

Non-State Nuclear Proliferation: Extra-Territorial Jurisdiction and UN Resolutions 1540 and 1373

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History

1. International Emergency Economic Powers Act (IEEPA)
 - Presidential declaration of national emergency pursuant to an “unusual or extraordinary threat” to U.S.
 - Originating at least in part outside U.S.
 - Authorizes blocking of transactions and freezing assets
 - Executive Order 13224 (and others/amendments)
 - Prohibiting transactions with persons who commit, threaten to commit or support terrorism
 - **Persons “owned or controlled by, operating for or on behalf of, assisting, sponsoring, providing financial, material, technological support or services, or are *otherwise associated* with designated persons**
 - Executive Order 12938 (and others/amendments)
 - Used (or prepared to use) chemical or biological weapons, import bans, etc. on those engaged in WMD proliferation
2. U.S. Anti-money laundering Provisions
 - Bank Secrecy Act and other provisions
 - Essential backdrop of obligations of financial institutions to financial crime
 - Expanded over time to strengthen due diligence, monitoring and reporting
3. Of course other authorities and “lists” (TWEA, controlled items, TEL and other lists, etc.)
 - How to “expand” existing authorities to:
 - Use financial and economic tools to combat illicit threats broadly (TF and WMD proliferation)
 - Internal declaration of threats and those recognized internationally (UN)
 - Apply our tools in context of “global” financial/economic infrastructure
 - Capture activities that are knowing and ‘unknowing’ (strict liability)
 - Change behavior – at least of unknowing actors
 - Make it riskier, costlier and more difficult for *any* actor anywhere to support illicit activity by capturing ALL touches to the U.S.

Anti-Money Laundering Laws

- Bank Secrecy Act (1970)
 - Requirements for reporting and due diligence
 - Identify sources and methods of money laundering through financial institutions
- Money Laundering Control Act (1986)
 - Money Laundering = federal crime
 - Civil and criminal forfeiture for BSA violations
- Anti-Drug Abuse Act (1988)
 - Expanded definition of financial institution
- Annunzio-Wylie AML Act (1992)
 - Strengthened sanctions for BSA violations
 - BSAAG established
- Money Laundering Suppression Act (1994)
 - Strengthened internal procedures
 - Captured Money Service Businesses (MSBs)
- Money Laundering and Financial Crimes Strategy Act (1998)
 - Enhanced law enforcement capabilities
 - Creation of National Money Laundering strategy
- USA PATRIOT Act (2001)
 - Criminalizes terrorist financing
 - Strengthens qualitative application of anti-money laundering tools
- Intelligence reform & Terrorism Prevention Act (2004)

USA PATRIOT Act

- *Strengthens U.S. measures to prevent, detect, and prosecute international money laundering and the financing of terrorism*
 - Criminalizes Terrorist Financing
 - Block property PENDING an investigation
 - Confiscate/vest property of foreign country or national that has planned, authorized, aided or engaged in armed hostilities with or attacks against U.S.
 - Use of classified information – *ex parte and in camera* review
 - Expanded definition of covered financial institutions
 - Improved information sharing between institutions and govt.
 - Designations of foreign institutions
- Key take-aways
 - AML provisions and obligations: of *know your customer, due diligence and reporting, cross border flows monitoring* are expanded
 - Information sharing increased (law enforcement, FIUs, etc.)
 - Designation as *primary money laundering concern* and imposition of special measures
 - “Reach” of U.S. law and obligations on those falling under “US jurisdiction”

1373 and 1540

- 1373
 - “(a) Prevent and suppress the financing of terrorist acts;
 - “(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
 - “(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
 - “(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;
- 1540
 - *Gravely concerned by the threat of terrorism and the risk that non-State actors* such as those identified in the United Nations list established and maintained by the Committee established under Security Council resolution 1267 and those to whom resolution 1373 applies, may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery*
 - *1. Decides that all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery;*
 - (d) Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls **on providing funds and services** related to such export and trans-shipment **such as financing**, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations;
 - *2. Decides also that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist **or finance them**;*
 - (c) Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and **brokering in** such items in accordance with their national legal authorities and legislation and consistent with international law;
 - (d) Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations;

Banco Delta Asia

- Section 311
 - Finding of *Primary Money Laundering Concern*
 - **NOT** related to specific money laundering transactions
 - Obligations on US institutions – wherever located –
 - enhanced monitoring and ceasing transactions (including through correspondent and payable through accounts)
 - Reporting requirements to US authorities
- Macanese action – freezing of funds
 - Local authorities – NOT US
- Impact to private sector entities
 - Ceasing business with BDA lest they too be targeted
- Impact on other Govts
 - Moral suasion
 - What other “political” factors to be considered – 6 party process
- IEEPA Actions
 - Designation of targets culled from Section 311 process of review – individuals and entities facilitating illicit activities

Issues of Concern

- Governments (State Actors)
 - Application of UN resolutions
 - Inconsistency and Disagreements in interpretation
 - Local legal/regulatory framework – strength of controls
 - Should US govt
 - Multiple enforcement levels
 - How to share information – all types (FIU, intel, public, financial)
 - Classified vs unclassified information
- Soliciting private sector
 - Governed by multiple jurisdictions
 - Inconsistency of sophistication – regulatory oversight and internal
 - AML procedures (FATF, and regional bodies)
 - Inconsistency of fundamental Bank Secrecy-related framework
 - Comparing risks – commercial vs non-commercial
 - State controlled institutions?
- Licit vs illicit activity
 - Concept of “facilitation” – knowing and unknowing