

**MORRISON
FOERSTER**

INTERACTION: TOGETHER PROJECT

**Working Effectively under the Prohibitions Against
Providing Material Support to Foreign Terrorist
Organizations**

October 4, 2017

Agenda

- Legal Framework
- Lessons Learned from High Profile Case
- Other Potentially Applicable Legal Regimes
- Ramifications and Side Effects for U.S.-Based NGOs
- Guidance for Risk-Based Compliance

I. Legal Framework

- **In the mid-1990s, Congress passed the prohibitions against providing material support, which generally outlaws two types of support:**
 1. **Providing material support for the commission of certain designated offenses that might be committed by terrorists (18 U.S.C. 2339A); and**
 2. **Providing material support to certain designated terrorist organizations (18 U.S.C. 2339B).**
- **What is “Material Support”?**
 - Legal Definition: “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . and transportation, except medicine or religious materials.”
 - Practical Definition: Anything of value.

I. Legal Framework – Key Terms

- **Foreign Terrorist Organization (FTO):** “foreign organizations that are designated by the Secretary of State.”
- Legal criteria:
 - a. Must be a foreign organization.
 - b. The organization must engage in terrorist activity, terrorism, or retain the capability and intent to engage in terrorist activity or terrorism.
 - c. The organization’s terrorist activity or terrorism must threaten the security of U.S. nationals or the national security (national defense, foreign relations, or the economic interests) of the United States.
- The State Department, specifically the Bureau of Counterterrorism, publishes the list of FTOs.
 - Available online: <https://www.state.gov/j/ct/rls/other/des/123085.htm>.
 - The list also includes entities that have been delisted as FTOs.
 - Works in tandem with Treasury Department’s list of Specially Designated Nationals (SDNs). More later...

I. Legal Framework – Key Terms

- **“Training”**

- Legal Definition: instruction or teaching designed to impart a specific skill, as opposed to general knowledge.
- Practical Definition: teaching another a particular skill or subject.

- **“Expert advice or assistance”**

- Legal Definition: advice or assistance derived from scientific, technical, or other specialized knowledge.
- Practical Definition: imparting knowledge or skill that you possess as a result of specialized education, training, or experience.

I. Legal Framework – Criminal Liability and Penalties

- The “material support” laws are criminal laws, which means, among other things, that the defendant must “knowingly” violate the law. In this context, that means the defendant must:
 - Know or intend that the support further a terrorist attack; or
 - Provide that material support to an organization that it knows or should know is a foreign terrorist organization.
- **Penalties:** 15-20 years in prison. More if the support results in terrorist attack resulting in deaths.
- The statute also affords a private right of action – U.S. nationals may sue as a result of an act of international terrorism. This includes civil suits against entities providing material support of FTOs.

I. Legal Framework – Exemptions

- Medical Exemption –
 - Applies to the provision of medicine itself, but less clear whether it applies to other types of medical supplies, services, or medical advice.
 - Case studies:
 - A doctor who swore allegiance to al Qaeda and promised to be on-call to treat wounded members of a terrorist organization was found guilty of providing and conspiring to provide material support to a terrorist organization. See *United States v. Forhane*, 634 F.3d 127 (2d Cir. 2011).
 - Another court suggested that sanctions would not apply to doctors working with aid organizations like Doctors Without Borders, even if the patients that they treat in connection with their NGO's work are affiliated with a terrorist organization because they are providing assistance on their own and are not under the terrorist organization's "direction or control." See *United States v. Shah*, 474 F. Supp. 2d 492, 496-99 (S.D.N.Y. 2007).
- Religious Material Exemption – untested.

II. Lessons Learned from *HLP* Case

***Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010)**

- Overview: Humanitarian Law Project sought injunction and declaration providing that they could train members of identified FTOs on how to use humanitarian and international law to peacefully resolve disputes, engage in political advocacy on their behalf, and teach members how to petition the UN or other international entities for relief.
 - They also challenged the constitutionality of material support statutes. They claimed that the statutes were impermissibly vague and raised free speech, free association, and Fifth Amendment due process challenges.

II. Lessons Learned from *HLP* Case

Holder v. Humanitarian Law Project, 561 U.S. 1 (2010), cont.

Court's holding:

- Found material support statutes constitutional.
- Reinforces the government's broad authority to prosecute under the material support statute.
- Rejected the claim that money and support could possibly be given to the charitable side of an FTO.
 - Court was concerned with “how terrorist groups systematically conceal their activities behind charitable, social, and political front” and embraced the idea that “money is fungible” in concluding that the provision of money and other material support could not be tolerated.

III. Other Relevant Laws - OFAC

The Office of Foreign Assets Control (OFAC)

The Office of Foreign Assets Control, within the U.S. Treasury Department, administers economic sanctions programs against terrorist organizations and Specially Designated Nationals.

- See https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic.
- OFAC will issue licenses to NGOs seeking to provide humanitarian assistance. These licenses are issued on a case-by-case basis.

III. Other Relevant Laws - OFAC

OFAC's regulations are broader than the specific laws that deal with the terrorists and persons who support them. All individuals and entities that fall under U.S. jurisdiction should use OFAC's list of Specially Designated Nationals and Blocked Persons (SDN List).

- Available online at: <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>.
- Search tool available online: <https://sanctionssearch.ofac.treas.gov/>.

Treasury also maintains a Resource Center, including a list of “Designated Charities and Potential Fundraising Front Organizations for FTOs” at <https://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-fto.aspx>.

For more information, see Guidance Related to the Provision of Humanitarian Assistance by Not-For-Profit Non-Governmental Organizations at https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/ngo_humanitarian.pdf.

IV. Issues for NGOs

- **Uncertainty about the scope of activities that would trigger prosecution under the material support statute:**
 - *Direct support is easier to identify and avoid.* General pattern of prosecution is on “direct” support like:
 - Financial
 - Recruiting services
 - Weapons or other hardware/equipment
 - If the government consistently used these criteria, then activities provided by NGOs would not be threatened by prosecution.

IV. Issues for NGOs

- **Uncertainty about the scope of activities that could trigger prosecution under the material support statute:**
 - Deviations from this pattern of prosecution and focus on “indirect” support contribute to uncertainty and chilling effect on humanitarian activities. For example:
 - *United States v. El-Mezian*, 664 F.3d 467 (5th Cir. 2011)
 - Holy Land Foundation of Relief and Development, a Muslim charity in the U.S. with the mission of providing humanitarian assistance to Palestinians living in West Bank and Gaza, charged with helping to fundraise for Hamas by sending money to certain “zakat” committees located in the West Bank. Zakat committees are charitable organizations, but the Government charged that the committees were part of Hamas’s social network. 664 F.3d at 485.

IV. Issues for NGOs

- **Chilling effect on humanitarian activities:**
 - Concern that the distribution of supplies, such as food and basic necessities, and the provision of technical assistance and training or education materials could be interpreted as material support has led some organizations to reconsider aid activities.
 - Scope of statutes are broad enough to encompass traditional humanitarian support, notwithstanding nominal exclusion of “religious” and “medical” support.

IV. Issues for NGOs

- **Chilling effect on humanitarian activities:**

- Possible chilling effects on humanitarian activities have resulted from material support statutes, including:
 - Reduction of individual donations to Muslim charities and donations by Muslim donors.
 - Impaired ability to establish and fund smaller, localized organizations that are important to humanitarian and other non-profit goals in sensitive regions.
 - These types of organizations do not have compliance and accounting processes in place, and it is difficult to generate resources necessary to do so.
 - Concern that such groups could have ties to FTO in region that would disqualify them as a potential partner in bringing aid to an area.
 - May have affected amount of funding available for international aid and development.

See Adelsberg, Pitts, and Shebaya, The Chilling Effect of the Material Support Law on Humanitarian Aid, 4 Harv. Nat'l Sec. J. 282 (2013).

V. Guidance for Compliance

- **What are the red flags?** A “red flag” is an activity or condition that increases the likelihood of a possible violation of law.
 - NGOs are likely to encounter red flags when hiring local vendors or providing services in war-torn regions or regions known for terrorist activity. Such red flags may include:

Won't certify to compliance with U.S. laws	Won't complete questionnaire re relationship with other orgs.	Requests commissions to be paid in another country, to a third party, or in cash or untraceable funds
History of problems with other foreign companies	Third-party vendor documentation conceals the true identity of an in-country rep. or agent	Use of general purpose or miscellaneous accounts
Unrecorded accounts or transactions	Incomplete information on purchase orders or contracts	Little or no business background
Vendor's activity is inconsistent with vendor's business	Financial transactions occur for which there appears to be no logical economic purpose	Funds transfers do not include information on the originator, or the person on whose behalf the transaction is conducted, when the inclusion of such information would be expected
Multiple personal and business accounts are used to collect and funnel funds to a small number of foreign beneficiaries	Vendor or its address is similar to one of the organizations found on the list of FTOs or SDNs	If a vendor is helping NGO distribute aid materials, be wary if they are reluctant to offer information about the end-use or end-user of the aid

V. Guidance for Compliance

Tips – Adopt a Risk-Based Compliance Program and Compliance Officer

- What is a risk-based compliance program? Rather than establish a complex, overly rigorous compliance program – which can be unmanageable and expensive – you identify your particular areas of high risk and prioritize compliance processes around those areas.
- Use internal checks and exercise due diligence to rebut any possibility of providing support to terrorist organizations:
 - Establishing institutional controls can help to rebut any challenges against an organization’s compliance with these statutes.
 - Keeping records to show that reasonable steps were taken to avoid any illegal activity could help protect an NGO from criminal liability in the event that they are accused of violating material support statutes or related laws.
 - Mitigates against accusation of “knowing” violations.

V. Guidance for Compliance

- Aid groups should consider establishing a Compliance Program to avoid violations
- Before distributing any funds to an organization, providing any services to third parties, or hiring a vendor, NGOs should take steps to protect themselves.
 - “Know your Customer,” i.e., screen against lists and take steps to know the ultimate aid recipient.
 - Train your personnel on the legal framework, identifying red flags, and being able to respond appropriately up the chain if there is an issue.

V. Guidance for Compliance

NGOs should collect the following basic information about the person(s) or organizations they wish to fund or hire:

- Name
- Jurisdiction in which the organization is incorporated or formed
- Copies of incorporating or other governing instruments
- Information on the individuals who formed and operate the organization
- Information relating to the organization's operating history
- Postal, email, and URL addresses and phone number of each place of business
- Statement of the principal purpose of the organization, including organization's projects and goals
- Information about the organization's or vendor's sources of income, such as grants, private endowments, and commercial activities

Questions?

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