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Financial Institutions May Have Civil and Criminal Exposure for Knowingly or Unknowingly Assisting Customers Who Support Terrorist Activities

While there have been numerous shifts in government enforcement priorities in the past three months, there does appear to be one area where the status quo has remained the same. This new administration has made it clear that preventing financial institutions from working with terrorist organizations remains a top concern. While the administration has added “new” entities to its lists in the form of drug cartels and other nefarious groups, none of this changes the fact that it is as important as ever for banks and similar financial institutions to maintain effective compliance to avoid the government’s crosshairs. Moreover, if one of these banned entities does become inadvertently involved with a financial institution, it is equally as important to know how to get in front of the issue to mitigate the relevant and serious risk.

For decades, terrorist organizations have tried to access the U.S. financial system to fund their terrorist operations around the world. Terrorist organizations and other criminals use various strategies to conceal the nature of their activities, including money laundering and structuring. The U.S. government has multiple tools for combatting terrorists’ abuse of the U.S. financial system. Congress enacted the Currency and Foreign Transaction Reporting Act of 1970, as amended (referred to as the Bank Secrecy Act or BSA) to monitor the source, volume, and flow of currency and other monetary instruments through the U.S. financial system to detect and prevent money laundering and other criminal activities. After the terrorist

attacks on Sept. 11, 2001, Congress strengthened the BSA framework through the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. Among other things, the USA PATRIOT Act targeted terrorist financing and enhanced enforcement mechanisms to combat it. Indeed, there are numerous other statutes and regulations that may come into play in cases involving terrorist financing. Those statutes and regulations rely heavily on U.S. financial institutions to identify and report bad actors.

The risks involved when banks fail to follow these statutes and regulations are severe, and this GT Advisory summarizes the current laws that the government uses to try to eliminate terrorist organizations' ability to move funds for their nefarious activities. U.S. financial institutions and their employees have substantial exposure if they knowingly or unknowingly assist customers in supporting or financing terrorist activities. As mentioned above, while the new administration is changing the way the government addresses the threat of terrorist funding in some ways, the basic tools used in detecting and prosecuting remain largely the same. Some of the government's tools that should be considered in creating effective compliance for financial institutions include the following.

1. Terrorist Support and Financing Violations

The most powerful tool in U.S. law enforcement's quiver in curbing terrorist financing involves statutes proscribing the provision of material support to designated terrorist organizations. The government can prosecute individuals and entities that facilitate or finance terrorism under multiple statutes: (i) 18 U.S.C. § 2339A, which prohibits persons from providing material support or resources, including financial services, knowing that they will be used in preparation for or in carrying out certain predicate offenses associated with terrorism; (ii) 18 U.S.C. § 2339B, which prohibits knowingly providing material support to designated foreign terrorist organizations; and (iii) 18 U.S.C. § 2339C, which prohibits providing or collecting funds with the knowledge or intention that they will be used to carry out a terrorist attack. The statutes are complex, but it is important to note that conspiring to commit terrorism or aiding and abetting the commission of terrorism are punishable as if the person has committed the crime himself. Moreover, under 18 U.S.C. § 2339C, an individual or entity can be prosecuted for concealing the nature, location, source ownership, or control over any material support or resources knowing that they will be or were provided to support terrorist activity. All of these statutes include severe criminal penalties for individuals and entities. These statutes apply to banks and other financial institutions similarly to how they would apply to anyone that helps known terrorists and, consequently, contain penalties to reflect the severity of the underlying conduct.

More specifically, under 18 U.S.C. § 2339B, if a financial institution becomes aware that it has possession of or control over funds of a foreign terrorist organization or its agent, the financial institution is required to retain possession or control over the funds and report the existence of the funds to the Secretary of Treasury in accordance with the regulations. The failure to do so may result in a civil penalty equal to the greater of \$50,000 per violation or twice the value of the funds over which the financial institution was supposed to retain possession or control. The material support statute specifically states that it applies extraterritorially, meaning that the law reaches individuals, companies, and conduct that is normally beyond the reach of U.S. jurisdiction. Since the statute's inception, U.S. courts have affirmed criminal convictions and civil penalties based on its broad extraterritorial reach.

2. IEEPA Violations

While not as chilling as the threat of being charged as supporting terrorism, the executive branch also can use its emergency powers to curb and punish financial institutions that conduct transactions with designated terrorists. This issue of emergency powers has been in the news recently because of the current

administration's discussion of using these powers to curb narcotics trafficking by targeting the various drug cartels.

Specifically, the International Emergency Economic Powers Act (IEEPA) delegates authority to the president of the United States to regulate financial transactions to address threats following the declaration of a national emergency. As mentioned above, President Trump has issued multiple executive orders (EOs) designating terrorists or terrorist groups. The EOs prohibit U.S. persons from engaging in transactions with the designated terrorists or terrorist groups. The Office of Foreign Assets Control (OFAC) enforces sanctions against U.S. persons or non-U.S. persons with a U.S. nexus who deal with designated terrorists or terrorist groups. Financial institutions must notify OFAC of any blocked transactions and file an annual report. A financial institution that willfully violates an executive order or IEEPA implementing regulation may be charged criminally. The fines for a financial institution found to have violated these orders may be high and also involve potentially damaging collateral effects, such as debarment.

3. Money Laundering

While money laundering has always been a relevant risk for financial institutions, in light of the new administration's views on stopping both terrorism and narcotics trafficking, the industry should expect that the administration will pursue these laundering cases with greater zeal than the prior one. If a U.S. financial institution or its employees willfully assist a customer in laundering money, the government may charge the financial institution or its employees with conspiracy to commit money laundering. While laundering may occur throughout the United States in any location where a nefarious individual is trying to hide ill-gotten proceeds, the increased focus on international criminal and terrorist activities will result in greater detection of laundered amounts and, consequently, much higher fines.

The government may also charge international money laundering in terrorist financing cases. International money laundering is sometimes referred to as "reverse money laundering" because it involves the transfer of legitimate funds abroad for an illegal purpose. 18 U.S.C. § 1956(a)(2)(A) prohibits the transport, transmission, or transfer of funds and monetary instruments of funds from the United States to a place outside of the United States with the intent to promote a specified unlawful activity. Specified unlawful activities include the terrorism material support offenses, IEEPA violations, and other criminal activities connected to terrorism.

Most importantly, money laundering is something that a financial institution is legally required to take steps to detect and prevent. These efforts will never be perfect but taking steps to enact effective compliance is critical to mitigating the risk of fines and penalties and, in some circumstances, may even change charging decisions. Effective compliance programs that are continuously reviewed and improved are key to mitigating the risk of fines and penalties if cases like the ones discussed above arise.

4. BSA Violations

Similar to the money laundering issues discussed above, the Bank Secrecy Act (BSA) creates challenges for financial institutions that may increase over the coming years. The BSA imposes substantial reporting and due diligence requirements on financial institutions to prevent abuse of the U.S. financial system. Among other requirements, each financial institution must: (i) develop and implement an effective anti-money laundering (AML) program; (ii) file and retain records of currency transaction reports (CTRs) to report cash transactions of \$10,000 or more; (iii) file and retain records of suspicious activity reports (SARs) where the financial institution knows, suspects, or has reason to suspect, inter alia, that the money was from an illegal source or the transaction occurred in connection with a plan to violate federal law or

evade reporting requirements; (iv) file and retain records of Reports of International Transportation of Currency or Monetary Instruments (CMIRs) to report the transportation of currency or monetary instruments exceeding \$10,000 to or from the United States; and (v) adopt customer identification procedures and perform other due diligence measures. The BSA rules are administered by the Financial Crimes Enforcement Network (FinCEN), the Internal Revenue Service (IRS), and the federal banking agencies including the Federal Deposit Insurance Corporation, the Office of the Comptroller of Currency, and the National Credit Union Administration.

The penalties for violating BSA requirements can be severe. Potentially applicable penalties include:

- **Criminal Liability for Financial Institutions or Employees Who Willfully Violate BSA Reporting Requirements** - A person, including a bank employee, who willfully violates the BSA reporting requirements may be subject to five years in prison and a fine of up to \$250,000. The criminal penalties are increased to 10 years in prison and a fine of up to \$500,000 where the person commits the BSA reporting violation in connection with another crime or engages in a pattern of illegal conduct.
- **Structuring Violations** - A person who structures, attempts to structure, or assists in structuring any transaction with one or more domestic financial institutions to evade a BSA reporting requirement may be guilty of a crime. Structuring involves willfully breaking a payment into smaller amounts so that they fall under the reporting threshold. Structuring is punishable by up to five years in prison and a fine of up to \$250,000. Like the reporting penalties, the criminal penalties for structuring are increased to up to 10 years in prison and a fine of up to \$500,000 where the person commits structuring in connection with another crime or engages in a pattern of illegal conduct exceeding more than \$100,000 in a 12-month period.
- **Civil Penalties** - The secretary of the Treasury may impose a civil penalty of \$500 for a negligent violation of the recordkeeping requirements in the BSA. The penalty can be increased by up to \$50,000 where there is a pattern of negligent violations. Where a financial institution engages in certain international money-laundering violations, the secretary of Treasury may impose a penalty equal to the greater of two times the value of the transaction or \$1,000,000.

Where a financial institution's failure to satisfy the recordkeeping requirement is willful, the civil penalty is equal to the greater of the value of the transaction or \$25,000, up to a maximum of \$100,000. The penalty is applied for each day the violation continues on each branch or place of business. Therefore, the civil penalties can increase significantly. The civil penalty can apply in addition to any criminal penalties.

- **Egregious Violator** - Where an individual willfully commits a BSA violation and the violation either facilitated money laundering or terrorist financing (i.e. the individual is an "egregious violator"), the individual is prohibited from serving on the board of directors of a U.S. financial institution for a period of 10 years commencing on the date of the conviction or judgment.

5. Internal Revenue Code Currency Violations

The Internal Revenue Service frequently uses information gathered under the BSA reporting requirements to determine if taxpayers are compliant with their U.S. tax reporting obligations. Large transfers of cash are not per se illegal; however, they may be an indicator of fraud for tax purposes. Therefore, the IRS has a strong interest in financial institutions filing timely and accurate CTRs. To this end, the Internal Revenue Code includes a parallel statute that addresses the failure to file or the filing of inaccurate CTRs. The following penalties may apply under 26 U.S.C. § 6050I:

- **Criminal Liability for Willful Failure to File a CTR** - Any person who willfully fails to file a CTR is guilty of a felony punishable with up to five years in prison and a fine of up to \$25,000 (or \$100,000 in the case of a corporation).
- **Criminal Liability for Willfully Filing a False CTR** - Any person who willfully files a false CTR is guilty of a felony punishable with up to three years in prison or a fine of up to \$100,000 (or \$500,000 in the case of a corporation).
- **Criminal Liability for Structuring** - The Internal Revenue Code includes its own criminal provision for structuring violations. A person who structures or assists in structuring may be punishable with the same penalties that apply to a person who fails to file or files an incorrect CTR.
- **Criminal Liability for Willfully Aiding or Assisting in Preparing a False CTR** - Any person who aids, assists, counsels, or advises in the preparation of a false CTR is guilty of a felony punishable with up to three years in prison or a fine of up to \$100,000 (or \$500,000 in the case of a corporation).
- **Civil Penalty** - The civil penalty for failure to file or filing an incorrect CTR is equal to the greater of \$25,000 or the amount of cash received in the transaction, up to a maximum of \$100,000.

6. Forfeiture Actions

In addition to civil and criminal penalties, the government can use civil and criminal forfeiture statutes to seize the property related to terrorism or money-laundering violations. This includes proceeds of the criminal activity, funds used to facilitate the criminal activity, and in some circumstances, legitimate funds that have been knowingly commingled with illegal funds. Where the illegal funds are being held abroad, the government may be able to seize assets held in correspondent accounts that foreign financial institutions maintain in the United States as a substitute.

7. Loss of Bank Charter or Removal from Banking Activities

In addition to the civil and criminal penalties that can apply, federal banking agencies have the authority to revoke bank charters and prohibit bank employees from engaging in further banking activities. Equally concerning are the various state banking regulators that can also revoke a financial institution's charter for violations of federal laws. Because of the regulated nature of financial institutions, the ramifications of any of the violations mentioned above, even if not particularly egregious, have the potential to cause irreparable harm to the institution.

Conclusion

The government has numerous tools to penalize financial institutions or their employees for knowingly and unknowingly assisting customers with supporting or financing terrorism. As the strategies that terrorists use to access the U.S. financial systems continue to evolve, financial institutions may wish to consult with their advisors on the best way to prevent violations.

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