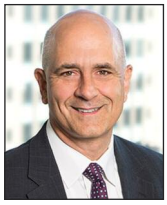
National emergency creep threatens OFAC's good standing



OFAC's expansion and misuse of the "significant transnational criminal organizations" designation jeopardizes international respect and judicial deference for important national security sanctions programs, write Steven Pelak, Jason Prince and Jeremy Paner.

The U.S. Department of Treasury's Office of Foreign Assets Control ("OFAC") serves a vital and important role in U.S. national security and furthering our country's foreign policy interests, particularly when it comes to dealing with Iran and deterring acts of international terrorism. Under the authorities granted by the International Emergency Economic Powers Act ("IEEPA") to deal with an "unusual and extraordinary threat . . . to the national security, foreign policy or economy of the United States,"[1] the President has empowered OFAC to employ various national security sanctions programs to designate individuals and entities or to prohibit unlicensed transactions with them as part of our nation's efforts to restrain and deter Iran's support of terrorists, proliferation of weapons of mass destruction ("WMD"), and schemes to defeat U.S. economic sanctions.[2]

Iran and its agents have murdered, taken hostage, and tortured U.S. citizens and U.S. Government employees for nearly 40 years running.[3] Such actions compel our Republic to respond through economic sanctions, among other means of national power, to disrupt, deter, and cabin in the Iranian government's support for international terrorists, efforts to injure and destabilize U.S. allies, human rights abuses, and proliferation of WMD. In its role to implement and administer those economic sanctions, OFAC should and must continue vigorously to identify Iranian individuals and entities for designation pursuant to its IEEPA authorities and thereby contribute to our nation's efforts in response to Iranian support for international terrorism and acts of barbarity against U.S. citizens across the globe.

To safeguard its ability to act effectively in those pursuits, OFAC must carefully and wisely exercise its authorities within statutory and constitutional limitations. When OFAC utilizes a national security Executive Order to address a set of factual circumstances for which that Executive Order was not specifically and explicitly intended, OFAC violates IEEPA, runs the risk of losing the international community's respect for U.S. economic sanctions, and jeopardizes the judicial deference traditionally afforded to OFAC's exercise of its IEEPA authorities. We note a recent example to highlight this potential risk of harm to U.S. national security and foreign policy.

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The Ajily Group designation

In July 2017, OFAC designated the Ajily Software Procurement Group ("Ajily Group"), based in Iran, as a "significant transnational criminal organization" ("significant TCO") under E.O. 13581. OFAC also derivatively designated two Iranian nationals and an Iranian company for directly or indirectly acting or purporting to act for or on behalf of the Ajily Group.

Six years prior in July 2011, President Obama issued E.O. 13581 to block the property of violent transnational drug cartels and gangs, which were "becoming increasingly entrenched in the operations of foreign governments and the international financial system, thereby weakening democratic institutions, degrading the rule of law, and undermining economic markets," and "facilitat[ing] and aggravat[ing] violent civil conflicts." Section 3(e) of E.O. 13581 defines the term "significant transnational criminal organization" as:

> "a group of persons, *such as those listed in the Annex to this order*, that includes one or more foreign persons; that engages in an ongoing pattern of serious criminal activity involving the jurisdictions of at least two foreign states; and that threatens the national security, foreign policy, or economy of the United States."[4]

In turn, the Annex to E.O. 13581 listed four organizations which were to serve as the specified kind of organization to be designated pursuant to the President's finding of a national emergency and Executive Order: Los Zetas (Mexican/Central American drug cartel), the Yakuza (Japanese mafia), the Brothers' Circle (Eurasian mafia), and the Camorra (Italian mafia). All four of those crime syndicates have, through repeated acts of violence, coercion, and public corruption, gained influence and control in various aspects of civil society and civil governments, according to publicly issued criminal complaints, indictments, and charging documents.

The President's finding of a national emergency in relation to significant TCOs was issued in conjunction with, and further explained by, the White House/National Security Council's July 2011 issuance of the "Strategy to Combat Transnational Organized Crime: Addressing Converging Threats to National Security" (the "National Security Strategy Report"). In setting

forth a definition of the transnational criminal organizations which were the subject of the President's declaration of a national emergency, the National Security Strategy Report explained that the subject transnational criminal organizations share the following characteristics: "

"
- In at least part of their activities they commit violence or other acts which are likely to intimidate, or make actual or implicit threats to do so.
- They exploit differences between countries to further their objectives, enriching their organization, expanding its power, and/or avoiding detection/apprehension.
- They attempt to gain influence in government, politics, and commerce through corrupt as well as legitimate means.
- They have economic gain as their primary goal, not only from patently illegal activities but also from investment in legitimate businesses; and
- They attempt to insulate their leadership and membership from detection, sanction, and/or prosecution through their organizational structure."[5]

In summary, as defined in E.O. 13581 and further explained in the July 2011 National Security Strategy Report, significant TCOs "such as" Los Zetas, the Yakuza, the Brothers' Circle, and the Camorra use violence, extortion, and corruption to seize segments of government or civil society and create a vacuum and abuse of power devoid of the rule of law and governmental legitimacy, thereby posing an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. In relation to these types of "significant TCOs," the President found such an unusual and extraordinary threat warranting the exercise of the emergency and powerful authorities of IEEPA.

By the plain terms of the President's July 2011 Executive Order, the definition of a significant TCO is dependent upon a finding by OFAC that the organization at issue must be "such as" Los Zetas, the Yakuza, the Brothers' Circle, and the Camorra. Whether used in a congressional statute, federal regulation, or Executive Order, the term "such as" means "of the specified kind."[6] The judiciary has interpreted the term "such as" to provide or impose a restrictive scope to the relevant listing of items in a congressional statute or administrative regulation.[7]

As the administrative agency charged with implementation of the July 2011 Executive Order, OFAC may reasonably designate as a significant TCO an organization that is smaller in size or impact or that is embedded within civil society or government to a lesser degree than international criminal organizations such as Los Zetas, the Yakuza, the Brothers' Circle, and the Camorra. Yet, OFAC may not expand the definition of a significant TCO and invoke national security authorities under the July 2011 Executive Order against persons whose alleged international criminal activity is not of the specified kind of, or similar in nature to, the activity of organizations "such as" Los Zetas, the Yakuza, the Brothers' Circle, and the Camorra.

The Ajily Group is alleged to operate from Iran and to have sold some of the stolen software programs, which may be used in the design of rockets and GPS-guided weaponry, to Iranian military and government entities.

Emergency creep control

Under IEEPA, Congress prohibited such national emergency creep and expansion by OFAC, requiring the President – and the President alone – in each instance to declare a new and expanded national emergency which must be submitted to, discussed with, and reviewed by Congress. Specifically, Congress directed that the emergency authorities of IEEPA "may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared . . . *and may not be exercised for any other purpose*."[8] For instance, OFAC may not expand the definition of a "significant TCO" beyond the scope of the President's previously declared national emergency to exercise IEEPA authorities over an alleged "significant TCO" to gain bargaining leverage over an indicted person for the U.S. Department of Justice ("DOJ") in criminal plea negotiations or to obtain cooperation from unindicted persons suspected of criminal fraud to identify other alleged criminal co-conspirators. To do so would empower OFAC with the authority, in effect, to declare a "national emergency," something which Congress restricted solely to the President of the United States.[9]

In IEEPA, Congress further instructed the Executive Branch that it could not use emergency authorities reviewed and justified to deal with one national emergency to attack a separate or different unusual and extraordinary threat to the national security, foreign policy, and economy of the United States:

"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."[10]

In short, neither the President nor OFAC may use one national emergency to justify the blocking of a foreign national's property simply because the President or OFAC believes that the foreign national presents an unusual and extraordinary threat to national security, foreign policy, or the economy unless that threat falls squarely within the scope of a previously proclaimed and defined national emergency (which is notified to the Congress and the People) and is thereby within OFAC's authorization under IEEPA to act. As the U.S. Attorney General has stated recently, Executive action, without proper statutory authority, amounts to "an open-ended circumvention" of the laws and thus "an unconstitutional exercise of authority by the Executive Branch."[11]

Threat to OFAC's good standing

Based on OFAC's publicly released information about the Ajily Group's activities as well as the criminal indictment returned publicly in the U.S. District Court for the District of

Vermont, it is alleged that the Ajily Group "uses hackers to steal engineering software programs from the United States and other western countries."[12] The Ajily Group is alleged to operate from Iran and to have sold some of the stolen software programs, which may be used in the design of rockets and GPS-guided weaponry, to Iranian military and government entities. At least from the publicly available allegations, there is no indication that Ajily Group engages in criminal conduct that is akin to or "such as" that of the drug cartels and violent mafias like Los Zetas, the Yakuza, the Brothers' Circle, and the Camorra, each of which includes leaders and members who have been charged, indicted, and convicted in the United States or abroad of committing acts of violence, extortion, and corruption to sabotage and control civil government and civil society.

Although the designation of the Ajily Group based on information released by OFAC and the associated indictment appears appropriate under one or more other national security sanctions programs,[13] OFAC's apparent expansion and misuse of the significant TCO designation against the Ajily Group may jeopardize OFAC's own legitimacy and good standing for several reasons.

First, foreign financial institutions and other international actors may conclude that OFAC fails to apply evenly and uniformly the standards set forth in the President's Executive Orders, thereby disregarding the rule of law and resulting in a loss of international respect for U.S. economic sanctions. Consequently, OFAC may lose the benefit of what its leadership has referred to as "a decisive 'force multiplier'" – i.e., the fact that "non-U.S. international financial institutions frequently implement [OFAC's] targeted sanctions voluntarily, even when they are under no legal obligation from their host countries to do so."[14]

As importantly, the perception that OFAC acts in an arbitrary and capricious manner may diminish the agency's credibility with the European Union and United Nations, both of which provide critical partnerships in implementing sanctions targeting terrorism financing and weapons proliferation. OFAC partners with the international community to increase the effectiveness of its actions and openly acknowledges the important role of international cooperation in its designation process: "When examining individuals or organizations for potential designation, the United States works in conjunction with authorities from several other nations, and with international organizations, such as the European Union and the United Nations."[15] In 2016, a U.S. Treasury Department official commented that successful sanctions require that the United States "deploy multilateral, not unilateral, sanctions whenever possible," and "work closely with [its] foreign partners, and with the private sector, to implement sanctions effectively."[16] The continuation of effective multilateral sanctions regimes may be jeopardized if foreign allies of the United States have reason to doubt OFAC's willingness to interpret consistently and uniformly the bounds of the President's designation criteria as set forth in Executive Orders.

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Furthermore, maintenance of international respect for the U.S. designation process should be of paramount concern to the Executive Branch based on our leadership role within the U.N. Security Council. The U.N. Security Council Committees which oversee sanctions measures imposed by the U.N. Security Council make listing decisions by consensus, but they generally rely upon expertise and leadership from the United States. This is due in no small part to the continued good standing of OFAC, particularly in the eyes of allied nations.

Second, when OFAC in one instance impermissibly expands a previously issued Presidential Executive Order and fails to apply carefully an Executive Order according to a consistent and uniform application of the rule of law, the federal judiciary may not only reject OFAC's unlawful and unconstitutional action in the first instance but may also be more inclined to find that OFAC has acted in an unlawful or arbitrary and capricious manner in the next instance.[17] In other words, OFAC's reservoir of respect and judicial deference may run dry or at least run low if OFAC veers from a consistent and uniform application of Executive Orders even against national security adversaries which warrant sanction under other IEEPA-based sanctions programs.

In fact, when OFAC abuses its designation authority under IEEPA, OFAC increases the risk of the judiciary imposing a requirement that the agency obtain a warrant as a prerequisite for future IEEPA designations and blocking actions.[18] Even courts otherwise disposed to defer to OFAC's actions in the national security arena may be persuaded that the Fourth Amendment warrant requirement must be imposed over OFAC blocking actions to guard against OFAC's unlawful expansion of the Executive's emergency authorities.[19]

Furthermore, the federal judiciary may become more willing to look behind the curtain and examine whether federal prosecutors are using OFAC and its national emergency authorities as a stalking horse to accomplish what they could not do, or did not want to do, as a matter of policy or law.[20] At base, the judiciary may begin to strike down criminal law enforcement and OFAC action where the "coordinated action" by two government agencies amounted to "impermissible gamesmanship" which resulted in a "single integrated effort by [the Government] to circumvent the Constitution," the forfeiture laws, or any other legal restrictions imposed by Congress upon the Executive.[21]

Third, even if the federal judiciary declines to rein in OFAC's unauthorized expansion of national emergency authorizations, Congress may enter the fray by limiting the judicial deference granted to OFAC's interpretation of federal law, including in the national security and IEEPA context.[22] In the past, the Executive Branch has argued against a warrant requirement or prior judicial review of

individual national security/foreign policy designations, in part, by making statements under oath to Congress and the judiciary of the "extensive legal review" and "extensive investigation" of IEEPA designations and the careful interagency consideration and evaluation to ensure that designations meet "the strategic national security and foreign policy goals of the United States."[23] Such Executive Branch assurances and representations ring hollow where individual designations disregard the particular definitions and limitations of Executive Orders issued under the *emergency* authorities Congress has granted pursuant to IEEPA. Furthermore, Congress may act upon the recommendations made in January 2001 by the congressionally established Judicial Review Commission on Foreign Asset Control which was chaired by former Deputy Attorney General Larry Thompson and which wisely recommended that Congress enact legislation to establish a system of administrative review with strict time schedules, neutral arbiters, and a meaningful, on-the-record review of OFAC designations and actions.[24]

Clear thinking required

Considering what OFAC stands to lose, one would expect that, particularly in the context of significant TCOs, OFAC and government officials should act carefully to apply uniformly and consistently the standards of Executive Orders and federal law. Of course, none of the above speaks to whether there may be other appropriate means for OFAC to sanction the Ajily Group under E.O. 13382 (WMD proliferation), E.O. 13608 (designation of Iranian sanctions evaders), E.O. 13757 (malicious cyber-enabled activities), or another national emergency Executive Order. Nevertheless, based on OFAC and the U.S. Government's publicly alleged facts in relation to the Ajily Group, one is left with a significant doubt regarding the current legal justification for OFAC's designation of the Ajily Group as a "significant TCO" under the President's July 2011 E.O. 13581.

[W]hen OFAC abuses its designation authority under IEEPA, OFAC increases the risk of the judiciary imposing a requirement that the agency obtain a warrant as a prerequisite for future IEEPA designations and blocking actions.

If OFAC continues its expansive application of the significant TCO designation beyond the scope of the President's July 2011 Executive Order and the bounds of IEEPA, then an international business or financial institution accused by OFAC of fraud, money laundering, willful violation of the Arms Export Control Act, willful violation of the Foreign Corrupt Practices Act, willful violation of IEEPA, and other similar serious criminal offenses involving international financial transactions or the international shipment of goods or services may run the risk of being branded by OFAC with the label of a significant transnational criminal organization, without notice, indictment by grand jury, or criminal conviction. If doubt exists regarding that observation and the possible risk of OFAC designation or the implicit or explicit threat of such designation raised in plea negotiations by the DOJ to gain a more favorable guilty plea, fine, or forfeiture, one need only take a moment to review past press releases of the DOJ in instances of criminal prosecutions of major international financial institutions and electronics companies over the past several years. Those DOJ press releases set forth recitals of facts involving willful and repeated acts of serious international criminal fraud and conspiracies with the governments of Iran, Syria, and Sudan that would fit OFAC's definition – but not the July 2011 Executive Order's definition – of a significant transnational criminal organization.

When an administrative agency adopts such unbridled discretion and its sanctions and designations allow it to put a company out of business in a heartbeat and to deny effectively an individual's access to employment, insurance, and banking services in a modern economy without notice and without the right to confront and cross-examine evidence and allegations in a public forum, injustice sadly follows.

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Links and notes

[1] 50 U.S.C. § 1701(a).

[2] See, e.g., Executive Order ("E.O.") 13382 (designation of WMD proliferators and supporters); E.O. 13553 (designation of Iranian human rights abusers); E.O. 13608 (prohibition of transactions with Iranian sanctions evaders).

[3] See, e.g., *Bank Markazi v. Peterson*, __ U.S. __, 136 S. Ct. 1310, 1319 n.5 (2016) (listing a number of the long list of civil judgments against Iran for its support and sponsorship of acts of terrorism).

[4] E.O. 13581 (emphasis added).

[5] NSC, Strategy to Combat Transnational Organized Crime: Definition, https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime/definition.

[6] *Merriam-Webster's Dictionary Online*, retrieved October 8, 2017, from https://www.merriam-webster.com/dictionary/such%20as); *Black's Law Dictionary* (5th ed.) ("'Such' represents the object as already particularized in terms which are not mentioned").

[7] See, e.g., *Maracich v. Spears*, __ U.S. __, 133 S. Ct. 2191, 2202 (2013) (restricting the scope of a statutory provision in light of illustrative examples presented in the statutory provision); *Lawler Mfg. Co., Inc. v. Bradley Corp.*, 280 F. App'x 951, 954-955, 2008 WL 2185990 (Fed. Cir. 2008) (finding that the term "such as" is intended to reference "items similar to what are recited rather than indicating that the recited items are just examples of what is covered"); *Carlyle Compressor Co. v. Occupational Safety & Health Review Comm'n*, 683 F.2d 673, 676 (2d Cir. 1982) (interpreting the term "such as" to restrict the scope of a federal regulation to things similar to those enumerated following the term "such as" and rejecting the U.S. Labor Department's contrary, expansive interpretation of its own regulation).

[8] 50 U.S.C. 1701(b) (emphasis added); see also H.R. Rep. No. 95-459 at 10 (1977)(expressing Congress's intent that the Executive would only use emergency authorities under IEEPA to address the "specific set of circumstances" by which the President initially acted to find a national emergency and "for no other purpose").

[9] 50 U.S.C. § 1701(a) (". . . if the President declares a national emergency . . .").

[10] 50 U.S.C. § 1701(b).

[11] September 4, 2017 Letter by U.S. Attorney General to Acting Secretary of U.S. Department of Homeland Security, https://www.dhs.gov/news/2017/09/05/rescission-deferred-action-childhood-arrivals-daca.

[12] U.S. Department of the Treasury Press Release, "Treasury Targets Persons Supporting Iranian Military and Iran's Islamic Revolutionary Guard Corps" (July 18, 2017), https://www.treasury.gov/press-center/press-releases/Pages/sm0125.aspx.

[13] For instance, OFAC's own July 18, 2017 press release announcing the designation of the Ajily Group noted that the Ajily Group "also procured specialized software for Malek Ashtar University of Technology" which was previously designated in 2012 under the WMD Proliferation Executive Order, E.O. 13382.

[14] See Prepared Testimony by Daniel Glaser and Adam Szubin Before a House Foreign Affairs Joint Subcommittee Hearing, "Isolating Proliferators and Sponsors of Terror: The Use of Sanctions and the International Financial System to Change Regime Behavior" (2007), https://archive.org/details/gov.gpo.fdsys.CHRG-110jhrg34715.

[15] U.S. Department of the Treasury, Frequently Asked Questions, Designations, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/designations.aspx

[16] April 15, 2016 Remarks by Acting Under Secretary Adam Szubin at the Center for a New American Security, https://www.treasury.gov/press-center/press-releases/Pages/jl0425.aspx.

[17] See, e.g., *Epsilon Electronics, Inc. v. OFAC*, 857 F.3d 913, 919, 928-29 (D.C. Cir. 2017) (applying arbitrary and capricious standard to partially reverse and remand OFAC action because the administrative record did not clearly explain OFAC's consideration of certain potentially exculpatory evidence; and noting that de novo review may be appropriate where an agency's fact finding procedures are "severely defective"); *Ramaprakash v. F.A.A.*, 346 F.3d 1121, 1124, 1125 (D.C. Cir. 2003) (finding that under the APA "agency action is arbitrary and capricious if it departs from agency precedent without explanation" and that an "agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making") (citation and internal quotation marks omitted).

[18] See, e.g., *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 994 (9th Cir. 2012) ("We therefore hold that OFAC violated AHIF-Oregon's Fourth Amendment right to be free of unreasonable seizures" by blocking its assets indefinitely without obtaining a warrant); *KindHearts for Charitable Humanitarian Development, Inc. v. Geither*, 647 F. Supp. 2d 857 (N.D. Ohio 2009) (holding that OFAC's blocking of the plaintiff's assets pending investigation violated its Fourth Amendment right to be free of unreasonable seizure).

[19] *Kadi v. Geithner*, 42 F.Supp.3d 1, 37 (D.D.C. 2012) (upholding OFAC action but noting the finding by other courts that OFAC's blocking actions were "seizures" under the Fourth Amendment and noting that "[t]his Court, as well, has expressed some reluctance to find that, categorically, blocking orders could never be 'seizures' under the Fourth Amendment").

[20] See *U.S. v. Marllory Chacon Rossell*, No. 11-Cr.-20582, April 22, 2015 Defendant's Objections and Corrections to the Presentence Report, at 9 (defense memorandum noting the apparent use by OFAC of its designation authority to sanction without evidence of criminal involvement a teenage daughter of a criminal defendant/mother); "The Guatemalan Trafficker Who Confessed to the DEA," republished at InSight Crime (March 30, 2015) (noting seriatim OFAC sanctions used to designate uncharged daughter and bring indicted mother/defendant to the criminal bargaining table), http://www.insightcrime.org/news-analysis/the-guatemalan-trafficker-who-confessed-dea.

[21] See *United States v. Gorman*, 859 F.3d 706, 719 (9th Cir. 2017) (affirming district court's suppression of evidence, dismissal of forfeiture action, and award of attorney fees against the U.S. Government; and concluding that "[a]n illegal police venture cannot be made legal simply by dividing it into two coordinated stops" or governmental actions. See also *Leonard v. Texas*, __ U.S. __, 137 S. Ct. 847, 848 (2017) (Thomas, J., concurring in denial of certiorari) (noting the important question whether modern forfeiture practice "can be squared with the Due Process Clause" and observing that situations in which property may be seized with limited judicial oversight by government actors "has led to egregious and well-chronicled abuses").

[22] See Separation of Powers Restoration Act of 2017, S. 1577, 115th Congress (2017-2018) (introducing to the Senate Judiciary Committee on July 18, 2017 a proposal to amend section 706 of the Administrative Procedure Act to significantly repeal Chevron deference).

[23] See *Final Report to Congress of the Judicial Review Commission on Foreign Asset Control* (Chairman Larry D. Thompson), at 11 n.35, 47-48 n.225, and Appendix E at 9 (January 2001) (noting the DOJ's written representations and testimony that any person to be designated as a "significant foreign narcotics trafficker" should be under public indictment for significant narcotics-related criminal offenses so designated only after "extensive legal review"), http://apps.americanbar.org/dch/committee.cfm?com=IC716000 (Amer. Bar Assoc. webpage); Affidavit of OFAC Director Adam J. Szubin, at ¶ 31-33 (May 22, 2009), filed in *Kadi v. Geithner*, No. 09-CV-00108 (Doc.No.12-4).

[24] *Final Report to Congress of the Judicial Review Commission on Foreign Asset Control*, supra, at 129.