



# Executive Order 13438: Blocking Property of Certain Persons Who Threaten Stabilization Efforts in Iraq

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## Summary

On July 17, 2007, President Bush issued Executive Order 13438, Blocking Property of Certain Persons Who Threaten Stabilization Efforts in Iraq. It is the latest in a series of executive orders based on the national emergency declared by President Bush with respect to “the unusual and extraordinary threat to the national security and foreign policy of the United States posed by obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in that country, and the development of political, administrative and economic institutions in Iraq.” Regulations implementing this Executive Order were issued on September 13, 2010.

The President’s authority to issue the executive order stems from the International Emergency Economic Powers Act of 1977 (IEEPA). The executive order covers financial transactions and authorizes property controls with respect to three categories of persons: (1) individuals or entities determined “to have committed, or to pose a significant risk, of committing an act or acts of violence that have the purpose or effect of ... threatening the peace or stability of Iraq ...”; (2) individuals or entities determined “to have materially assisted, sponsored, or provided financial, material, logistical, or technical support for, or goods or services in support of, such an act or acts of violence or any person whose property and interests in property are blocked pursuant to this order ...”; and (3) individuals and entities determined “to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order....”

This report provides a brief history of the development of presidential powers in peacetime. It discusses some of the issues that might be raised in light of the contrast between the executive order’s broad language and its narrow aim—supplementation of sanctions applicable to Al Qaeda and former Iraqi regime officials to cover terrorists operating in Iraq. It examines the reach of the executive order and provides legal analyses of some of the constitutional questions raised in the courts by similar sanctions programs, noting that the broad language of the executive order is not unprecedented. The Department of the Treasury’s Office of Foreign Assets Control (OFAC) has published names of persons designated under the executive order and issued regulations further refining its terms and applicability. The report examines some of the procedures available to challenge OFAC sanction regulations and briefly discusses OFAC’s rules, which may be of concern to attorneys representing individuals and entities subjected to sanctions or involved in transactions with sanctioned persons.

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## Background

On July 17, 2007, President Bush issued Executive Order 13438, Blocking Property of Certain Persons Who Threaten Stabilization Efforts in Iraq.<sup>1</sup> It is the latest in a series of executive orders based on the national emergency declared by President Bush with respect to “the unusual and extraordinary threat to the national security and foreign policy of the United States posed by obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in that country, and the development of political, administrative and economic institutions in Iraq.”<sup>2</sup> The broad language of this executive order has been the subject of a degree of criticism as potentially reaching beyond insurgents in Iraq to third parties, such as U.S. citizens, who may unknowingly be providing support for the insurgency.<sup>3</sup>

Having declared a national emergency, the President invoked authority available under the International Emergency Economic Powers Act of 1977 (IEEPA)<sup>4</sup> and ordered the blocking of financial transactions and the institution of property controls with respect to any property or interests in property of persons determined to fall within three categories of individuals or entities threatening the stabilization efforts in Iraq. Implementation of this executive order is the responsibility of the Department of the Treasury’s Office of Foreign Assets Control (OFAC), which currently “administers economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction.”<sup>5</sup> OFAC has promulgated regulations implementing sanctions involving the Balkans, Belarus, Burma, Cote d’Ivoire (Ivory Coast), Cuba, diamond trading, Iran, Iraq, Liberia, Libya, narcotics trafficking, weapons of mass destruction proliferation, North Korea, Sudan, Syria, terrorists, and Zimbabwe.<sup>6</sup>

<sup>1</sup> 72 Fed. Reg. 39,719 (July 19, 2007). The national emergency has been continued for one-year periods, in accordance with section 50 U.S.C § 1622(d), the latest of which continues the national emergency for one year beyond May 22, 2010. k75 Fed. Reg. 27399 (May 17, 2010).

<sup>2</sup> Exec. Order No. 13350, 69 Fed. Reg. 46,055 (July 30, 2004) (expanding on the national emergency declared May 28, 2003 (Exec. Order No. 13303, 68 Fed. Reg. 3,193), which was expanded on September 3, 2003 (Exec. Order No. 13155, 68 Fed. Reg. 52,314).)

<sup>3</sup> See, e.g., Walter Pincus, “Destabilizing Iraq, Broadly Defined,” Washington Post, A-15 (July 23, 2007) (quoting Bruce Fein as raising questions about whether lawyers who provide legal assistance for persons listed under the executive order might be subject to asset freezes); ACLU website, “ACLU Says Executive Order ‘Material Support’ Provision Sweeps Too Broadly and Will Restrict Humanitarian Efforts in Iraq” (7/27/2007) <http://www.aclu.org/natsec/warpowers/31113prs20070727.html>; and, CivicActions website (asking whether the “executive order just criminalize[d] the anti-war movement in the US, giving the president the power to clean out our bank accounts?”) [http://www.civicactions.com/blog/executive\\_order\\_blocking\\_property\\_of\\_certain\\_persons\\_who\\_threaten\\_stabilization\\_efforts\\_in\\_iraq](http://www.civicactions.com/blog/executive_order_blocking_property_of_certain_persons_who_threaten_stabilization_efforts_in_iraq).

<sup>4</sup> P.L. 95-223, Tit. II, 91 Stat. 1652, 1626; 50 U.S.C. §§ 1701 *et seq.* IEEPA authority is triggered when the President declares a national emergency with respect to “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy or economy of the United States.” Other statutes invoked by the President in issuing the executive order are: the National Emergencies Act, 50 U.S.C. §§ 1601 *et seq.* (setting procedures for declaring, terminating, informing Congress about, reporting expenses incurred by national emergencies, and establishing a joint resolution as the means by which Congress may terminate the national emergency); and section 301 of Title 3, U.S.C. (authorizing agency heads to issue regulations).

<sup>5</sup> U.S. Department of the Treasury, Terrorism and Financial Intelligence, Office of Foreign Assets Control (OFAC), “Mission,” <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx> (last visited December 14, 2010).

<sup>6</sup> Texts of the sanctions regulations, legal documents ordering the sanctions, and guidance to the various industries (continued...)

## Recent Developments

On September 13, 2010,<sup>7</sup> OFAC issued regulations implementing Executive Order 13438 as well as various other Executive Orders issued since 2003 to deal with the situation in Iraq.<sup>8</sup> These regulations, the Iraq Stabilization and Insurgency Sanctions Regulations, 31 C.F.R., Part 576, elaborate to some extent on the Executive Order. For instance, they specify that the blocking orders for persons sanctioned under Executive Order 13438 are effective on “the earlier of the date of actual or constructive notice that such person’s property and interests in property are blocked,”<sup>9</sup> rather than, for example, on the date of publication in the *Federal Register* of the person’s designation as a Specially Designated Terrorist. The regulations also declare to be blocked any property or interests in property of any entity in which the blocked person has, directly or indirectly, a 50% interest, whether or not that entity has been designated under the Executive Order.<sup>10</sup> Persons whose interests have been blocked may challenge the blocking orders in two ways. If they can claim “mistaken identity,” they may seek to have the funds or property released by observing the procedures specified in 31 C.F.R. § 501.806. They also have the possibility of seeking administrative review of their designation as a Specially Designated Terrorist by showing that the basis on which they have been designated is “insufficient” or by proposing “remedial steps” that they could take to “negate the basis for designation.”<sup>11</sup>

A list of designees added to OFAC’s Special Designated Nationals and Blocked Persons List<sup>12</sup> under Executive Order 13438 was issued by Treasury on January 9, 2008.<sup>13</sup> It included Ahmed Fruzandeh, Brigadier General, Commanding Officer of the Iranian Islamic Revolutionary Guard Corps-Qods Force, Ramazan Corps, who “leads terrorist operations against Coalition Forces and Iraq Security Forces, and directs assassinations of Iraqi figures.”<sup>14</sup> Also included were two Iran-

(...continued)

required to abide by the sanctions can be found at OFAC’s website: <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx>. (last visited, December 14, 2010).

<sup>7</sup> 75 Fed. Reg. 55463 (September 13, 2010).

<sup>8</sup> Executive Orders 13303, 13315, 13350, and 13364.

<sup>9</sup> 31 C.F.R. 576.303(b); 75 Fed. Reg. 55470.

<sup>10</sup> 31 C.F.R. § 576.412; 75 Fed. Reg. 55472.

<sup>11</sup> A blocked “person may seek administrative reconsideration of his, her or its designation ... as blocked, or assert that the circumstances resulting in the designation no longer apply” pursuant to 31 C.F.R. 501.807. Upon receiving a request for reconsideration, OFAC will review the request and the arguments submitted and provide a written decision. If the request is denied, the OFAC decision may be challenged in federal court and upheld if the court finds that it is supported by substantial evidence on the record. *See, e.g.* *Al Haramain Islamic Foundation, Inc. v. U.S. Department of the Treasury*, 585 F. Supp. 2d 1233 (D.Or. 2008). It must be noted, however, that there is one case which treated the blocking order as a seizure under the Fourth Amendment and required that the government show “exigent circumstances” to justify its actions. *Kind Hearts for Charitable Humanitarian Development, Inc., v. Geithner*, 647 F. Supp. 2d 857 (N.D. Ohio, 2009).

<sup>12</sup> The current list, issued on January 6, 2011, can be found at <http://www.treasury.gov/ofac/downloads/t11sdn.pdf>. Names of “blocked persons,” “specially designated nationals,” and “specially designated terrorists,” with whom U.S. persons may not trade are also published in the *Federal Register* and in appendices to 31 C.F.R. “IRAQ3” is the designation given to names added pursuant to Executive Order 13438.

<sup>13</sup> U.S. Department of the Treasury Press Release HP-859, “Treasury Designates Individuals, Entity Fueling Iraqi Insurgency.” <http://www.treasury.gov/press-center/press-releases/Pages/hp759.aspx>.

<sup>14</sup> *Id.* The OFAC notes that the Brigadier General, Commanding Officer of the Iranian Islamic Revolutionary Guard Corps-Qods Force, Ramazan Corps, is also known as Ahmad Foruzandeh, Ahmad Fruzandah, Ahmad Fayruzi, Jafari Ahmad Foroozandeh, Abu Shahab, and Abu Ahmad Ishab.

based Iraqi nationals, and one Syria-based Iraqi national as well as Al-Zawra Television Station, based in Syria. The Treasury announcement includes a description of the activities of the designees that have led to the prohibition of transactions between them and any U.S. person and the freezing of any of their assets that are under the jurisdiction of the United States.

On September 23, 2008, the names of five newly designated individuals and two newly designated entities were added to the list of blocked persons and entities under the authority of Executive Order 13438.<sup>15</sup> One Iranian national was included,<sup>16</sup> as were three Iraqi nationals,<sup>17</sup> and one Syrian national.<sup>18</sup> The newly designated entities were both broadcasters operating in Syria: Al-Ra'y Satellite Television Channel, Near Damascus in the Yaafur area, and Suraqiya for Media and Broadcasting, Damascus.

On July 16, 2009, OFAC announced the names of one newly designated entity and one newly designated individual whose property and interests in property are blocked pursuant to Executive Order 13438.<sup>19</sup> On January 5, 2010, OFAC added the following designee to the list of entities and individuals whose property is blocked pursuant to Executive Order 13438: Jaysh Rijal Al-Tariq Al-Naqshabandi (a.k.a. Armed Men of the Naqshabandi Order; a.k.a. Naqshabandi Army; a.k.a. "AMNO"; a.k.a. "JRN"; a.k.a. "JRTN"), Iraq; website: <http://www.alnakshabandia-army.org>; <http://www.alnakshabandia-army.com> [IRAQ3].<sup>20</sup>

## Statutory Basis: IEEPA

The July 17, 2007, executive order cites as its authority IEEPA. Under IEEPA, once the President has declared a national emergency with respect to a threat "to the national security, foreign policy, or economy of the United States" from a source "in whole or in substantial part outside the

<sup>15</sup> 73 Fed. Reg. 54896.

<sup>16</sup> Abdul Reza Shahlai.

<sup>17</sup> Arkam Abbas Al-Kabi, Harith Sulayman Al-Dari, and Ahmad Hassan Kaka Al-Ubaydi.

<sup>18</sup> Raw'a Al-Usta.

<sup>19</sup> 74 Fed. Reg. 34639. The entire list of blocked individuals and entities, as published on that date, is:

AL-MUHANDIS, ABU MAHDI (a.k.a. AL BASERI, Abu Mahdi; a.k.a. AL-BASARI, Abu Mahdi; a.k.a. AL-BASRI, Abu-Mahdi al-Mohandis; a.k.a. AL-IBRAHIMI, Jamal; a.k.a. AL-IBRAHIMI, Jamal Ja'afar Muhammad Ali; a.k.a. AL-IBRAHIMI, Jamal Ja'far; a.k.a. AL-MADAN, Abu Mahdi; a.k.a. AL-MOHANDAS, Abu-Mahdi; a.k.a. AL-MOHANDESS, Abu Mehdi; a.k.a. AL-MUHANDIS, Abu Mahdi; a.k.a. AL-MUHANDIS, Abu Mahdi al-Basri; a.k.a. AL-MUHANDIS, Abu-Muhannad; a.k.a. BIHAJ, Jamal Ja'afar Ibrahim al-Mikna; a.k.a. EBRAHIMI, Jamal Jafaar Mohammed Ali; a.k.a. JAMAL, Ibrahim; a.k.a. "AL-IBRAHIMI, Jamal Fa'far 'Ali"; a.k.a. "AL-TAMIMI, Jamal al-Madan"; a.k.a. "JAAFAR, Jaafar Jamal"; a.k.a. "MOHAMMED, Jamal Jaafar"), Mehran, Iran; Al Fardoussi Street, Tehran, Iran; Al Maaqal, Al Basrah, Iraq; Velayat Faqih Base, Kenesht Mountain Pass, Northwest of Kermanshah, Iran; DOB 1953; POB Ma'ghal, Basrah, Iraq; citizen Iran; alt. citizen Iraq; nationality Iraq (individual) [IRAQ3] KATA'IB HIZBALLAH (a.k.a. HIZBALLAH BRIGADES; a.k.a. HIZBALLAH BRIGADES IN IRAQ; a.k.a. HIZBALLAH BRIGADES-IRAQ; a.k.a. KATA'IB HEZBOLLAH; a.k.a. KHATA'IB HEZBOLLAH; a.k.a. KHATA'IB HIZBALLAH; a.k.a. KHATTAB HEZBOLLAH; a.k.a. "HIZBALLAH BRIGADES-IRAQ OF THE ISLAMIC RESISTANCE IN IRAQ"; a.k.a. "ISLAMIC RESISTANCE IN IRAQ"; a.k.a. "KATA'IB HIZBALLAH FI AL-IRAQ"; a.k.a. "KATIBAT ABU FATHAL AL A' ABAS"; a.k.a. "KATIBAT ZAYD EBIN ALI"; a.k.a. "KATIBUT KARBALAH"), Iraq; Najaf, Iraq [FTO] [SDGT] [IRAQ3]

<sup>20</sup> 75 Fed. Reg. 518.

United States,”<sup>21</sup> broad authority is available to the President to impose an economic embargo over transactions and property in which a foreign nation or foreign person has an interest. Specifically, the statute authorizes the President to

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, or through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or national thereof; and

(iii) the importing or exporting of currency or securities ... and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.<sup>22</sup>

This language is derived from section 5(b) of the Trading with the Enemy Act of 1917 (TWEA),<sup>23</sup> which grants authority to the President to block and freeze enemy property and interests in property and to regulate financial transactions involving enemy countries, their nationals and their allies during a declared war.<sup>24</sup> It was first used in peacetime in 1933, in the midst of the Great Depression, when President Franklin D. Roosevelt proclaimed a bank holiday and closed banks in the United States, thereby interfering with both foreign and domestic financial transactions, in response to what he deemed to be a national banking emergency related to “extensive speculative activity abroad in foreign exchange ... [resulting] in severe drains on the Nation’s stocks of gold.”<sup>25</sup> Congress immediately ratified this action and amended TWEA,<sup>26</sup> extending the emergency powers granted under the original legislation to cover both wartime and “any other period of national emergency declared by the President” and provided the President with authority to regulate purely domestic transactions.<sup>27</sup> President Roosevelt invoked TWEA again in peacetime in 1939, as Hitler was advancing in Europe, to block assets of Norway and Denmark and their nationals. Eventually TWEA was used to block assets of the Axis enemies of the United

<sup>21</sup> 50 U.S.C. § 1701(a).

<sup>22</sup> 50 U.S.C. App. 1702(a)(1).

<sup>23</sup> Act of October 6, 1917, ch. 106, § 5, 40 Stat. 411; as amended 12 U.S.C. § 95(a), 50 U.S.C. App. §§ 1 - 44.

<sup>24</sup> As enacted, this statute excluded U.S. citizens and corporations incorporated in the United States from the definition of “enemy.” *Id.* § 2, 40 Stat. 441. The current version continues to exclude “citizens of the United States” and corporations incorporated in the United States from its definition of “enemy.” 50 U.S.C. App. §§ 2(c) and (a).

<sup>25</sup> Proclamation No. 2039, 48 Stat. 1689 (March 6, 1933).

<sup>26</sup> Act of March 9, 1933, ch. 1, 48 Stat. 1.

<sup>27</sup> Act of March 9, 1933, ch. 1, § 2, 48 Stat. 1. Not only did the 1933 amendment remove the TWEA requirement for a declared war, it also removed the requirement of a foreign nexus, authorizing the President “to investigate any transactions in foreign exchange, transfers of credit between or payments by banking institutions ... and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency by any person within the United States.” Upon enactment of this legislation, President Roosevelt issued an executive order authorizing the Secretary of the Treasury to permit banks to reopen and to regulate exports of gold. Exec. Order No. 6073 (March 10, 1933).

States.<sup>28</sup> A 1940 amendment expanded presidential power under TWEA by specifically authorizing asset freezes and expanding authority beyond transactions with enemies or allies of enemies to cover financial transactions in which *any foreign state or foreign national* had an interest.<sup>29</sup> TWEA, thus, was used to block assets of friendly nations threatened by Axis occupation. A 1941 amendment to TWEA added the power to seize and vest<sup>30</sup> title to any property of a foreign person or nation.<sup>31</sup> This amendment extended the “power of seizure ... to all property of any foreign country or national so that no innocent appearing device could become a Trojan horse,” i.e., it was designed “to reach enemy interests which masqueraded under ... innocent fronts.”<sup>32</sup> The Supreme Court upheld the seizing and vesting of property of a non-enemy alien in wartime,<sup>33</sup> it also upheld the authority of the Treasury Department to vest assets of an enemy (Austrian) entity, making them unavailable to U.S. creditors despite a New York court’s having appointed a temporary receiver to collect the Austrian concern’s assets and ultimately distribute them to U.S. creditors.<sup>34</sup>

<sup>28</sup> After Hitler invaded Norway and Denmark, President Roosevelt issued Executive Order 8389 on April 10, 1940, prohibiting foreign exchange transactions involving the property of Norway or Denmark or any national thereof. Congress confirmed that executive order and its implementing regulations by Joint Resolution of May 7, 1940, ch. 185, § 2, 54 Stat. 179. Subsequently, this executive order was amended repeatedly to regulate transactions with over thirty Axis nations, Axis-occupied countries, Axis allies, and other countries threatened by the Axis powers. See 12 U.S.C. § 95a, note.

<sup>29</sup> As amended in 1940, TWEA section 5(b) specifically authorized the President to “investigate, regulate, or prohibit ... any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest.” Joint Resolution of May 7, 1940, ch. 185, § 2, 54 Stat., at 179.

<sup>30</sup> According to material that Bethany Kohl Hipp, “Defending Expanded Presidential Authority to Regulate Foreign Assets and Transactions,” 17 *Emory Inter'l L. Rev.* 1311, 1345 - 1346(2003)(citations omitted), gleaned from *Emergency Controls on International Economic Transactions: Hearing on H.R. 1560 and H.R. 2382 Before the Subcomm. on Int'l Econ. Policy & Trade, House Comm. on Int'l Relations & Markup of Trading with the Enemy Reform Legislation*, 93d Cong., 1<sup>st</sup> Sess., n. 30, at 51 (1977):

Freezing, or blocking, is not taking assets; rather it is a short- or long-term deprivation of the assets or the usage thereof. Freezing does not involve a transfer of title. For example, during World War II, both German and Dutch assets held in the United States were frozen. German assets were subsequently vested in the United States—title passed from Germany or nationals thereof to the United States. The Court held that the vesting of German property was not a compensable taking because the Fifth Amendment does not apply to enemy property. Conversely, Dutch assets were never vested. The blocking, or freezing, and vesting of foreign assets have never been held to be unconstitutional.

<sup>31</sup> Act of December 18, 1941, ch. 593, § 301, 55 Stat. 838, 839 - 841, 77<sup>th</sup> Cong., 1<sup>st</sup> Sess. The statute provided, *inter alia*, that “any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States.” *Id.* at 840. Originally, TWEA permitted vesting of “enemy” property and defined “enemy” in terms of nations at war with the United States and citizens thereof and entities having a principal place of business therein. 40 Stat. 411, § 2. This allowed enemy nations to “cloak” their ownership of property by organizing a business entity under the laws of a friendly nation.

<sup>32</sup> *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 48 and 485 (1947).

<sup>33</sup> *Silesian-American Corporation v. Clark*, 332 U.S. 469 (1947).

<sup>34</sup> *Propper v. Clark*, 337 U.S. 472 (1949). The Court, thus, held that the freezing order nullified any subsequent unlicensed judicial attempt to transfer the assets. The Court stated: “Through the Trading with the Enemy Act, in its various forms, the nation sought to deprive enemies, actual or potential, of the opportunity to secure advantages to themselves or to perpetrate wrongs against the United States or its citizens through the use of assets that happened to be in this country. To do so has necessitated some inconvenience to our citizens and others who, as here, are not involved in any actions adverse to the nation’s interest.” *Id.* at 481 - 482.



In the 1970s, during the Vietnam war, congressional concern with ways to oversee presidential use of emergency power led to questioning of the broad invocation of TWEA in circumstances not directly related to war and not substantially originating abroad.<sup>35</sup> One result was the enactment of the National Emergencies Act of 1976 (NEA) and IEEPA, in 1977. NEA sets forth various procedures to be followed by the President when declaring a national emergency, such as *Federal Register* publication<sup>36</sup> and specification of the provisions of law under which the actions under the national emergency are to be taken.<sup>37</sup> It specifies procedures for terminating national emergencies and provides a role for Congress by imposing presidential reporting requirements and establishing congressional review procedures.<sup>38</sup> NEA terminated existing national emergencies,<sup>39</sup> except for those invoking section 5(b) of TWEA, therefore, imposing no notice and reporting requirements on the President when invoking section 5(b). This was changed with the enactment of IEEPA.<sup>40</sup>

IEEPA was enacted primarily, according to the Senate Report accompanying the legislation, as a direct response to expanding use of emergency power by Presidents:

The purpose of the bill is to revise and delimit the President's authority to regulate international economic transactions during wars or national emergencies. The bill is a response to two developments: first: extensive use by Presidents of emergency authority under section 5(b) of the Trading With the Enemy Act of 1917 to regulate both domestic and international economic transactions unrelated to a declared state of emergency and, second, passage of NEA, which provides safeguards for the role of Congress in declaring and terminating national emergencies, but exempts section 5(b) of the Trading With the Enemy Act from its coverage.<sup>41</sup>

By restricting the use of TWEA section 5(b) to wartime, IEEPA draws a distinction between the power provided Presidents in declaring peacetime national emergencies having their origin abroad and that available when war has been declared. Nonetheless, because of the need to provide Presidents with sufficient flexibility to respond to emergencies,<sup>42</sup> the breadth of authority provided in IEEPA is considerable with respect to affording powers to the President to impose economic sanctions in peacetime emergencies originating abroad. To use these powers, the

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<sup>35</sup> See, e.g., Exec. Order No. 8843, 6 Fed. Reg. 4,020 (August 15, 1940) (issued by President Roosevelt to regulate consumer installment loans); Exec. Order No. 11387, 33 Fed. Reg. 47 (January 3, 1968) (issued by President Lyndon Johnson to regulate capital transfers abroad).

<sup>36</sup> 50 U.S.C. § 1621(a).

<sup>37</sup> 50 U.S.C. § 1631.

<sup>38</sup> 50 U.S.C. § 1622.

<sup>39</sup> P.L. 94-412, Tit. V, § 502(a)(1), 90 Stat. 1258.

<sup>40</sup> To continue in existence, declarations of national emergencies must be renewed annually. 50 U.S.C. § 1622(d). Other procedural requirements are succinctly summarized as follows:

IEEPA requires the President to consult with Congress, whenever possible before declaring a national emergency, and while it remains in force. Once a national emergency goes into effect, the President must submit to Congress a detailed report explaining and justifying his actions and listing the countries against which such actions are to be taken, and why. The President is also required to provide Congress periodic follow up reports every six months with respect to actions taken since the last report and any change in information previously reported. H. Comm. on Ways and Means. *Overview and Compilation of U.S. Trade Statutes* 209 (Comm. Print 2003 ed.).

<sup>41</sup> Sen. Rep. 95-466, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess 2 (1977).

<sup>42</sup> See Note, "The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power," 96 Harvard Law Review 1102, 1106 (1983).

President must declare a national emergency with respect to “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy or economy of the United States.”<sup>43</sup> Once such a national emergency has been declared, IEEPA provides the President with broad power to impose controls over economic transactions involving transfers abroad and foreign property controls.

(1) Under IEEPA, the President may “under such regulations as he may prescribe, by means of instructions, licenses, or otherwise ... investigate, regulate, or prohibit” any foreign exchange transaction, any transfers of credit or payments involving any foreign interest, and the import or export of currency or securities “by any person, or with respect to any property, subject to the jurisdiction of the United States.”<sup>44</sup>

(2) IEEPA also empowers the President to “investigate, block during pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.”<sup>45</sup>

(3) IEEPA does not provide authority to block international communications,<sup>46</sup> information or informational materials.<sup>47</sup> Humanitarian aid<sup>48</sup> is excepted to the blocking authority; however, humanitarian aid may be restricted if the President determines that humanitarian aid “would seriously impair his ability to deal with” the national emergency; is coerced; or would endanger U.S. armed forces.<sup>49</sup>

(4) Until 2001, IEEPA did not authorize the vesting of property, i.e., taking title to blocked or frozen property. With the enactment of the USA PATRIOT Act<sup>50</sup> in 2001, IEEPA provides authority for the President, during “armed hostilities” or when the United States has been

<sup>43</sup> 50 U.S.C. § 1701(a). The statute emphasizes that “[t]he authorities granted to the President ... may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.” 50 U.S.C. § 1701(b).

<sup>44</sup> 50 U.S.C. § 1701 (a)(1)(A).

<sup>45</sup> 50 U.S.C. § 1701 (a)(1)(B). The USA PATRIOT Act, P.L. 107-56, § 106(1)(B), 115 Stat. 277, added “block during the pendency of an investigation.”

<sup>46</sup> 50 U.S.C. § 1702(3)(b)(1) specifies that the authority granted to the President does not include authority to regulate “any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value.”

<sup>47</sup> 50 U.S.C. § 1702(b)(2).

<sup>48</sup> 50 U.S.C. § 1702(b)(3). It has been held that the plain language of the statute does not include monetary aid within the humanitarian aid exception. *Veterans Peace Convoy Inc. v. Schultz*, 722 F. Supp. 1425 (S.D. Tex. 1988); *Holy Land Foundation for Relief and Development v. Aschroft*, 219 F. Supp. 2d 57 (D.D.C. 2002), *aff’d* 333 F. 3d 156 (D.C. Cir 2003), *cert. denied*, 540 U.S. 1218 (2004). OFAC’s refusal of a license to a Quaker wishing to contribute \$2,000 to a Canadian Friends organization to aid North and South Vietnam non-combatants was upheld in *Welch v. Kennedy*, 319 F. Supp. 945 (D.D.C. 1970) with the court noting the possibility that any funds or supplies sent to North Vietnam would be diverted from civilian purposes to free up funds for military weaponry.

<sup>49</sup> 50 U.S.C. § 2702(b)(2).

<sup>50</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, P.L. 107-56, 115 Stat. 272.

attacked, to confiscate property of *foreign* persons, organizations, or countries he has determined to have “planned, authorized, aided or engaged in” the armed hostilities or attacks and to vest title in any agency or person for the benefit of the United States.<sup>51</sup> The first and, to date only, use of this power under IEEPA occurred on March 20, 2003. On that date, in Executive Order 13290, President Bush ordered the blocked “property of the Government of Iraq and its agencies, instrumentalities, or controlled entities” to be vested “in the Department of the Treasury... [to] be used to assist the Iraqi people and to assist in the reconstruction of Iraq.”<sup>52</sup> A subsequent executive order ordered further blocking and confiscation of property of former Iraqi officials and their families and the vesting of title in the Department of the Treasury to be transferred to the Development Fund for Iraq to be “used to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq’s infrastructure, for the continued disarmament of Iraq, for the cost of Iraqi civilian administration, and for other purposes benefitting of the Iraqi people.”<sup>53</sup>

Unlike the language of TWEA, the language of IEEPA appears to withhold certain powers from the President: (1) IEEPA provides no explicit authority over purely domestic transactions;<sup>54</sup> (2) IEEPA provides no explicit authority to regulate gold and silver bullion;<sup>55</sup> (3) IEEPA provides no explicit authority to seize records;<sup>56</sup> and (4) IEEPA provides no authority to interfere with international communications.<sup>57</sup> Because IEEPA covers “any interest” in property by a foreign national or government and provides the President with expansive power to issue interpretative regulations,<sup>58</sup> there has been some speculation that “any large scale financial transaction, even if it

<sup>51</sup> The statute reads,

... the President may ... when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that [the President] determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes. P.L. 107-56, § 106, 115 Stat. 272, 277, 50 U.S.C. § 1702(a)(1)(C).

<sup>52</sup> Exec. Order No. 13290, 68 Fed. Reg. 14,307 (March 24, 2003).

<sup>53</sup> Exec. Order No. 13315, 68 Fed. Reg. 52,315 (September 3, 2003).

<sup>54</sup> Section 5(b) of TWEA includes language authorizing the President in wartime to regulate an array of financial transactions, including inter alia, “transfers of credit or payments between, by, through, or to any banking institution” “by any person, or with respect to any property, subject to the jurisdiction of the United States.” 50 U.S.C. App. § 5(b)(1). IEEPA’s grant of authority over such financial transactions runs only “to the extent that such transfers or payments involve any interest of any foreign country or a national thereof.” 50 U.S.C. § 1702(a)(1)(A)(ii).

<sup>55</sup> Included in the language of section 5(b) of TWEA is the authority to regulate “the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion.” 50 U.S.C. App. § 5(b)(1)(A).

<sup>56</sup> IEEPA provides authority to order recordkeeping and production of records, 50 U.S.C. § 1702(a)(2), but does not include authority as included in TWEA to require “if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of” persons required to keep reports on covered transactions. 50 U.S.C. § 5(b)(B).

<sup>57</sup> Section 3 of TWEA includes authority to censor international communications, 50 U.S.C. App. § 3; IEEPA states that “[t]he authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly ... any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of any thing of value.” 50 U.S.C. § 1702(3)(b).

<sup>58</sup> 50 U.S.C. § 1703 provides that “[t]he President may issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise of the authorities granted by this chapter.”

involved only United States parties, might be subject to regulation if it affected the economy of a foreign nation.”<sup>59</sup>

Constitutional challenges to actions taken under IEEPA’s authority to regulate foreign transactions and property have generally failed. Regulations issued under the authority of IEEPA placing controls on foreign assets have been upheld against claims of impermissible delegation and violation of the U.S. Constitution’s Fifth Amendment.<sup>60</sup> The fact that blocked assets are those of a U.S. person and purely domestic has not been held to place them beyond the reach of the President’s power to subject them to freeze orders under IEEPA so long as there is an “interest”<sup>61</sup> of a foreign country or national.<sup>62</sup> Moreover, provided the executive order declaring the national emergency makes the requisite findings with respect to regulating humanitarian assistance, a freeze order directed against assets intended for humanitarian aid is enforceable.<sup>63</sup> It has also been held that notice and a pre-seizure hearing are not constitutionally mandated with respect to freeze orders.<sup>64</sup> It has also withstood challenge on First Amendment grounds.<sup>65</sup>

<sup>59</sup> Note, “The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power,” 86 Harvard L. Rev. 1102, 1110 - 1111 (footnote omitted) (1983). The author reasoned: “It is unlikely that any significant economic activity in the United States would not be reached under such a theory of presidential power, given the current interdependence of the world’s industrial economies.” *Id.* at 1111.

<sup>60</sup> In *Sardino v. Federal Reserve Bank of New York*, 361 F. 2d 106 (2d Cir. 1966), the indefinite freezing of a Cuban national’s U.S. bank account pursuant to the Cuban Assets Control Regulations was upheld against claims of impermissible delegation by Congress to the President and by the President to the Department of the Treasury. The court also ruled that the regulations did not constitute a taking both because, without vesting, there was no transfer of title, hence no taking, and because the regulations were found to have provided adequate due process protections.

<sup>61</sup> “Interest” is defined in OFAC regulations, 31 C.F.R. § 500.311 - .312 to mean “an interest of any nature whatsoever, direct or indirect.” The Supreme Court has ruled that “any interest” may be construed as broadly as possible. *Regan v. Wald*, 468 U.S. 222 (1984).

<sup>62</sup> In *Global Relief Foundation, Inc. v. O’Neill*, 207 F. Supp. 2d 779 (N.D. Ill. 2002), *aff’d* 315 F. 3d 748 (7<sup>th</sup> Cir. 2002), *cert. denied*, 540 U.S. 1003 (2003), the court upheld an order freezing assets of a U.S.-based Muslim charitable organization pending investigation of its possible links to the September 11 terrorist attack upon the United States. Although the organization itself was a U.S. person, two of its three directors were resident aliens, i.e., foreign nationals, who were directly involved in soliciting funds and distributing them abroad. The freeze order was based on Executive Order 13224, declaring a national emergency based on terrorist acts and the threat of further acts of terrorism. In upholding the freeze order, the court relied on the grant of authority authorized by Congress in the 2001 amendment to IEEPA, which authorized the President to “block during the pendency of an investigation ... any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of ... any right, power, or privilege with respect to ... any property in which any foreign country or a national thereof has any interest by any person ... subject to the jurisdiction of the United States.” According to the court,

Congress’ decision to use repeatedly the word ‘any’ in this section of the statute guides our interpretation of the President’s power to block during the pendency of an investigation. It is clear that Congress intended to provide the President with sweeping power to regulate all relevant property upon his declaration of a national emergency. Furthermore, if Congress had intended to only authorize the President to block foreign assets that were located within the United States, it could have made that intention clear. However, repeated use by Congress of the word ‘any’ as well as its choice of the phrase ‘any property, subject to the jurisdiction of the United States,’ without an indication that it meant only *foreign* property, compels our conclusion that the powers granted to the President under IEEPA include the ability to block purely domestic assets of a U.S. person pending an investigation. *Id.* at 793 (emphasis in original).

<sup>63</sup> *Id.* at 794 - 796.

<sup>64</sup> *Global Relief Foundation, Inc. v. O’Neill*, 315 F3d 748 (7<sup>th</sup> Cir. 2002). According to the court:

[a]lthough pre-seizure hearing is the constitutional norm, postponement is acceptable in emergencies.... Risks of error rise when hearings are deferred, but these risks must be balanced against the potential for loss of life if assets should be put to violent use. Opportunity to obtain recompense under the Tucker Act, 28 U.S.C. § 1491(a), if the blocking turns out to be invalid,

(continued...)

The Supreme Court has upheld Presidential exercise of authority under IEEPA on very broad grounds, saying that when “taken pursuant to specific congressional authorization, it is ‘supported by the strongest presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.’”<sup>66</sup>

## Executive Order 13438 Coverage

### Persons Covered

The executive order does not identify particular persons whose property is to be blocked or frozen; rather it leaves identification of the particular individuals and entities to the Secretary of the Treasury, in consultation with the Secretary of State and Secretary of Defense. These individuals are to fall into three categories provided in the executive order:

(1) Individuals or entities determined “to have committed, or to pose a significant risk, of committing an act or acts of violence that have the purpose or effect of ... threatening the peace or stability of Iraq or the Government of Iraq ... or ... undermining the efforts to promote economic reconstruction and political reform in Iraq or to provide humanitarian assistance to the Iraqi people....”<sup>67</sup>

(2) Persons or entities determined “to have materially assisted, sponsored, or provided financial, material, logistical, or technical support for, or goods or services in support of, such an act or acts

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(...continued)

provides the private party with the very remedy that the Constitution names: just compensation. *Id.* at 754 (citations omitted).

<sup>65</sup> In *Holy Land Foundation v. Aschroft*, 333 F. 3d 156 (D.C. Cir. 2003). *cert. denied*, 540 U.S. 1218 (2004), the U.S. Court of Appeals for the District of Columbia stated that “there is no First Amendment right nor any other constitutional right to support terrorists” and that a freeze order affecting all the property of a Muslim charity supported by evidence of original sponsorship by, fund raising on behalf of, meetings with, and funneling money to Hamas supplied sufficient evidence of supporting terrorists.

<sup>66</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981), citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952). The case involved a plaintiff who had a contract claim against the Iranian government and had secured a prejudgment attachment pursuant to a general license issued under the regulations implementing Executive Order 12170. That executive order invoked IEEPA to declare a national emergency with respect to the seizure of the U.S. embassy in Tehran and to freeze the assets of the government and the central bank of Iran. Under the Algiers Accords, an executive agreement with Iran to secure the release of American hostages held in the embassy, all litigation was terminated; all interests of U.S. nationals in Iranian assets were nullified; all Iranian assets were to be transferred to the Federal Reserve Bank of New York for transfer to Iran; and claims against Iran or against the assets to be transferred to Iran were to be subjected to a binding arbitration process—the Iran-United States Claims Tribunal. After executive orders implementing the Algiers Accords had been issued, the plaintiff secured a final judgment, which the district court suspended. It also vacated the prejudgment attachment and stayed further proceedings. Plaintiff sued to prevent enforcement of the executive orders and implementing Treasury regulations, alleging that they were unconstitutional to the extent that they affected its litigation. Ultimately, the Supreme Court interpreted the language of IEEPA to authorize the President’s action, saying, “where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President’s action, we are not prepared to say that the President lacks the power to settle such claims.” *Id.* at 688.

<sup>67</sup> Exec. Order No. 12438, Section 1(a)(i).

of violence or any person whose property and interests in property are blocked pursuant to this order....<sup>68</sup>

(3) Persons determined “to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order....”<sup>69</sup>

The executive order, moreover, provides that these prohibitions include “the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order, and ... the receipt of any contribution or provision of funds, goods, or services from any such person.”<sup>70</sup> There is also a prohibition covering transactions by a U.S. person, or within the United States with the purpose of evading the prohibitions of the executive order; attempts to violate any of the prohibitions, and conspiracy formed to violate the executive order’s prohibition.<sup>71</sup>

In issuing the executive order, the President made the requisite finding with respect to aid and, thus, prohibited humanitarian assistance;<sup>72</sup> he also made a finding that for effectiveness sake, no prior notice need be given to those with a constitutional presence in the United States whose property and interests in property are to be blocked “because of the ability to transfer funds or other assets instantaneously.”<sup>73</sup>

## Objectives

In 2007, Molly Millerwise, who was at that time a spokesperson for the U.S. Department of the Treasury, reportedly provided certain information concerning the background and objectives of the executive order, including a statement that appears to indicate that one of the desired effects of the order is to motivate foreign financial institutions to voluntarily comply with these prohibitions.<sup>74</sup> She also is reported to have indicated that the executive order: (1) is needed to supplement current sanctions programs because these cover elements of the former Saddam Hussein regime<sup>75</sup> and Al Qaeda,<sup>76</sup> but not insurgent groups now active in Iraq; (2) is intended to apply to “Shia militia groups linked with Iran, Sunni insurgent groups with sanctuary in Syria and

<sup>68</sup> *Id.*, Section 1(a)(ii).

<sup>69</sup> *Id.*, Section 1(a)(iii)

<sup>70</sup> *Id.*, Section 1(b).

<sup>71</sup> *Id.*, Section 2.

<sup>72</sup> *Id.*, Section 4. Under 50 U.S.C. § 1702(b)(2), humanitarian aid may be prohibited if the President makes a determination “that such donations (A) would seriously impair his ability to deal with any national emergency declared under section 1701 ..., (B) are in response to coercion against the proposed recipient or donor, or (C) are in a situation where imminent involvement in hostilities is clearly indicated by circumstances.”

<sup>73</sup> *Id.*, Section 5.

<sup>74</sup> Spencer Ackerman, “Treasury: Exec. Order ‘Filling in the Cracks’ of Insurgent Financing,” <http://www.tpmuckraker.com/archives/003733.php> (last visited November 7, 2007).

<sup>75</sup> Exec. Order No. 13315 blocks property of the former Iraqi regime, its senior officials and their family members.

<sup>76</sup> On September 23, 2001, President Bush issued an executive order blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism. This executive order was based on the President’s declaring a national emergency involving the “grave acts of terrorism and threats of terrorism committed by foreign terrorists ... and the immediate threat of continuing further attacks on the United States. Exec. Order No. 13224, 68 Fed. Reg. 49,079 (September 25, 2001). “Al Qaida/Islamic Army” heads list of persons and entities initially designated under this executive order and included in an annex published with it.

some of the indigenous Iraqi insurgent groups”; (3) will result in blocking of assets of U.S. residents and citizens “because they’re actively abetting a panoply of insurgent and militia groups”; (4) will result in a list that Treasury is compiling of entities and individuals covered by the order that will be ongoing and made public.<sup>77</sup>

## Transactions Covered

The executive order blocks “all property and interests in property” of the three categories of persons, *supra* at footnote 22, provided that the property or interests in the property are in the United States or come within the control of U.S. persons. Although the executive order does not define “property” or “interests in property,” OFAC regulations define these terms to have a broad reach. “Interest” when used in connection with property is defined to mean “an interest of any nature whatsoever, direct or indirect.”<sup>78</sup> In defining “property,” the regulations provide a list of categories, but make it clear that the list is “not by way of limitation.”<sup>79</sup>

## Implementation

Executive Order 13438 covers essentially five categories of individuals or entities: (1) those committing acts of violence having the effect of destabilizing Iraq; (2) those committing acts of violence with the purpose of destabilizing Iraq; (3) those posing a significant risk of committing such acts of violence; (4) those providing support for such acts of violence, and (5) those providing support for any person whose property has been blocked pursuant to the executive order. The executive order also forbids transactions by U.S. persons that evade or have the purpose of evading the prohibitions of the executive order, attempts to avoid the order, and conspiracies to violate the order.

The executive order leaves the process of designating specific individuals and entities whose transactions and property are to be frozen or blocked to the Secretary of the Treasury, in consultation with the Secretaries of State and Defense.<sup>80</sup> A list of designees added to OFAC’s Special Designated Nationals and Blocked Persons List<sup>81</sup> under this executive order was issued

<sup>77</sup> Spencer Ackerman, “Treasury: Exec. Order ‘Filling in the Cracks’ of Insurgent Financing,” <http://www.tpmuckraker.com/archives/003733.php>, quotes Ms. Millerwise as saying: “Be assured that the individuals and entities we add to this list are in full faith acting in an aggressive, violent and reckless way in financing the insurgency,” and as stating that groups making charitable donations to orphans does not seem to be “a valid concern.”

<sup>78</sup> 31 C.F.R. § 500.312.

<sup>79</sup> 31 C.F.R. § 500.311. The list is as follows: “money, checks, drafts, bullion, bank deposits, savings accounts, any debts, indebtedness obligations, notes, debentures, stocks, bonds, coupons, any other financial securities, bankers’ acceptances, mortgages, pledges, liens or other right in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors’ sales agreements, land contracts, real estate and any interest therein, leaseholds, ground rents, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks, copyrights, contracts or licenses affecting or involving patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, contracts of any nature whatsoever, services, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent.”

<sup>80</sup> Exec. Order No. 13438, Sec. 1(a).

<sup>81</sup> <http://www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf>. Names of “blocked persons,” “specially designated nationals,” and “specially designated terrorists,” with whom U.S. persons may not trade are also published in the Federal Register and in appendices to 31 C.F.R. “IRAQ3” is the designation given to names added pursuant to (continued...)

by Treasury on January 9, 2008.<sup>82</sup> The Treasury announcement includes a description of the activities of the designees that have led to the prohibition of transactions between them and any U.S. person and the freezing of any of their assets that are under the jurisdiction of the United States. There is authority for the issuance of blocking orders prior to OFAC's listing of persons to be sanctioned under the executive order.<sup>83</sup> The expectation, however, is that ultimately the names of blocked individuals and entities identified for blocking orders will be publicly disseminated by being added to OFAC's Special Designated Nationals and Blocked Persons List.<sup>84</sup>

The executive order authorizes the Secretary of the Treasury, in consultation with the Secretaries of State and Defense, to issue regulations.<sup>85</sup> Regulations were issued on September 2, 2010.<sup>86</sup> They use broad definitions of "property," and "transfer" to block the transfer of property of any kind.<sup>87</sup> There is one blanket exception: the blocking orders do not apply to property and interests in property "controlled by the military forces of the United States and their coalition partners present in Iraq and acting under the command or operational control of the commander of the United States Central Command."<sup>88</sup> The regulations include extensive bans on trade and financial transactions,<sup>89</sup> authorize certain activities pursuant to a general license,<sup>90</sup> and permit other

(...continued)

Executive Order 13438.

<sup>82</sup> <http://www.treasury.gov/press-center/press-releases/Pages/hp759.aspx>. "Treasury Designates Individuals, Entity Fueling Iraqi Insurgency."

<sup>83</sup> OFAC apparently has had a practice of blocking accounts prior to formal designation. After the enactment of the USA PATRIOT Act, IEEPA permits blocking orders pending investigations. 50 U.S.C. § 1702(a)(1)(B). This authority was lacking in 1998 when OFAC ordered the freezing of accounts belonging to Salah Idris, owner of the factory bombed following the terrorist attack on the U.S. Embassies in Kenya and Tanzania. After the filing of a lawsuit challenging the freeze order, OFAC ordered the accounts unblocked rather than risk having to disclose intelligence sources. *See*, Peter L. Fitzgerald, "'If Property Rights Were Treated Like Human Rights, They Could Never Get Away With This': Blacklisting and Due Process in U.S. Economic Sanctions Programs," 51 *Hastings Law Journal* 73, 111 - 113, 134 (1999) (hereinafter, Fitzgerald, Property Rights), citing Vernon Loeb, "A Dirty Business," *Washington Post*, F1 (July 25, 1999); Milt Bearden, "U.S. Should Admit Its Mistake in Sudan Bombing," *Wall Street Journal*, A-20 (May 20, 1999); and David S. Cloud, "U.S. Unfreezes Accounts in Suit on Sudan Bombing," *Wall Street Journal* A-8 (May 4, 1999).

<sup>84</sup> It appears that this has been the case. Subsequent designations occurred on September 23, 2008, 73 *Fed. Reg.* 54896; July 16, 2009, 74 *Fed. Reg.* 34639; and January 5, 2010, 75 *Fed. Reg.* 518. For the entire list see *supra*, footnotes 14 and 15.

<sup>85</sup> Exec. Order No. 13438, Sec. 6.

<sup>86</sup> 73 *Fed. Reg.* 55463 (September 13, 2010). This regulation promulgates 31 C.F.R., Part 576; subsequent references will be made to the C.F.R. citation.

<sup>87</sup> The regulation blocks "[a]ll property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of U.S. persons, including their overseas branches." As used in this regulation, "interest" is broadly defined to mean "an interest of any nature whatsoever, direct or indirect." 31 C.F.R. § 576.307. "Property" is defined broadly, specifically including "letters of credit." 31 C.F.R. § 576.312.

<sup>88</sup> 31 C.F.R. § 576.511.

<sup>89</sup> The regulation declares that the blocked property and interests in property "may not be transferred, paid, exported, withdrawn, or otherwise dealt in." 31 C.F.R. § 576.201(a). It specifies that the prohibitions include "[t]he making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked ... [and] [t]he receipt of any contribution or provision of funds, goods, or services from any person whose property and interests in property are blocked...." 31 C.F.R. § 576.201(c).

<sup>90</sup> General licenses are available for a transfer of funds or credit by a U.S. financial institution between blocked accounts in its branches or offices in the United States held in the same name; for normal service charges; for investment and reinvestment of funds; and for provision of certain legal services. 31 C.F.R. §§ 576.504 - 507. OFAC has authority to make exclusions relative to any license. 31 C.F.R. § 576.503.



activities pursuant to a specific license,<sup>91</sup> issued upon application to OFAC on a case-by-case basis. The regulations specify the types of legal services that may be provided pursuant to a general license but permit reimbursement only on the basis of a specific license.<sup>92</sup> The regulations<sup>93</sup> incorporate by reference the recordkeeping and reporting requirements applicable to all OFAC sanction programs.<sup>94</sup>

Under the regulations,<sup>95</sup> violation of sanctions under Executive Order 13438 are subject to the penalties applicable under IEEPA. With the enactment of P.L. 110-96,<sup>96</sup> civil penalties for IEEPA violations are defined in terms of the greater of \$250,000 or twice the amount of the transaction on which the penalty is based; criminal penalties are \$1 million and 20 years' imprisonment.<sup>97</sup> Included in the regulations are requirements for the issuance of a pre-penalty notice and procedures for responses and for settlement.<sup>98</sup>

## Reach—Is It Limited to “Foreign” Persons?

Neither the executive order nor the regulations limits potential targets to “foreign” persons, as some executive orders have done.<sup>99</sup> So far, the list of blocked persons under the regulations includes no U.S. person. At the time the executive order was issued, there was some indication that the primary focus was foreigners. A Treasury Department spokesperson<sup>100</sup> said at that time that the list, when issued,<sup>101</sup> would include “Shia militia groups linked with Iran, Sunni insurgent

<sup>91</sup> Special licenses may be issued to provide emergency medical services in the United States to persons whose property is blocked. 31 C.F.R. § 576.509.

<sup>92</sup> The list of legal services for which a special license may be authorized under the Iraq sanctions, 31 C.F.R. § 576.507, is more limited than those available under the Global Terrorism Sanctions Regulations, 31 C.F.R. § 594.506.

<sup>93</sup> 31 C.F.R. § 576.601.

<sup>94</sup> 31 C.F.R. Part 501, Subpart C.

<sup>95</sup> 31 C.F.R. § 576.701.

<sup>96</sup> 121 Stat. 1101, 50 U.S.C. §1705 (2007).

<sup>97</sup> The penalties may be adjusted pursuant to 28 U.S.C. § 2461, note (adjustment of civil penalties for inflation); 18 U.S.C. § 3571 (alternative criminal fine based on gain or loss).

<sup>98</sup> 31 C.F.R. § 576.702.

<sup>99</sup> See, e.g., Exec. Order No. 13224 of September 23, 2001, 66 Fed Reg. 4909, Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism.

<sup>100</sup> Spencer Ackerman, “Treasury: Exec. Order ‘Filling in the Cracks’ of Insurgent Financing,” quoting “Treasury Department spokeswoman, Molly Millerwise,” TPMUCKRAKER.COM (July 19, 2007) <http://www.tpmuckraker.com/archives/003733.php>.

<sup>101</sup> One commentator has described the OFAC designation process as follows:

According to the Administration, ‘a number of U.S. agencies, including the Treasury, State, Justice, the FBI and the intelligence community, review open source and confidential information, including tips and leads, about persons and entities who commit, threaten to commit or support terrorism.’ A ‘subset of agencies’ is then responsible for developing a file on the entity, which is then reviewed by a ‘larger group’ before it is forwarded to the National Security Council. The Security Council ‘convenes a meeting of Deputy Agency heads’ who make a recommendation to the Secretary of the Treasury, who, in cooperation with the Secretary of State [with respect to Executive Order 13348, Secretary of Defense] and Attorney General, issues a final designation and a blocking order. This blocking order is implemented by OFAC, pursuant to the President’s mandate ... [in the executive order] gives the entity no prior notice that its assets will be frozen. Upon issuance of the blocking order, the entity is told that its assets have been frozen, its name is published in the Federal Register, and this information is disseminated to financial institutions.

Nicole Nice-Peterson, Justice for the ‘Designated’: The Process That Is Due to Alleged Financiers of Terrorism, 2005 (continued...)

groups with sanctuary in Syria and some of the indigenous Iraqi insurgent groups.”<sup>102</sup> Since September 11, 2001, the practice seems to have been that foreign terrorists have formed the preponderance of designees on OFAC’s lists, but blocking orders, seizures, and penalties have been directed against U.S. persons based on allegations that they have in their possession property or interests in property which are either legally or beneficially the property of a designated or blocked person, or that they have been conducting prohibited transactions in blocked property or with blocked persons.

Prior to the issuance of the regulations, the piggybacking potential of the executive order raised questions.<sup>103</sup> One issue was whether the executive order’s application to anyone who provides “support” for a designated entity might affect U.S. persons inadvertently involved in some form of assistance, such as arranging transportation for, selling consumer goods to, or providing routine legal assistance to an entity which becomes blocked under the executive order. Could such U.S. persons find themselves designated under the authority of the executive order and thereby have all of their assets subject to blocking whether or not the assets have any nexus with the transaction with the blocked entity or with any foreign entity? With respect to those whose property is to be blocked on the grounds of providing material assistance to those who are designated as committing or posing a significant risk of committing acts of violence, the scope covered by the executive order raised an array of questions including: (1) To what extent are lawyers representing persons and entities on the list subject to the order? (2) To what extent are donors to various U.S. charities operating internationally subject to the order?

There is some clarification of these issues in the licensing sections of the regulations. For example, one provision of the regulations blocks charitable contributions for blocked persons unless specifically authorized.<sup>104</sup> Another provides general license authority for the provision of specified legal services to blocked persons and blocks all other types of legal services unless a special license is obtained.<sup>105</sup>

An example of how OFAC implements financial transaction and property controls imposed under executive orders invoking IEEPA is illustrative of the reach of such sanction regulations. The Global Terrorist Sanctions Program<sup>106</sup> implements Executive Order 13224 of September 23, 2001.<sup>107</sup> That executive order declared a national emergency with respect to “grave acts of

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Georgetown Law Journal 1287, 1394 (2005) (footnotes omitted). (Exec. Order No. 13348, 69 Fed. Reg. 44,885 (July 27, 2004), blocks property of certain persons and prohibits the importation of certain goods from Liberia.)

<sup>102</sup> Millerwise statement, *see supra*, footnote 74. Ms. Millerwise did not foreclose the possibility of listing U.S. nationals, but indicated that compiling the list would be an exercise in precision, saying, ““Be assured that individual and entities we add to this list are in full faith acting in an aggressive, violent and reckless way in financing the insurgency.... These things are strongly vetted, going layers and layers back. (A group) donating money to orphans getting swept up in this doesn’t seem to be a valid concern.””

<sup>103</sup> *See*, Pincus, *supra* footnote 3, who states that “... the text of the order, if interpreted broadly, could cast a far bigger net to include not just those who commit violent acts or pose the risk of doing so in Iraq, but also third parties—such as U.S. citizens in this country—who knowingly or unknowingly aid or encourage such people.”

<sup>104</sup> 31 C.F.R. § 576.409.

<sup>105</sup> 31 C.F.R. § 576.507.

<sup>106</sup> 31 C.F.R. Part 594.

<sup>107</sup> 66 Fed. Reg. 49,079. In addition to the Global Terrorists Sanctions, OFAC administers two other sanctions programs: (1) the Terrorist Sanctions Regulations, 31 C.F.R., Part 595, implementing Executive Order 12947 of January 23, 1995, 60 Fed. Reg. 5,079, which declared a national emergency with respect to “grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process” and (2) the Foreign Terrorist Organizations (continued...)

terrorism and threats of terrorism committed by foreign terrorists.” It contained a list of foreign terrorist persons and provided authority for administrative designations of various categories of persons, some of which need not be confined to foreign persons.<sup>108</sup> Subsequently, some U.S. based charitable organizations were listed on OFAC’s terrorist lists.<sup>109</sup> Under the Global Terrorism Regulations, U.S. financial institutions are required to take precautions lest they engage in prohibited transactions.<sup>110</sup> The names of persons whose property is blocked are published both on OFAC’s website and in the *Federal Register*.<sup>111</sup> The regulations prohibit various transactions, specify procedures to comply with the prohibitions,<sup>112</sup> and define applicable terms.<sup>113</sup> They also specify such matters as the nullification of property transfers made in violation of the regulations,<sup>114</sup> report and recordkeeping requirements,<sup>115</sup> and penalties and penalty procedures.<sup>116</sup>

The reach of Executive Order 13438 is not unprecedented. The language is similar to at least one other order, Executive Order 13219 of June 25, 2001, Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans.<sup>117</sup> That executive order, among other things, authorizes property and transaction controls with respect to persons designated by the Secretary of the Treasury in consultation with the Secretary of State as having committed or posing “a significant risk of committing, acts of violence that have the purpose or effect of threatening the peace or diminishing the stability or security of any area or state in the Western Balkans regime, undermining the authority, efforts or objectives of international organizations or entities present in the region, or endangering the safety of persons participating in or providing support to the activities of those international organizations or entities.” Also covered by Executive Order 13219 are persons determined “to have actively obstructed, or pose a significant risk of actively obstructing, the Ohrid Framework Agreement of 2001 relating to Macedonia, United Nations Security Council Resolution 1244 relating to Kosovo or the Dayton

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Sanctions Regulations, 31 C.F.R., Part 597, implementing provisions of the Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat. 1214, 1248 - 1253, 8 U.S.C. § 1189, 18 U.S.C. § 2339B.

<sup>108</sup> It authorized designation of (1) “foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten, or pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy or economy of the United States”; (2) “persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of” persons designated under the executive order; and (3) with certain provisos, “persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General (i) to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism” of persons designated under the executive order, or (ii) “otherwise associated with” designated persons. Exec. Order. No. 13, 224, section 1, 66 Federal Register 49079 - 49980.

<sup>109</sup> See <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-fto.aspx>, Designated Charities and Potential Fundraising Front Organizations for FTOs (listed by affiliation and designation date).

<sup>110</sup> Exec. Order 13,224, section 2, like Executive Order 13438, prohibits transactions by U.S. persons in property or interests in property blocked pursuant to the order; transactions by U.S. persons evading or having the purpose of evading or attempting to violate the prohibitions of the executive order; and any conspiracy to violate any of the prohibitions of the executive order.

<sup>111</sup> 31 C.F.R. § 594.201, note 2 to paragraph (a).

<sup>112</sup> 31 C.F.R. §§ 594.201 - 594.206.

<sup>113</sup> 31 C.F.R. §§ 594.311 - 594.315.

<sup>114</sup> 31 C.F.R. § 594.202.

<sup>115</sup> 31 C.F.R. § 594.601.

<sup>116</sup> 31 C.F.R. §§ 594.701 - 594.705.

<sup>117</sup> 66 Fed. Reg. 3,477, as amended by Executive Order 13304 §§ 3,4, May 28, 2003, 68 Fed. Reg. 32,315.

Accords or the Conclusions of the Peace Implementation Conference held in London on December 8-9, 1995, including the decisions or conclusions of the High Representative, the Peace Implementation Council or its Steering Board relating to Bosnia and Herzegovina.”<sup>118</sup>

Given the concern that Executive Order 13438 might place those lawyers who are providing legal assistance to targets of the freeze orders at risk, it is noteworthy that, on July 9, 2003, OFAC issued a general license to permit U.S. persons to provide professional legal services relating to the representation of persons whose property is blocked in matters pending before the International Criminal Tribunal for the former Yugoslavia.<sup>119</sup>

## Attorney-Client Implications

The potential impact of OFAC regulations on attorney-client relationships has been the focus of some litigation and commentary in legal journals.<sup>120</sup> The one federal case that has dealt with the issue is *American Airways Charters, Inc. v. Regan*.<sup>121</sup> It held that, under the Cuban sanctions, OFAC had authority to require a license for payment of legal fees from blocked assets, but not to “condition the bare formation of an attorney-client relationship on advance government approval.”<sup>122</sup> The holding does not rest on constitutional grounds, but rather on the court’s analysis of whether preventing a designated entity from obtaining counsel could be said to further the purposes for which the particular provision of TWEA on which OFAC relied had been enacted. By concluding that the basic intent of Congress was to deny an enemy nation use of economic resources, the court found that access to legal services, without access to any blocked funds, was not within the coverage contemplated by TWEA. Language in the opinion suggests that OFAC’s exercise of the power to prevent a designated person from consulting an attorney might raise due process concerns as tantamount to denying the person the right to a meaningful challenge of the designation.

Despite the *American Airways* ruling, OFAC’s regulations continue to include bans on the provision of legal services. Some of the recent regulations differ both in purpose and scope from those at issue in *American Airways*. Whether the differences will be sufficient for courts to find that OFAC’s reach extends to the formation of lawyer-client relationships with blocked persons is a question that remains unanswered until a proper case is presented. OFAC’s Global Terrorism Sanctions Regulations, promulgated after the September 11, 2001 terrorist attacks, differ from the sanctions at issue in *American Airways*. They rely on the authority of IEEPA rather than TWEA and focus on private individuals and entities rather than on a particular foreign nation. Moreover,

<sup>118</sup> Executive Order 13219, as amended, § 1(B) and (C); 50 U.S.C. § 1701, note.

<sup>119</sup> [http://www.treasury.gov/resource-center/sanctions/Documents/balkans\\_gl1.pdf](http://www.treasury.gov/resource-center/sanctions/Documents/balkans_gl1.pdf). Office of Foreign Assets Control, Western Balkans Stabilization Regulations, 31 C.F.R., Part 588, General License No. 1, Legal Representation in Matters Pending before the International Criminal Tribunal for the Former Yugoslavia (July 9, 2003).

<sup>120</sup> Two courts have found OFAC without authority to prevent the mere formation of an attorney-client relationship: *American Airways Charters, Inc. v. Regan*, 746 F. 2d 865 (D.C. Cir. 1984); *Looper v. Morgan*, 1995 U.S. Dist. LEXIS 10241 (S.D. Tex. 1995). Others have found that an attorney’s lack of an OFAC license is not a bar to court jurisdiction; *Comet Enterprises Ltd. v. Air-A-Plane Corp.*, 128 F. 3d 855 (4<sup>th</sup> Cir. 1997); *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F. 2d 355 (11<sup>th</sup> Cir. 1984); *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800 (D. Del. 1990). See also Jill M. Troxel, “Office of Foreign Assets Control Regulations: Making Attorneys Choose Between Compliance and the Attorney-Client Relationship,” 24 *Review of Litigation* 637 (2005); Michael P. Malloy, “Economic Sanctions and Retention of Counsel,” 9 *Admin. L. J. Am. U.* 515 (1995).

<sup>121</sup> 746 F. 2d 865 (D.C. Cir. 1984).

<sup>122</sup> *Id.*, at 866 - 867.

they coincide with the changed congressional focus reflected in the post September 11, 2001 IEEPA amendments and the tendency of the courts to uphold OFAC's authority in the face of constitutional challenges.<sup>123</sup>

The legal services provisions of the Iraq regulations are similar to other OFAC regulations which prohibit the provision of services, including legal services, to designated persons or blocked entities and require a specific license for all but a limited list of legal services for which a general license<sup>124</sup> is provided in the regulations.<sup>125</sup> For reimbursement for any legal services, application must be made to OFAC for a specific license.<sup>126</sup>

OFAC's Global Terrorism Sanctions Regulations, which appear to be the model for the Iraq regulations, illustrate this framework. Under 31 C.F.R. § 594.406, "U.S. persons<sup>127</sup> may not, except as authorized by or pursuant to this part, provide legal ... services to a person whose property or interests in property are blocked pursuant to § 594.201(a)."<sup>128</sup> Under 31 C.F.R. § 594.506, five types of legal services are authorized "provided that all receipts of payment of professional fees and reimbursement of incurred expenses must be specifically licensed."<sup>129</sup> Other legal services must be specifically licensed.<sup>130</sup> The types of legal services which may be provided without a specific license are:

- (1) Provision of legal advice and counseling on the requirements of and compliance with the laws of any jurisdiction within the United States, provided that such advice and counseling are not provided to facilitate transactions in violation of this part;
- (2) Representation of persons when named as defendants in or otherwise made parties to domestic U.S. legal, arbitration, or administrative proceedings;
- (3) Initiation and conduct of domestic U.S. legal, arbitration, or administrative proceedings in defense of property interests subject to U.S. jurisdiction;

<sup>123</sup> Troxel, *supra* footnote 116, at 662 - 666.

<sup>124</sup> "General license" is defined in 31 C.F.R. § 500.317; licensing procedures are set forth in 31 C.F.R. § 501.801. In addition to general licenses specified in regulations, general licenses may be issued for sanction programs not yet codified in regulations.

<sup>125</sup> *See, e.g.*, 31 C.F.R. § 594.406, which is the provision of services provision of the Global Terrorism Sanctions Regulations. It also might be noted that there is always the possibility that OFAC will require documentation or reports in connection with a general license. Under 31 C.F.R. § 501.801(a), "persons availing themselves of certain general licenses may be required to file reports and statements in accordance with the instructions specified in those licenses."

<sup>126</sup> 31 C.F.R. § 576.507(a). *See also, e.g.*, 31 C.F.R. § 515.212 (Cuba); 31 C.F.R. § 536.506 (Narcotics Trafficking); 31 C.F.R. § 537.507 (Burma); 31 C.F.R. § 538.505 (Sudan); 31 C.F.R. 541.507 (Zimbabwe); 31 C.F.R. § 542.507 (Syria); 31 C.F.R. § 545.513 (Taliban); 31 C.F.R. § 560.525 (Iran—general license authorizes a longer list of legal services and payment of fees and reimbursement of costs for all listed legal services); 31 C.F.R. § 586.509 (Kosovo); 31 C.F.R. § 587.507 (Yugoslavia—Milosevic); 31 C.F.R. § 588.507 (Yugoslavia—Kosovo); 31 C.F.R. § 594.506 (Global Terrorism); 31 C.F.R. § 595.506 (Terrorism); and 31 C.F.R. § 598.507 (Foreign Narcotics Kingpin).

<sup>127</sup> "United States person" is defined for purposes of the Global Terrorism Sanctions Program as "any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States." 31 C.F.R. § 594.404.

<sup>128</sup> 31 C.F.R. § 201(a) defines those persons whose property has been blocked under the executive orders covering global terrorism.

<sup>129</sup> The procedures for specific licenses are detailed in 31 C.F.R. § 801(b).

<sup>130</sup> 31 C.F.R. § 594.506(b).

- (4) Representation of persons before any federal or state agency with respect to the imposition, administration, or enforcement of U.S. sanctions against such persons; and
- (5) Provision of legal services in any other context in which prevailing U.S. law requires access to legal counsel at public expense.<sup>131</sup>

The descriptions of legal services permitted under the general license have been criticized as ambiguous and narrow.<sup>132</sup> For example, the first one authorizes providing legal counsel to comply with U.S. laws but not to facilitate prohibited transactions without any elaboration on how to distinguish what is allowed from what may cross the line and subject the lawyer to liability.<sup>133</sup> This might mean that any prudent lawyer will decide not to provide any legal services regarding attempted transactions without securing a specific license. The fact that OFAC's list is ever-growing with names added frequently also means that lawyers providing legal services to clients involved in business transactions with designated persons or entities prior to their designation likely must apply for a specific license to continue the legal services since the general licenses apply only to legal services provided to or on behalf of blocked persons, not to individuals and entities involved in transactions with them.<sup>134</sup>

## OFAC Administrative Procedures

OFAC regulations specify procedures for imposing and challenging penalties imposed under TWEA<sup>135</sup> and for each of the sanctions programs operating under authority of IEEPA,<sup>136</sup> including the Iraq regulations.<sup>137</sup> The Iraq regulations address the Pre-Penalty notice and provide explicit rights to respond, to obtain extensions of the time for response, to representation, and a right to seek judicial review when a Penalty Notice is finally issued. The explicit rights provided

<sup>131</sup> 31 C.F.R. § 594.506(a)(1) - (5).

<sup>132</sup> See, Troxel, *supra* footnote 116, at 648 - 650.

<sup>133</sup> Since the Global Terrorism Sanctions Regulations prohibit "any transaction by any U.S. person or within the United States on or after the effective date that evades or avoids, has the purpose of evading or avoiding, or attempts to violate any of the prohibitions set forth." 31 C.F.R. § 594.205.

<sup>134</sup> See, e.g., 31 C.F.R. § 594.506(a) (Global Terrorism Sanctions Regulations). The implications of an OFAC requirement for a specific license to maintain an existing attorney-client relationship is explored within the context of representing a defendant before the International Criminal Tribunal for the Former Yugoslavia (ICTY) in Anne Beck and Sylvia Tordova, "No Legal Representation Without Governmental 'Interposition,'" 17 *Georgetown Journal of Legal Ethics* 597 (2004). Exec. Order No. 13304, 68 Fed. Reg. 32,315 (May 28, 2003), added to the designees under the Western Balkans Stabilization Regulations (Yugoslavia), names of individuals under indictment by the ICTY. Responding to an inquiry, OFAC informed the attorneys that their activity was not covered by the general license, thereby, prompting some of them to seek suspension of the case rather than face the prospect of OFAC penalties. Subsequently, OFAC revised its position and granted a general license by letter entitled, "31 C.F.R. Part 588 General License No. 1, authorizing legal representation of ICTY defendants named in the Executive Order." Although the general license covered provision of legal services, it did not extend to payment from any source other than the ICTY.

<sup>135</sup> 31 C.F.R. §§ 501.701 - 501.747.

<sup>136</sup> Procedures for each sanction program, other than those imposed under the authority of TWEA, are detailed separately within the regulations applicable to each sanctions program. The procedures applicable to OFAC's imposition of penalties under the Global Terrorism Sanctions Regulations are found at 31 C.F.R., Part 594. They include notice of the potential penalties which may be imposed under the various statutes (IEEPA, the United Nations Participation Act, and 18 U.S.C. § 1001), and the right to a prepenalty notice. Also specified are: the right to respond to the prepenalty notice; the right to a written notice imposing a penalty; and the right to be notified that imposition of a penalty is final agency action, appealable to a federal district court.

<sup>137</sup> 36 C.F.R. §§ 576.702.

in connection with TWEA sanctions are: right to receive a prepenalty notice;<sup>138</sup> right to provide a written response to the prepenalty notice;<sup>139</sup> right to request a hearing on the record<sup>140</sup> before an administrative law judge for any penalty assessed;<sup>141</sup> right to discovery in preparation for the hearing (subject to various privileges);<sup>142</sup> and an opportunity—after the hearing—to file proposed findings and conclusions of law.<sup>143</sup> There is also the possibility of an OFAC review of the administrative law judge’s conclusion.<sup>144</sup>

The general OFAC regulations also include an appendix detailing OFAC’s procedures for enforcement of sanctions as they relate to banking institutions supervised by one of the federal banking regulators.<sup>145</sup> Among its highlights are annexes providing “Risk Matrices,” which banking institutions may use to evaluate their compliance programs,<sup>146</sup> and an outline of “Sound Banking Institution OFAC Compliance Programs.”<sup>147</sup> The enforcement procedures cover such issues as (1) the effect of voluntary disclosure by an institution with respect to a violation of the sanctions;<sup>148</sup> (2) OFAC’s policy of acting promptly in the face of significant violations, leaving other apparent violations for inclusion in periodic reviews scheduled according to an institution’s “risk profile”;<sup>149</sup> and (3) OFAC coordination with the banking regulators in determining use of enforcement tools.<sup>150</sup> The civil enforcement tools which OFAC may use against a banking institution include administrative subpoenas, cease and desist orders, evaluation letters, civil penalty proceedings, and suspension or revocation of OFAC licenses.<sup>151</sup> OFAC may refer potential criminal violations to the Department of Justice and also pursue civil penalties.<sup>152</sup> There is also a list of factors which OFAC will consider in determining whether to impose any civil penalties. It includes such factors as the institution’s history of sanctions violations, its compliance programs, the size of the institution in relation to the number of its violations, and whether the violations are atypical. Also included are the following considerations: whether there has been a voluntary disclosure by the institution or an effort to conceal the harm attributable to the violation; whether the institution has undertaken actions to correct the situation; and OFAC’s evaluation of the potential deterrent effect of a sanction.<sup>153</sup>

<sup>138</sup> 31 C.F.R. § 501.706.

<sup>139</sup> 31 C.F.R. §§ 501.706(b)(2) and 501.707.

<sup>140</sup> 31 C.F.R. § 501.739.

<sup>141</sup> 31 C.F.R. 501.711.

<sup>142</sup> 31 C.F.R. § 501.723.

<sup>143</sup> 31 C.F.R. § 501.735.

<sup>144</sup> 31 C.F.R. § 501.741. This is not a right, but a request for a review is a prerequisite for federal court review of the agency’s decision under the federal Administrative Procedure Act, 5 U.S.C. § 500.

<sup>145</sup> These are: the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of Thrift Supervision.

<sup>146</sup> 31 C.F.R., Part 501, Appendix A, Annex A. Both of the risk matrices are taken from the Federal Financial Institutions Examination Council’s *Bank Secrecy Act Anti-Money Laundering Examination* (2005).

<sup>147</sup> 31 C.F.R., Part 501, Annex B. The major components which OFAC includes in its outline of sound compliance programs are: identifying high risk business areas; maintaining internal controls; conducting testing; identifying responsible individuals; and providing appropriate training.

<sup>148</sup> 31 C.F.R., Part 501, Annex A, I (D).

<sup>149</sup> 31 C.F.R., Part 501, Appendix A, II (B).

<sup>150</sup> 31 C.F.R., Part 501, Appendix A, II (A).

<sup>151</sup> 31 C.F.R., Part 501, Appendix A, II (A).

<sup>152</sup> 31 C.F.R., Part 501, Appendix A, II (C).

<sup>153</sup> 31 C.F.R., Part 501, Appendix A, IV.

## Challenging Designations

Broad-based challenges to OFAC designations have generally been unavailing. There is, however, one case, *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*,<sup>154</sup> in which a federal district court has found an OFAC blocking order freezing the assets of a United States-based charitable organization to be a seizure within the meaning of the Fourth Amendment to the U.S. Constitution.<sup>155</sup> OFAC regulations include provisions which permit particularized administrative appeals of OFAC designations on limited grounds.

OFAC regulations include provisions governing availability of information,<sup>156</sup> procedures to have funds unblocked on grounds of mistaken identity,<sup>157</sup> and procedures for removing names from OFAC's lists of designated persons.<sup>158</sup> With respect to release of information, the regulation covers only public information available under the Freedom of Information Act;<sup>159</sup> information which the Privacy Act<sup>160</sup> requires to be made available to individuals; OFAC forms; and information on civil penalties.<sup>161</sup> The regulations specify that OFAC must release certain information on its website with respect to the civil penalties which it has imposed, including the name and address of the entity penalized; the sanctions program involved; a description of the violation; whether there was voluntary disclosure; and whether there is a settlement or imposition of penalty. Names of individuals may not be released, and OFAC may choose to disclose more information than required.<sup>162</sup> There is no indication of the extent to which OFAC must or may disclose any information concerning the evidence relied on for making a designation under a sanctions program or for blocking transactions and property. Challenges to IEEPA designations confront the prospect that the evidence on which the government has based its designation is classified and may be presented to the court *ex parte* and *in camera*.<sup>163</sup>

The OFAC regulations also include general provisions permitting challenges to blocking orders on the grounds of mistaken identity. Under 31 C.F.R. § 501.806, a person whose funds have been blocked who believes that there has been mistaken identity may challenge the order by following the prescribed procedures. These require a written request to OFAC containing various information about the transaction being blocked and the basis on which the applicant believes the blocking to have resulted from mistaken identity.

<sup>154</sup> 647 F. Supp. 2d 857 (N.D. Ohio 2009).

<sup>155</sup> The federal district court has also issued an injunction enjoining the Department of the Treasury and OFAC from designating KindHearts as a Specially Designated Global Terrorist pending the court's fashioning of a remedy for the violation of the plaintiff's constitutional rights. *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 647 Fed Supp. 2d 857 (N.D. Ohio, 2009).

<sup>156</sup> 31 C.F.R. § 501.805.

<sup>157</sup> 31 C.F.R. § 501.806.

<sup>158</sup> 31 C.F.R. § 501.807.

<sup>159</sup> 5 U.S.C. § 552.

<sup>160</sup> 5 U.S.C. § 552a.

<sup>161</sup> 31 C.F.R. §§ 501.805 (a), (b) and (d).

<sup>162</sup> 31 C.F.R. § 501.806.

<sup>163</sup> 50 U.S.C. § 1702(c) provides that "[i]n any judicial review of a determination made under this section, if the determination was based on classified information ... such information may be submitted to the reviewing court *ex parte* and *in camera*."



OFAC's regulations provide procedures to (1) have funds unblocked that have been blocked through mistaken identity<sup>164</sup> and (2) have a designation reconsidered or to assert that changed circumstances have rendered a designation inapplicable.<sup>165</sup> Persons named to one of the terrorist lists may challenge the designation by presenting arguments or evidence that there is an insufficient basis for the designation.<sup>166</sup> The same officer responsible for making the designation, OFAC's director, is responsible for reviewing the challenge to the designation. The regulations contain no specifications with respect to the review process, such as requirements for a written record, a hearing on the record, or specified time line for consideration of the challenge to the designation. Without a full written record, for a federal court challenge to an OFAC designation to succeed, the plaintiff must convince the court that OFAC's designation is arbitrary and capricious; were a full record available, the issue might be whether the designation was based on substantial evidence in the record.<sup>167</sup>

In mistaken identity applications, any party to a transaction in which funds have been blocked may direct a written request to OFAC for the release of the funds. That request must include various types of specific information and documentation, such as the identity of the requester, the nature of the transaction and of the applicant's interest in the transaction, the amount in question, and why the applicant believes that the transaction has been blocked due to mistaken identity.<sup>168</sup> Upon receipt of this information, OFAC may require the applicant to provide more documentation.<sup>169</sup> There have been instances in which listed persons have been able to have their names removed from OFAC's lists by showing that OFAC has made a mistake. In 1989, for example, an OFAC list of specially designated Cuban nationals included the Spanish government's tobacco monopoly, Tabacalera; a month later the company was removed from the list.<sup>170</sup>

## Potential Impact of OFAC Designations

OFAC designations have repercussions both in the United States and in terms of the international banking system. OFAC has characterized its anti-terrorism economic sanctions programs as a "wide-ranging assault on international terrorism and its supporters and financiers," and reported that these programs have resulted in the blocking, as of December 31, 2009, of almost \$20 million in terrorist assets, of which over \$11.2 million is that of Al Qaeda.<sup>171</sup> The total dollar

<sup>164</sup> 31 C.F.R. § 501.806.

<sup>165</sup> 31 C.F.R. § 807.

<sup>166</sup> 31 C.F.R. § 501.807.

<sup>167</sup> In its Final Report to Congress, the Judicial Review Commission on Foreign Asset Control, 113-116 (2001), mentioned this possible consequence of what it had identified as deficiencies in OFAC's administrative process: lack of an appeal process, inability to review the record on which OFAC based its decision, lack of a right to a prompt post- or pre-designation hearing, and lack of requirements for a written record.

<sup>168</sup> A list of requirements is contained in 31 C.F.R. §§ 501.806(b) - (d).

<sup>169</sup> 31 C.F.R. § 806(e) references 31 C.F.R. § 501.602, which authorizes OFAC to require production under oath of reports and records of any transaction subject to OFAC's regulations, including "the production of any books of account, letters or other papers connected with any such transaction or property, in the custody or control of the persons required to make such reports." The regulation also authorizes OFAC to issue subpoenas to require attendance and testimony of witness and production of documents relating to any matter under investigation.

<sup>170</sup> 54 Fed. Reg. 49,258, 24,259 (November 29, 1989); 55 Fed. Reg. 2, 644, 2,645 (January 26, 1990).

<sup>171</sup> U.S. Department of the Treasury, Office of Foreign Assets Control, Terrorist Assets Report: Calendar Year 2009, at 1 and 8. <http://www.treasury.gov/resource-center/sanctions/Documents/tar2009.pdf>.

amount of terrorist assets which have been blocked does not represent the total effect of the economic sanctions. When OFAC designates an organization or an individual under its terrorists' programs, the impact may extend beyond assets frozen by the United States. Not only does the international banking community have to provide transparency in its transactions with U.S. financial institutions to prevent them from unknowingly handling prohibited transactions, but the designation of an international terrorist may inspire international cooperation. OFAC reports that "banks and other private institutions around the world voluntarily consult OFAC's [terrorist] list[s] and routinely report denying access to their institutions."<sup>172</sup>

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<sup>172</sup> *Id.* at 10.