



LEGAL DIMENSIONS OF INTERNATIONAL GRANTMAKING

International Grantmaking after September 11: Dealing with Executive Order 13224 and the USA Patriot Act

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Authors' Note: Because of the potentially fast-changing nature of measures to combat terrorism, the executive orders, laws and regulations discussed in this article can be expected to change frequently. This article references relevant provisions in effect as of September 1, 2002.

Soon after the terrorist attacks of September 11, 2001, President George W. Bush declared a national emergency and issued Executive Order 13224, "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism" (the "Executive Order").¹ The following month, Congress passed and the President signed into law the USA PATRIOT Act—"Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" (the "Patriot Act").² Both the Executive Order and the Patriot Act prohibit financial transactions with individuals and organizations associated with terrorism. While both the Executive Order and the Patriot Act reach far beyond the specific concerns of foundations and corporations engaged in grantmaking, they may well have important implications for grantmakers, especially those involved with organizations abroad. This article summarizes provisions of particular concern to U.S. grantmakers engaged in international grantmaking, and suggests steps that grantmakers can take to comply with these laws.

THE EXECUTIVE ORDER

The Executive Order freezes all property and interests in property of certain "persons" (both individuals and organizations) identified as terrorists or otherwise associated with terrorism. More important for purposes of potential grantmakers, it prohibits any transactions involving such "persons" or their property or property interests. These "persons," referred to below as "Listed Persons," are designated in one of several places: on a list of individuals and organizations designated by the Secretary of the Treasury (the "Treasury Department List") and maintained by the Office of Foreign Assets Control ("OFAC"); on a supplemental list attached as an annex to the Executive Order itself (the "Executive Order Annex List"); and on a list promulgated by the Secretary of State (the "State Department List"). All of these lists can be found online. (The Annex to the

Executive Order and the Treasury Department List are bundled with the Executive Order and posted online at the OFAC website in a document called "Terrorism: What You Need to Know about U.S. Sanctions," (the "OFAC Document") at www.treasury.gov/offices/enforcement/ofac/sanctions/t11ter.pdf [PDF format] or www.treasury.gov/offices/enforcement/ofac/sanctions/terrorism.html [HTML format]. The State Department List is posted at www.state.gov/s/ct/rls/fs/2002/9014.htm.) Prohibited transactions include "any contribution of funds, goods or services to or for the benefit of [Listed Persons]."

In addition to its ban on transactions with specifically Listed Persons, the Executive Order prohibits transactions with and freezes assets of *unnamed* persons who "assist in, sponsor or provide financial, material or technological support for, financial or other service to or in support of such

¹ Exec. Order No. 13,224, 3 C.F.R. 786 (2001), *reprinted* in 50 U.S.C.A. § 1701 (West Supp. 2002), *amended* by Exec. Order No. 13,268, 3 C.F.R. (2002), effective September 24, 2001.

² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, *amended* by Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543, effective October 24, 2001.



acts of terrorism or [Listed Persons]” or are “otherwise associated with” Listed Persons. The Executive Order does not explain or qualify the nature of the association between Listed Persons and “others associated with” them that will violate the prohibition.

The open-endedness of the prohibitions contained in the Executive Order creates a potential dilemma for all international grantmakers, but particularly for those who might seek to provide humanitarian aid to persons and in areas affected by the U.S. military actions against terrorism. In the past, when the United States has declared international economic sanctions, the International Emergency Economic Powers Act (“IEEPA”) has restricted the President’s authority to regulate or prohibit, directly or indirectly, donations of articles such as food, clothing and medicine intended to be used to relieve human suffering.³ However, the Executive Order prohibits such humanitarian donations on the grounds that they would “seriously impair [the President’s] ability to deal with the national emergency declared in this order.”⁴ Accordingly, subject to other possible limitations, food, clothing and medicine may be given to persons who are not Listed Persons, but if those persons are found to have “otherwise associated with” Listed Persons or are later deemed to “assist in, sponsor or provide financial, material or technological support for or financial or other service to or in support of such acts of terrorism or [Listed Persons],” donors may unwittingly enter a difficult gray area.

THE PATRIOT ACT

The Patriot Act, passed approximately one month after the Executive Order was signed, has a much broader scope than the Executive Order, and many of its provisions, such as those dealing with border security, are of limited interest here. However, the Patriot Act picks up on some of the same themes of preventing financial support for terrorism that are embodied in the Executive Order. One section of potential immediate concern for international grantmakers deals with criminal sanctions for “material support for terrorism.”

Title 18 of the United States Code already included criminal sanctions for persons who provide material or financial support for terrorism and for “Foreign Terrorist Organizations” (“FTOs”) in particular.⁵ The Patriot Act supplements these existing provisions, enhancing criminal penalties and expanding jurisdiction over the crime of providing support for terrorism. The provisions of Title 18, as amended by the Patriot Act, effectively add a fourth list identifying “persons” (including, again, both individuals and organizations) known or suspected to be engaged in terrorism: the Treasury Department’s list of “Specially Designated Nationals and Blocked Persons” (the “SDN List”), which includes organizations that have been designated as FTOs by the secretaries of State and Treasury. (Individuals and organizations appearing on the SDN List are also referred to below as “Listed Persons.”) The SDN List is online at www.treasury.gov/offices/enforcement/ofac/sdn/t11sdn.pdf.

The relevant provisions of Title 18, as amended by the Patriot Act, impose fines and terms of imprisonment of up to 15 years for any entity that provides material support or resources *knowing* or *intending* that they are to be used in terrorist acts or by FTOs.⁶ If the terrorism results in the death of any person, the prison term can be for any term of years or for life.⁷ “Material support or resources” are broadly defined and clearly would include grants if the recipient engages in terrorist acts or is an FTO.⁸

For international grantmakers, the worrisome issue raised by these criminal statutes is the possibility that—despite their best intentions—they might be found to have knowingly or intentionally provided material support or resources for terrorism. In criminal cases, “knowledge” generally is defined as “done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.” Clearly, most international grantmakers lack the affirmative intention of supporting terrorism. However, whether a grantmaker can be claimed to have “known” that the support or resources it provided would end up in terrorist hands is a different question altogether. No court has addressed in a published opinion the level of “knowledge” required to trigger Title

³ International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1702.

⁴ Exec. Order 13,224, § 4.

⁵ E.g., 18 U.S.C. § 2339A.

⁶ Title 18 U.S.C., §§ 2339A(a), 2339B(a) as amended by Patriot Act.

⁷ *Id.*

⁸ Title 18 U.S.C., Sections 2339A(b) as amended by Patriot Act.



18's criminal prohibition against providing support for terrorism. But in other criminal contexts, "knowledge" includes circumstances in which an individual is aware of a high probability that a certain fact is true and consciously avoids confirming that fact.⁹ Thus, it is conceivable, although unlikely, that a grantmaker could be held to have knowingly supported terrorism if, for example, it made a grant to a highly suspicious recipient without first confirming whether or not the recipient was a Listed Person.

Another concern for international grantmakers is potential civil liability should their grants end up in the wrong hands. Title 18 provides a specific civil cause of action against those who violate the criminal prohibitions against providing support for terrorism. In addition, a federal court recently has held that entities—specifically including, apparently, charitable foundations—who fund terrorist groups may be held liable for aiding and abetting any terrorist acts that those groups perpetrate.¹⁰ Ultimately, the possibility of civil exposure may prove more vexing for international grantmakers than the specter of criminal prosecution.

At the end of June 2002, the relevant sections of Title 18 were supplemented again to criminalize the "financing of terrorism."¹¹ This new provision, however, punishes only an individual or organization who "*willfully* provides or collects funds with the *intention* that such funds be used" to carry out acts of terrorism (emphasis added)¹² or who knowingly conceals the source of funds used to carry out terrorism or to support FTOs.¹³ Thus, it is unlikely that the most recent provisions could be used to prosecute international grantmakers who act in good faith.

OTHER ANTITERRORISM-RELATED EXECUTIVE ORDERS, LAWS AND REGULATIONS

The OFAC Document, mentioned above, includes several other items, including earlier executive orders and digests of other previously existing antiterrorism-related laws and regulations, reminding grantmakers that concerns over

financial support for terrorism did not begin after September 11. Although many of the relevant prohibitions are effectively subsumed by the Executive Order and the Patriot Act, many other preexisting prohibitions—for example, against financial transactions with specific foreign governments—remain separately relevant to grantmaking in those countries. Comprehensive consideration of these prohibitions falls outside the scope of this article.¹⁴

STEPS INTERNATIONAL GRANTMAKERS MAY TAKE

Despite the attention paid in press coverage to charities that have helped finance and aid terrorist activities, the Executive Order and the Patriot Act are not targeted directly to grantmaking organizations. Unfortunately, they do not articulate specific procedures that grantmaking organizations should undertake in order to comply with the law. Still, the prohibitions against material aid to terrorism contained in both the Executive Order and the Patriot Act do create certain identifiable affirmative duties of compliance for grantmaking organizations. In particular, organizations should be familiar with all four lists of blocked individuals and organizations, and at a minimum, should take steps to assure they are not making grants *directly* to Listed Persons.

Thus far, no organ of U.S. government has promulgated "due diligence" guidance or standards that grantmakers can follow—beyond checking the lists of Listed Persons—to be sure they are not *inadvertently* (or *indirectly*) supporting terrorism. Until there is such guidance, grantmakers will have to rely a good deal on common sense. Some useful ideas to consider include:

- *Know what you can about your grantees and their associates.* The more grantmakers know about their grantees and potential grantees the less likely they will be inadvertently to make prohibited grants. Learning about grantees should include, at a minimum, learning about associated umbrella organizations, affiliates,

⁹ *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000)

¹⁰ *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002).

¹¹ 18 U.S.C. §2339C(a).

¹² *Id.*

¹³ 18 U.S.C. § 2339C(c).

¹⁴ More information can be found in "Grantmaking and Embargoed Countries: An Overview Using Kosovo as a Case Study," *Legal Dimensions of International Grantmaking*, Summer 1999 (available through the Council's website, www.cof.org/newsroom/newsletters/international/index.htm).



subsidiaries and key staff. Names of individuals and organizations learned in the process should all be checked against the four lists of Listed Persons.

- *Know what you can about donors who play a role in identifying grantees.* For grantmakers who accept funding from donors who then play an advisory role in identifying grantees—such as donors to donor-advised funds—the inquiry should extend to the identity of the donors themselves, including the identities of the principals if the donor is an organization. Here, too, names of individuals and organization learned in the process should be checked against the four lists of Listed Persons.
- *Involve your donors and grantees in the compliance process.* Grantmakers should consider taking steps to protect themselves further against inadvertent violation of the Executive Order and Patriot Act by requiring some assurances from donors who play a role in identifying grantees and from grantees. For example, donor advisers might be asked to sign written statements acknowledging that they are aware of the prohibitions contained in the Executive Order and Patriot Act and that they intend to comply. Grantees might be asked to verify that they do not provide support, directly or indirectly, for terrorist organizations or terrorist activity. Additionally, grantees might be asked to consent in advance to an audit of their books and records if questions arise about their activities.
- *Educate board and staff about internal anti-terrorism measures.* Grantmakers' boards and staff should be familiar with the provisions of the Executive Order and the Patriot Act and their help should be enlisted in learning about grantees and potential grantees and their associates. For grantmakers with local staff abroad, this awareness-building is particularly likely to help lead to names to be checked against the four lists of Listed Persons.
- *Consider development of an anti-terrorism policy statement.* Adoption of an anti-terrorism policy statement may help to underscore a grantmaker's commitment to carry out the spirit of the Executive Order and the relevant provisions of the Patriot Act—both to the internal audience of board members and staff and to the general public.
- *Discuss concerns with legal counsel.* Specific grants in specific contexts are likely to trigger more concern about potential violations of the Executive Order or the Patriot Act. Grantmakers should discuss these

concerns with legal counsel, ideally counsel experienced in criminal law and government investigations.

- *Document steps taken to comply with the Executive Order and the Patriot Act.* It is important for grantmakers to *document* the steps they take to comply with the Executive Order and the Patriot Act. At a minimum, grantmakers' files should reflect that all names associated with a grantee have been checked against the four lists of Listed Persons.
- *Keep informed about developments.* Above all, grantmakers should have a diligently followed and carefully documented practice of keeping themselves informed about the Treasury Department List, the Executive Order Annex List, the State Department List and the SDN List, which all will be supplemented regularly. In addition, and particularly in the current political and social environment, changes to the governing laws are likely. Grantmakers should stay abreast of such changes and any implications for their work.

International grantmakers should proceed with the important work they do and not allow the new regulatory environment to delay or curtail the delivery of their support. Thoughtful and careful attention to grantees' identities and associations, combined with detailed recordkeeping, will help to ensure that organizations comply with the law while also fulfilling their missions.

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