

DEPARTMENT OF HOMELAND SECURITY

Bureau of Immigration and Customs Enforcement

8 CFR Part 236

[ICE 2355-05; DHS Docket No. ICE-2006-0012]

RIN 1653-AA53

Consular Notification for Aliens Detained Prior to an Order of Removal

AGENCY: Bureau of Immigration and Customs Enforcement, DHS.

ACTION: Final rule.

SUMMARY: This final rule amends the Department of Homeland Security (DHS) regulations governing the detention of aliens prior to an order of removal. The rule updates the list of countries in 8 CFR 236.1(e), which, based on existing treaties, requires immediate communication with consular or diplomatic officers when nationals of listed countries are detained in the United States. The rule adds Algeria, Tunisia, and Zimbabwe to the list of countries and removes Albania and South Korea from the list of countries. In addition, the rule clarifies provisions related to treaties that the United States has with China, Hong Kong, and Poland. Finally, the rule updates the list with Antigua and Barbuda's official name and by adding clarifying language about provisions governing U.S.S.R. successor states.

DATES: This final rule is effective January 17, 2007.

FOR FURTHER INFORMATION CONTACT: Lisa Hoechst, Bureau of Immigration and Customs Enforcement, Department of Homeland Security, 425 I Street, NW., Washington, DC 20536, telephone 202-732-2868.

SUPPLEMENTARY INFORMATION:

I. Background

Bilateral treaties between the United States and many countries require immediate communication with a consular or diplomatic officer of such a country whenever one of their nationals is arrested or detained in the United States. The immediate communication must occur, regardless of whether the alien requests such communication and even if the alien requests that no such communication be undertaken on his or her behalf.

There are three states that are party to such a treaty with the United States but are not included in the current list of countries in 8 CFR 236.1(e). Those states are Algeria, Tunisia, and Zimbabwe.

The relevant portions of the bilateral treaties with those states are provided below.

- The Consular Convention with the Democratic and Popular Republic of Algeria, Jan. 12, 1989, U.S.-Alg., art. 33(1), S. Treaty Doc. No. 101-13, provides:

The consular post of the sending State shall be informed without delay of any measure taken to deprive one of its nationals of his liberty and the motivating circumstances.

- The Consular Convention with the Republic of Tunisia, May 12, 1988, U.S.-Tunis., art. 39(1), S. Treaty Doc. No. 101-12, provides:

The competent authorities of the receiving State shall, without delay, inform the appropriate consular post whenever a national of the sending state is the subject of an arrest or of any form of restriction on his personal freedom. For the purpose of this article, the term "without delay" contemplates that this notification will be made within three days following restriction on the freedom of nationals of the sending State, or in cases where the notification cannot be made within three days because of communications or other difficulties, as soon as possible thereafter.

- The Consular Convention with the United Kingdom, June 6, 1951, U.S.-U.K., art. 16(2), 3 U.S.T. 3426, which has continued to apply to Zimbabwe since it became independent, provides:

A consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district.* * *

In addition, there are two countries currently on the list in 8 CFR 236.1(e) that are not covered by such a treaty: Albania and South Korea. There is currently no bilateral consular convention in force between the United States and Albania. The multilateral Vienna Convention on Consular Relations (VCCR), April 24, 1963, art. 36(1)(b), 21 U.S.T. 77, 101, 596 U.N.T.S. 261, 292 governs the notification of consular officials when Albanian nationals are detained in the United States. It provides that:

[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.* * * [Emphasis added.]

Consular notification is not mandatory—it is at the request of the detained person.

The Consular Convention with the Republic of Korea, January 8, 1963, U.S.-S. Korea, art. 5(2), 14 U.S.T. 1637,

also does not require mandatory consular notification. It states:

The appropriate authorities of the receiving state shall, *at the request* of any national of the sending state who is under arrest or otherwise detained in custody, immediately inform a consular officer of the sending state.* * * [Emphasis added.]

Any detained South Korean national has the discretion to decide whether his or her consulate will be notified of the detention.

II. Provisions of the Rule

This rule amends 8 CFR 236.1(e) to add Algeria, Tunisia, and Zimbabwe to the list of foreign countries having a bilateral treaty that requires consular notification when their nationals are detained in the U.S. The rule also removes Albania and South Korea from the list.

The rule also makes several changes with regard to China. The rule states, in a footnote to "China" in the list of countries, that consular notification is not mandatory for any person who carries a "Republic of China" passport issued by Taiwan. Such persons are not covered by any consular convention that provides for mandatory consular notification.

In addition, the rule removes Hong Kong from the list of British dependencies in the footnote to "United Kingdom." It adds "Hong Kong" to the list of countries and adds a footnote to the entry for "Hong Kong." The footnote discusses the reversion of Hong Kong to Chinese sovereignty and to the requirement that United States officials notify Chinese consular officials whenever the bearer of a Hong Kong passport is arrested or detained in the United States. The latter requirement is contained in the Agreement Regarding the Maintenance of the United States Consulate General in the Hong Kong Special Administrative Region, March 25, 1997, U.S.-China, 33 U.S.T. 2973, para. 3(f)(2):

If a national of the sending State is arrested or placed under any form of detention within the consular district, the competent authorities of the receiving State shall immediately, but no later than within four days from the date of arrest or detention, notify the consulate of the sending State. If it is not possible to notify the consulate of the sending State within four days because of communications difficulties, they should try to provide notification as soon as possible.* * *

This provision is identical to article 35(2) of the Consular Convention with China, Sept. 17, 1980, U.S.-China, 33 U.S.T. 2973.

The rule also adds a footnote to "Poland" in the list of countries, stating

that mandatory consular notification does not apply to any Polish national who has been admitted to permanent residence in the United States. The Consular Convention with Poland, May 31, 1972, U.S.-Pol., art. 29(2), 24 U.S.T. 1231, states:

The appropriate authorities of the receiving State shall immediately inform a consular officer of the sending State of the detention or arrest of any national of the sending State who has not been admitted to permanent residence in the receiving State. In the case of the detention or arrest of a national of the sending State who has been admitted to permanent residence in the receiving State, the appropriate authorities of the receiving State, on the request of such national, shall immediately inform a consular officer of the sending State of such detention or arrest. [Emphasis added.]

Finally, the rule changes “Antigua” in the list of countries to “Antigua and Barbuda,” the official name of that country. It also adds language to the footnote to “U.S.S.R.,” which clarifies that mandatory consular notification applies to a national of any of its successor states who is still traveling on a U.S.S.R. passport.

It is crucial that DHS make these changes, especially the addition of Algeria, Tunisia, and Zimbabwe to the list of countries whose consular or diplomatic officials must, under treaty, be notified if their nationals are detained in the United States. The failure to list these countries has led to complaints from those countries’ governments that DHS has not always notified consular officials as required under treaty. It could lead such governments to not honor their treaty obligation to notify officials of the United States when United States nationals are detained. Accordingly, DHS is inserting this language to help assure that such governments honor their treaty obligation to notify officials of the United States when United States nationals are detained.

III. Regulatory Analyses

A. Administrative Procedure Act

This rule is exempt from requirements for notice and comment rulemaking under 5 U.S.C. 553(a)(1), because it relates to a foreign affairs function of the United States. Moreover, the rule does not implement any additional rights or responsibilities incumbent upon the general public, but merely consolidates a list of provisions of treaties currently in force. Accordingly, DHS has determined that the rulemaking provisions of the Administrative Procedure Act do not apply and that this rule is effective immediately upon publication in the **Federal Register**.

B. Regulatory Flexibility Act

Since no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), do not apply.

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48 (March 22, 1995) (2 U.S.C. 1502 *et seq.*).

D. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

E. Executive Order 12866

This rule is exempt from Executive Order 12866 review, and is therefore not subject to OMB review, because it “pertains to a military or foreign affairs function of the United States.” See section 2(d)(2) of Executive Order 12866.

F. Executive Order 13132

This rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement under section 6 of Executive Order 13132.

G. Paperwork Reduction Act

This rule does not impose any new reporting or recordkeeping requirements as described in the Paperwork Reduction Act, 44 U.S.C. 3507. Therefore, DHS does not need to submit any such requirement to the Office of Management and Budget (OMB) for review and approval.

List of Subjects in 8 CFR Part 236

Administrative practice and procedure, Aliens, Foreign relations, Immigration, Treaties.

■ Accordingly, part 236 of chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 236—APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED

■ 1. The authority citation for part 236 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1227, 1231, 1362; 18 U.S.C. 4002, 4013(c)(4); 8 CFR part 2.

■ 2. Section 236.1(e) is amended by revising the list of countries, and the accompanying footnotes, to read as follows:

§ 236.1 Apprehension, custody, and removal.

* * * * *

(e) * * *

Algeria¹
 Antigua and Barbuda
 Armenia
 Azerbaijan
 Bahamas, The
 Barbados
 Belarus
 Belize
 Brunei
 Bulgaria
 China (People’s Republic of)²
 Costa Rica
 Cyprus
 Czech Republic
 Dominica
 Fiji
 Gambia, The
 Georgia
 Ghana
 Grenada
 Guyana
 Hong Kong³

¹ Arrangements with the countries listed in 8 CFR 236.1(e) provide that U.S. authorities shall notify responsible representatives within 72 hours of the arrest or detention of one of their nationals.

² Notification is not mandatory in the case of any person who carries a “Republic of China” passport issued by Taiwan. Such persons should be informed without delay that the nearest office of the Taipei Economic and Cultural Representative Office (“TECRO”), the unofficial entity representing Taiwan’s interests in the United States, can be notified at their request.

³ Hong Kong reverted to Chinese sovereignty on July 1, 1997, and is now officially referred to as the Hong Kong Special Administrative Region, or

Hungary
 Jamaica
 Kazakhstan
 Kiribati
 Kuwait
 Kyrgyzstan
 Malaysia
 Malta
 Mauritius
 Moldova
 Mongolia
 Nigeria
 Philippines
 Poland ⁴
 Romania
 Russian Federation
 St. Kitts and Nevis
 St. Lucia
 St. Vincent/Grenadines
 Seychelles
 Sierra Leone
 Singapore
 Slovak Republic
 Tajikistan
 Tanzania
 Tonga
 Trinidad and Tobago
 Tunisia
 Turkmenistan
 Tuvalu
 Ukraine
 United Kingdom ⁵
 U.S.S.R. ⁶
 Uzbekistan
 Zambia
 Zimbabwe
 * * * * *

"S.A.R." Under paragraph 3(f)(2) of the March 25, 1997, U.S.-China Agreement on the Maintenance of the U.S. Consulate General in the Hong Kong Special Administrative Region, U.S. officials are required to notify Chinese officials of the arrest or detention of the bearers of Hong Kong passports in the same manner as is required for bearers of Chinese passports—i.e., immediately, and in any event, within four days of the arrest or detention.

⁴ Consular communication is not mandatory for any Polish national who has been admitted for permanent residence in the United States. Such notification should only be provided upon request by a Polish national with permanent residency in the United States.

⁵ United Kingdom includes England, Scotland, Wales, Northern Ireland and Islands and the British dependencies of Anguilla, British Virgin Islands, Bermuda, Montserrat, and the Turks and Caicos Islands. Their residents carry British passports.

⁶ All U.S.S.R. successor states are covered by this agreement. They are: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. Although the U.S.S.R. no longer exists, the U.S.S.R. is listed here, because some nationals of its successor states may still be traveling on a U.S.S.R. passport. Mandatory consular notification applies to any national of such a state, including one traveling on a U.S.S.R. passport.

Dated: January 9, 2007.

Michael Chertoff,

Secretary.

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DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 563

[No. 2007-02]

RIN 1550-AC06

Subordinated Debt Securities and Mandatorily Redeemable Preferred Stock

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: This final rule updates OTS regulations that require a savings association to obtain approval (or non-objection) before it may include subordinated debt securities or mandatorily redeemable preferred stock in supplementary (tier 2) capital. The final rule removes several unnecessary or outdated requirements and conforms certain provisions, such as maturity period requirements and purchaser restrictions, to the rules issued by the other federal banking agencies. The final rule also reconciles conflicting rules, adds appropriate statutory cross-references, and rewrites the rule in plain language.

DATES: This rule is effective April 1, 2007.

FOR FURTHER INFORMATION CONTACT:

David W. Riley, Senior Analyst, (202) 906-6669; Capital Policy, Karen Osterloh, Special Counsel, (202) 906-6639, Regulations and Legislation Division, or Gary Jeffers, Senior Attorney, (202) 906-6457, Business Transactions Division, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Discussion

A savings association must obtain OTS approval (or non-objection) before it may include subordinated debt securities or mandatorily redeemable preferred stock in supplementary (tier 2) capital. OTS rules at 12 CFR 563.81 address application and notice procedures, requirements that securities must meet to be included in supplementary capital, conditions for OTS approval (or non-objection), and other requirements.

On July 3, 2006, OTS proposed to update 12 CFR 563.81 to delete unnecessary or outdated requirements and conform certain provisions, such as maturity period requirements and purchaser restrictions, to the rules issued by the other federal banking agencies. In addition, OTS proposed to reconcile 12 CFR 563.81 with conflicting OTS rules, add appropriate statutory cross-references, and rewrite the rule in plain language.¹

OTS received comments from two trade associations in support of the proposed rule. Both commenters observed that the proposed rule is a much-needed update to the existing provisions. They noted that the proposed rule clarifies the existing requirements, is more consistent with the rules issued by other federal banking agencies, is less burdensome than the current rule, and provides greater flexibility to savings associations.

Commenters suggested only a few revisions to the proposed rule. These suggestions are discussed below. Unless otherwise noted, OTS has adopted the proposed rule without substantive change.

A. Processing and Review of Applications and Notices—Final § 563.81(b) and (d)

The proposed rule amended the existing rules governing OTS processing and review of applications and notices seeking approval of, or non-objection to, the inclusion of subordinated debt securities or mandatorily redeemable preferred stock in supplementary capital. These revisions deleted outdated rules that overlapped or duplicated 12 CFR part 516 (Application Processing Guidelines), and substituted appropriate cross-references to that part.

Commenters generally supported these revisions. One commenter, however, noted that proposed § 563.81(a) stated that a savings association may file its application or notice before or after it issues the covered securities, but may not include the covered securities in supplementary capital until OTS approves the application or does not object to the notice. This commenter urged OTS to establish a 30-day time limit on OTS's ability to object to a notice. The commenter argued that this change would provide a savings association with certainty that the covered securities that were the subject of a notice could be treated as tier 2 capital without further OTS action.

¹ 71 FR 37862 (July 3, 2006).