FCPA Update

A Global Anti-Corruption Newsletter

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Cartels as Foreign Terrorist Organizations: Key Implications for Multinational Companies

On his first day in office, President Trump declared a national emergency regarding threats posed by international cartels and directed the Secretary of State to recommend criminal organizations to be designated as Foreign Terrorist Organizations ("FTOs") or Specially Designated Global Terrorists ("SDGTs").[1] In response, on February 20, 2025, the State Department designated eight international cartel organizations as both FTOs and SDGTs.[2]

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1. Executive Order 14157, "Designating Cartels and Other Organizations as Foreign Terrorist Organizations and Specially Designated Global Terrorists" (Jan. 20, 2025), available here.
2. U.S. Department of State, Fact Sheet, "Designation of International Cartels" (Feb. 20, 2025), available here. The designated cartels are: Tren de Aragua, Mara Salvatrucha, Cártel de Sinaloa, Cártel de Jalisco Nueva Generación, Cártel del Noreste, La Nueva Familia Michoacana, Cártel de Golfo and Cárteles Unidos.

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Seven of the eight designated cartels had previously been designated under other sanctions programs mainly targeting narcotics traffickers and transnational criminal organizations. However, this is the first time cartels have been designated as FTOs, which has significant implications for companies and their employees alike. In particular, knowingly providing "material support or resources" to these entities is now a criminal offense for any person subject to U.S. jurisdiction, including extraterritorial jurisdiction.[3]

Companies should review and, as needed, update their existing customer and counterparty due diligence processes to account for risks posed by these designations. This is especially so for companies operating in parts of Mexico and elsewhere in Latin America where cartels maintain significant operations or investments, as well and companies otherwise more likely to implicate cartel activity such as financial institutions potentially facilitating cross-border activity between Mexico and the United States.

Significance of a Cartel's Designation as an FTO or SDGT

It is a serious criminal violation for any person to knowingly provide, or conspire with others to provide, "material support or resources" to an organization designated as an FTO.[4] This prohibition is interpreted broadly and can expose entities to criminal liability for engaging with an FTO or FTO-affiliated persons, even if the activity is not related to terrorist activities, as discussed further below. Criminal charges can also be brought against corporate executives and employees who facilitate, authorize or play other roles with respect to prohibited conduct. Indeed, DOJ is now prioritizing criminal investigations and prosecutions of cartel-linked conduct around the world.[5]

In addition, FTOs and SDGTs are included on the Specially Designated Nationals and Blocked Persons List (the "SDN List") maintained by the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") under terrorism-related sanctions authorities, which are broader than most other sanctions programs.

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3. For example, in 2022, the France-based multinational cement company, Lafarge S.A., and its Syrian subsidiary pled guilty to conspiracy to provide material support to FTOs stemming from the company allegedly making payments to ISIS in order to operate a cement plant in Syria. The company paid $778 million in fines and forfeiture as part of its resolution with the U.S. Department of Justice, and the company and certain executives are also facing prosecution in France.
4. 18 U.S.C. § 2339B.
5. The newly confirmed Attorney General directed DOJ to prioritize cartel-related investigations towards the goal of the "total elimination of cartels," signaling an increased enforcement focus on activities that facilitate cartel operations. U.S. Department of Justice, Office of the Attorney General of the United States, Memorandum, "Total Elimination of Cartels and Transnational Criminal Organizations" (Feb. 5, 2025), available here.

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This means that any property or interests in property of such FTO/SDGT that are in the United States or in the possession or control of a U.S. person must be frozen ("blocked") and reported to OFAC. Additionally, because these are terrorism-related sanctions programs, exemptions available under other sanctions programs (e.g., the so-called "travel exemption" and exemption for information or informational materials) are not available.[6]

Public companies may also have disclosure obligations to the Securities and Exchange Commission regarding any dealings with any person that falls under the FTO/SDGT designation, including unlisted legal entities automatically targeted by U.S. sanctions because they are ultimately owned by a designated cartel, as discussed further below.

"[K]nowingly providing 'material support or resources' to these entities is now a criminal offense for any person subject to U.S. jurisdiction, including extraterritorial jurisdiction."

Expansive Meaning of "Material Support or Resources"

The term "material support or resources" is defined as "any property, tangible or intangible, or service" and includes currency or monetary instruments or financial securities; financial services; lodging; training; expert advice or assistance derived from scientific, technical or other specialized knowledge; safehouses; false documentation or identification; communications equipment; facilities; weapons; lethal substances; personnel; and transportation.[7]

A person subject to U.S. jurisdiction that provides any such support or resources to an FTO, even if the activity is not directly linked to a terrorist act, could be investigated and prosecuted for a criminal violation of the material support statute. For example, making payments to cartel-affiliated organizations or individuals, or providing financial services to, or conducting financial transactions for, a cartel-owned business, may be investigated for contributing material support to an FTO. And again, criminal liability can also be imposed on any corporate officers or employees who play any role in the prohibited conduct.

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6. OFAC, Frequently Asked Questions 812, available here.
7. 18 U.S.C. § 2339A(b)(1).

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Meaning of "Knowingly"

It is a crime to "knowingly" provide material support to an FTO. Thus, to bring charges, DOJ must be prepared to prove that the person engaging with the FTO had knowledge that the counterparty was a designated FTO or that it engaged in terrorism or terrorist activity. It is critical to note, however, that "knowingly" does not necessarily require actual knowledge. DOJ generally argues that the standard is satisfied whenever the person reasonably *should have known* of the facts based on all the surrounding circumstances.

For companies, the most effective mitigating strategy is to have an up-to-date, well-tailored risk-based compliance and diligence program. It is essential to be able to document that the company undertook a sophisticated and good-faith effort to prevent any impermissible payments or other contacts.

Further, it is not necessarily a defense that a payment to an FTO was made under threat of extortion or as a ransom. These situations are highly fact-intensive and require careful consultation with counsel.

Regulatory Compliance Obligations

Blocking and Reporting

Designated FTOs and SDGTs are added to the SDN List, and as such, U.S. persons have the same obligations to block property, report such property to OFAC and generally not engage in any dealings with an individual or entity on the SDN List. In addition, pursuant to OFAC's so-called "50% Rule," an entity that is 50% or more owned by one or more persons on the SDN List is also automatically blocked. Because the FTO/SDGT designations target organizations that are not identifiable legal entities, it may be more difficult for persons subject to U.S. jurisdiction to trace ownership to ensure an entity they are engaging with is not affiliated with a designated FTO/SDGT.

SARs

Financial institutions that are required under the U.S. Bank Secrecy Act to report suspicious activity to the U.S. Treasury Department would be required to report a wide range of customer activity conducted "by, at or through" the financial institution that it suspects may involve or be related to an FTO.

Issuers of U.S. Publicly Traded Securities

As previewed above, companies that are issuers of SEC-registered securities and that file quarterly or annual reports with the SEC have an obligation to disclose in those reports if the issuer or any of its affiliates knowingly engaged in any transaction or

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dealing with persons designated as terrorist organizations under E.O. 13224, which include SDGTs.[8] These reporting obligations arise without a materiality threshold.

Extraterritorial Scope

The material support statute applies extraterritorially, meaning U.S. authorities can prosecute individuals and entities for conduct occurring outside the United States.[9] Among other bases for jurisdiction, the statute applies to conduct that has even a *de minimis* effect on interstate or foreign commerce (e.g., most transactions by a multinational company or facilitated by a multinational or local bank).[10]

In addition, non-U.S. persons determined to have provided "material support" may be designated themselves as SDNs and become a target of blocking sanctions.

The Potential Consequences of Violating the Material Support Statute

Criminal Liability

A person that violates the material support statute faces potentially significant criminal penalties. Specifically, a company may be required to pay criminal fines and forfeiture and enter into broad compliance obligations with the DOJ.[11] An individual could face a lengthy prison term in addition to financial penalties.

Civil Forfeiture

Even in the absence of a criminal prosecution, DOJ can seek forfeiture of assets derived from, involved in or used or intended to be used in carrying out violations of the material support statute.[12]

Sanctions

As previewed above, non-U.S. persons determined to have provided "material support" may be exposed to secondary sanctions risks and become a target of blocking sanctions. Furthermore, the U.S. government may impose correspondent account/payable through account sanctions on non-U.S. financial institutions determined to have knowingly conducted or facilitated a significant transaction on behalf of an FTO. However, these designations would require an affirmative action by the U.S. government, and such actions are generally reserved for cases of significant violations.

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8. Section 13(r) to the Securities Exchange Act of 1934. 15 U.S.C. § 78m(r).
9. 18 U.S.C. § 2339B(d)(1)(C).
10. 18 U.S.C. § 2339B(d)(1)(E).
11. *See* n. 4, *supra*.
12. 18 U.S.C. § 981(a)(1)(G).

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Civil Lawsuits

Under the Anti-Terrorism Act (the "ATA"), individuals injured in their person, property or business due to an act of international terrorism can sue for damages. Plaintiffs often seek compensation not only from FTOs but also from companies that allegedly aided or supported the FTOs, including following a material support resolution. The Justice Against Sponsors of Terrorism Act ("JASTA") expanded ATA liability to include secondary liability, allowing plaintiffs to hold third parties accountable under certain circumstances. To establish liability, plaintiffs must show that the defendant generally was aware that their actions contributed to illegal activity by an FTO, and plaintiffs may rely on aiding and abetting or conspiracy theories to bring such claims.

Key Mitigation Steps

- Consider a risk assessment of customers, suppliers, vendors, counterparties, business lines, products, services and geographic operations to identify high(er)-risk activities—implicating any cartel, especially those designated as FTOs or SDGTs—that may require additional diligence and possibly monitoring.
- Assess existing controls regarding the provision of services or goods to sectors or geographic locations known to have links or significant exposure to a cartel (e.g., companies or customers operating in certain regions in Mexico).
- Consider whether due diligence and third-party screening processes and policies should be enhanced to address cartel-related risks, including, as relevant, reviewing methodologies for determining the risk profiles of customers that may be associated with or have exposure to cartels, and document any related compliance enhancements.
- Consider relevant training for personnel to identify red flags related to cartels, including when and how to escalate any activity or customer potentially associated with a designated cartel.

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UK, France, and Switzerland Announce New Anti-Corruption Taskforce

On March 20, 2025, in a clear display of increased focus on international cross-border collaboration, the UK Serious Fraud Office ("SFO"), the French Parquet National Financier ("PNF"), and the Office of the Attorney General of Switzerland ("OAG") announced that they have formed an alliance to tackle international bribery and corruption.

Notably, the initiative includes the formation of a dedicated anti-corruption prosecutorial taskforce aimed at strengthening cooperation and coordination among the three countries. As highlighted in the joint founding statement, the taskforce will deliver:

- A "leaders' group" focused on the regular exchange of insight and strategy;
- A working group for the purpose of devising proposals for cooperation on cases;
- Increased "best practice sharing" to make full use of the SFO's, PNF's and OAG's combined expertise; and
- A "strengthened foundation" for seizing opportunities for operational collaboration.

The United Kingdom, France, and Switzerland all have extensive anti-bribery and corruption legislation, which allows them to prosecute extraterritorial criminal conduct provided there is some link to the prosecuting jurisdiction. All three nations have increasingly focused on international collaboration in recent years, and likely will use the taskforce to pool expertise, insights, and resources to address international economic crimes.

The SFO, PNF, and OAG all have track records of working closely together already. They regularly share information through various existing Mutual Legal Assistance instruments. They also work together in "Joint Investigation Teams," an international cooperation tool based on an agreement among the competent authorities of each state, including on the Rolls-Royce deferred prosecution agreement ("DPA") in 2017 and the Airbus DPA in 2020. The SFO and PNF are currently jointly investigating the Thales Group.

A key part of the significance of this new alliance is that it publicly demonstrates the continuing commitment of the three countries' governments to investigate bribery issues and enforce anti-corruption laws, amid the United States pausing and reassessing its enforcement of cases under the Foreign Corrupt Practices Act.

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The prevailing trend in Europe has been towards introducing more legislation to regulate corporates and prosecute white collar crime. Regarding a potential uptick in coordinated resolutions among the three founding jurisdictions, however, it remains to be seen whether the taskforce will foster the harmonization of their various white-collar laws, including the scope of pre-trial diversion agreements, or even their availability in Switzerland. Regardless, the establishment of this taskforce may indicate that all three nations intend to step in and partly fill the void in anti-corruption enforcement currently left by the United States.

Interestingly, the announcement invites other agencies with similar objectives to participate in the future, facilitating increased international cooperation over time. This approach is supported by comments from the Director of the SFO, Nick Ephgrave QPM, who emphasised that the alliance "reaffirms our individual and collective commitment to tackling the pernicious threat of international bribery and corruption, wherever it occurs." Similarly, the Head of the PNF, Jean-Francois Bohnert, noted that the taskforce "will definitely strengthen our current cooperation in order to fight more efficiently against bribery and corruption," following ten years of operational cooperation among the PNF, SFO, and OAG.

There is at this stage little substantive information on the alliance and how it proposes to achieve its aims, including in relation to Eurojust, whose role is to coordinate the work of national authorities from the EU Member States as well as third countries, including the United Kingdom and Switzerland. However, the strengthening of existing ties among the United Kingdom, France, and Switzerland and the possibility of other countries joining them makes the evolution of this taskforce an item to watch.

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FCPA Update is a publication of
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