these prohibitions shall be dropped from the list of designated banks. The prohibited services are:

- (a) advertising or otherwise promoting the sale, outside of Burma, of coins minted in Burma;
- (b) underwriting securities of the government of Burma; and
- (c) making loans to the government of Burma.

(c) In classifying banks, the Commissioner shall consider the following attributes and practices of a bank and its affiliates as negative factors indicative of a bank's failure to comply with U.S. government sanctions. The bank and its affiliates:

- (1) maintain an office, plant or employees in Burma or have investments in Burma, or are actively in the process of withdrawing such operations from Burma.
- (2) provide loans, including, without limitation, trade credits, to Burmese entities or to the Burmese government.
- (3) underwrite, maintain correspondent banking relations or provide correspondent banking services, including, without limitation, letters of credit, bankers acceptances and other banking services, with or to Burmese entities or the Burmese government.

- (4) have not divested all outstanding debt owed them by Burmese entities or the Burmese government;
- (5) have rescheduled loans owed them by Burmese entities or the Burmese government, and have converted outstanding debt owed them by the Burmese entities or the Burmese government into instruments whose maturities are longer than those of the original debt;
- (6) are not actively engaged in the cessation of all of their operations, if any, described in paragraphs 1 through 5 above and will not have ceased such operations within six months.

(d) To the extent the bank or its affiliates engage in the activities described in paragraphs 1 through 5 above, the Commissioner may take into account the extent of such activities and the degree to which the level of such activities have been reduced since 1990. In classifying banks, the Commissioner shall, based on information acquired pursuant to §§41-03 and 41-05 of these rules, give weight in the proportions described below to the extent banks fail to cease activities described in paragraphs 1 through 6 above:

- Para. 1 – eighteen percent (18%)
- Para. 2 – eighteen percent (18%)
- Para. 3 – eighteen percent (18%)
- Para. 4 – eighteen percent (18%)
- Para. 5 – eighteen percent (18%)
- Para. 6 – ten percent (10%)

(e) Based on an assessment of their activities conducted in accordance with the foregoing, the Commissioner shall classify the banks in such manner as the Commissioner shall determine best advances the purposes of these rules

§ 41-05 Public Comment; Publication of Classification

(a) The Commissioner shall offer banks and the public an opportunity for comment concerning the Burma-related activities of banks at a public hearing to be held prior to classifying or reclassifying such banks. The Commissioner shall also accept written comments until the date of a public hearing from a bank and the public concerning such bank's activities. Notice of such public hearing shall be published in the *City Record* a reasonable time before such hearing shall be held. In addition to the information provided by banks pursuant to §41-03 of these rules, the Commissioner may consider any such comments received in the classification of a bank hereunder. The Commissioner shall provide banks a reasonable opportunity to respond to any such comment so considered.

(b) After evaluating a bank's record of performance in complying with U.S. sanctions against Burma, and within a reasonable time after the public hearing, the Commissioner shall classify such bank as to its efforts according to the criteria stated in these rules and shall publish notice of such classification in the *City Record*. Upon the request of a bank or the public, or upon the Commissioner's own initiative, and after offering the public and the bank an opportunity to be heard, the Commissioner may change the classification of the bank. Notice of such change shall be published in the *City Record*.

§ 41-06 Application of the Classification

The classification of the bank as determined by the Commissioner shall be a criterion used by City agencies in their selection of banking service providers. When choosing among banks offering comparable services at a comparable cost. City agencies shall, in a manner consistent with guidelines established by the Commissioner, deposit, or invest funds at, and obtain services from, banks that have received the highest classification.

§ 41-07 Severability.

If any provision of these rules or application thereof to any person, entity, bank or circumstance is adjudged invalid by a court of competent jurisdiction, such determination shall not affect or impair the validity of the other provisions of these rules or the application thereof to other persons, entities, banks or circumstances.]

Basis and Purpose of Rulemaking Action

The purpose of this repeal of Chapter 41 of Title 19 of the Rules of the City of New York Relating to the Burma Classification of Banks is to bring the Department of Finance's rules into compliance with a recent United States Supreme Court decision and a New York City Law Department opinion, which based on the Court's decision, found Local Law 33 of 1997 invalid and unenforceable. This local law amended the New York City Charter with respect to the depositing of City funds in banks doing business in Burma and amended the New York City Administrative Code in relation to City contracts with entities that do business in Burma.

Local Law 33 specifically required the Commissioner of Finance to establish by rule the criteria to evaluate whether banks were using the means at their disposal to comply with the embargo on trade and financial transactions with Burma and any other sanctions imposed by the United States government with regard to Burma. Accordingly, Chapter 41 of Title 19 of the Rules of the City of New York was added on March 10, 1998.

A recent Supreme Court decision, Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000), held that a Massachusetts law that restricted state contracts with companies doing business with Burma was preempted by federal law. The New York City Law Department determined that the findings of preemption made in that decision applied equally to Local Law No. 33 of 1997, thereby making the local law invalid and unenforceable. Therefore, the Department of Finance is repealing these rules, which were promulgated pursuant to, and intended to implement, the now invalid local law.

Andrew S. Eristoff
Commissioner of Finance