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You Got Served: DOJ's New Approach to NDAA Subpoenas and the Significant Ramifications for Foreign Financial Institutions

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Since President Donald Trump's inauguration, his administration has moved at a dizzying pace to adopt a flurry of executive orders and agency guidance. Although most of these actions indicate a decline in enforcement activity, there are a few in particular demonstrating an increased focus on combating Hamas and so-called "transnational criminal organizations"—most notably, Mexican cartels. This is likely to have significant ramifications for financial institutions operating in the United States and abroad.

Indeed, while the announcement of these enforcement priorities requires financial institutions to update and strengthen their compliance programs, there may be a significant shift buried in the policy statement regarding Hamas—namely, an indication of DOJ's intention to increase the use of its subpoena power under 31 U.S.C. §5318(k), a power that was broadened in the National Defense Authorization Act for Fiscal Year 2021.

Under that expanded authority, DOJ can now subpoena any financial institution that maintains

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a correspondent bank account in the United States for financial records located anywhere in the world pertaining to any accounts held at the foreign financial institution, where before it could only seek records related to the correspondent bank account held in the United States.

For foreign financial institutions, the law can be particularly be challenging, because compliance with a subpoena may require production of documents from jurisdictions where foreign law would prohibit such disclosure, and the new version of Section 5318(k) explicitly states that the fact that compliance would violate foreign law is not a sufficient basis to resist production.

Although DOJ has had the authority to issue Section 5318(k) subpoenas for some time, it has been used sparingly, and only after review and approval by DOJ's Office of International Affairs ("OIA").

Now, though, this powerful tool no longer requires OIA approval in all instances, and DOJ's increased targeting of foreign terrorist organizations and transnational criminal groups will likely mean that foreign financial institutions more frequently find themselves in uncomfortable situations, as they try to balance complying with a Section 5318(k) subpoena and following their local laws.

> The new administration has moved quickly and demonstrated its intention to take an aggressive approach to combating Hamas and cartels. How that approach will play out remains unclear.

For foreign banks, it would be wise to get ahead of the problem by consulting with counsel proactively about their compliance and record-retention programs, and certainly to enlist counsel's help if the bank receives a subpoena implicating these issues.

DOJ's Focus on Mexican Cartels and Hamas

A. The Cartel Executive Order. The president has the authority to designate a foreign party that he has deemed to be a national security threat as a Foreign Terrorist Organization (FTO) under the Immigration and Nationality Act, 8 U.S.C. §1189, and/or a Specially Designated Global Terrorist (SDGT) under the International Emergency Economic Powers Act, 50 U.S.C. §1702, and Executive Order 13224. Entities designated as FTOs or SDGTs are subject to economic sanctions administered by OFAC, and U.S. persons who transact with or provide support to FTOs may be subject to criminal and civil liability.

Immediately after his inauguration, Trump issued Executive Order 14157 ("Cartel Order"), *Designating Cartels and Other Organizations as Foreign Terrorist Organizations and Specially Designated Global Terrorists*. 90 FR 8439.Under the Cartel Order, the president directed various government agencies to propose such designations for transnational criminal organizations, and, in particular, Mexican drug cartels.

Although the Executive Order does not identify any specific cartels, it does refer to Tren de Aragua and La Mara Salvatrucha (commonly referred to as "MS-13") as examples of national security threats, suggesting that these organizations will be designated. The Executive Order required the relevant U.S. government agencies make recommendations about the organizations to be designated by Feb. 3, 2025 although, as of Feb. 18, those recommendations have not been made public.

B. Attorney General Bondi's Cartel and Oct. 7 Memoranda. On Feb. 5, Attorney General Pam Bondi released a memorandum titled *Total Elimination of Cartels and Transnational Criminal Organizations* (the "Cartel Memo"), which, in line with the policies expressed in the Cartel Order, detailed DOJ's focus on the "total elimination of Cartels and Transnational Criminal Organizations (TCOs)."

In the Cartel Memo, Bondi directed DOJ employees to pursue the "most serious, readily provable offense" against members of cartels or TCOs, which, according to the memorandum,

would include terrorism, racketeering, and sanctions offenses.

The memorandum also instructed DOJ's Foreign Corrupt Practices Act Unit to "prioritize investigations related to foreign bribery that facilitates the criminal operations of Cartels and TCOs," such as "bribery of foreign officials to facilitate human smuggling and the trafficking of narcotics and firearms," and to "shift focus away from investigations and cases that do not involve such a connection."

What can foreign banks do to mitigate these risks?It is impractical for most financial institutions to exempt themselves from the demands of an Section 5318(k) subpoena by foregoing a U.S. correspondent bank account. Instead, banks should work proactively with counsel to get ahead of the situation.

Finally, the Cartel Memo also suspends several requirements for Main Justice authorization for investigations or prosecutions "for all matters relating to foreign bribery associated with Cartels and TCO," allowing those cases to proceed more quickly.

That same day, Bondi released another memorandum titled *Establishment of Joint Task Force October 7* (the "October 7 Memo"), that "establishes Joint Task Force October 7," known as "JTF 10-7." JTF 10-7 will be tasked with "seeking justice for victims of the October 7, 2023 terrorist attack in Israel, addressing the ongoing threat posed by Hamas and its affiliates, and combating antisemitic acts of terrorism and civil rights violations in the homeland."

In addition to efforts to prosecute Hamas members themselves, the October 7 Memo explains that JTF 10-7 will focus on "[i]nvestigating and prosecuting those responsible for funding Hamas." Of particular note, with respect to JTF 10-7 investigations, the October 7 Memo suspends the provision of the DOJ policy manual that requires prior approval by OIA for the issuance of "subpoenas to foreign banks with correspondent accounts in the United States pursuant to 31 U.S.C. §5318(k)."

The NDAA and Section 5318(k) Subpoenas

Enacted by Congress on Jan. 1, 2021, the National Defense Authorization Act for Fiscal Year 2021 (the "NDAA") authorizes DOJ to "issue a subpoena to any foreign bank that maintains a correspondent account in the United States and request any records relating to the correspondent account or any account at the foreign bank, including records maintained outside of the United States" when those records are "the subject of—(I) any investigation of a violation of a criminal law of the United States; (II) any investigation of a violation of this subchapter; (III) a civil forfeiture action; or (IV) an investigation pursuant to section 5318A." *See* Pub. L. 116–283, §6308; codified at 31 U.S.C. §5318(k).

Unlike the previous version of Section 5318(k), the law now authorizes subpoenas for records related to any account at a foreign bank that maintains a correspondence account in the U.S., not just the correspondent account itself, and also no longer requires the records sought to relate only to potential financial crimes.

Section 5318(k) permits DOJ to subpoena records from a foreign financial institution that are held abroad. As is all too familiar to legal and compliance folks working at foreign banks, there are often foreign law restrictions

on the disclosure of certain information, even in response to legal process.

The NDAA, however, expressly provides that "[a] n assertion that compliance with" such a subpoena "would conflict with a provision of foreign secrecy or confidentiality law shall not be a sole basis for quashing or modifying the subpoena." 31 U.S.C. §5318(k)(3)(A)(iv)(II).

In other words, foreign banks could find themselves in a tight spot, stuck between U.S. prosecutors clamoring for records and foreign regulators holding them back or threatening penalties for violations of foreign law.

Moreover, the penalties for non-compliance with a U.S. subpoena in these circumstances can be steep: the NDAA authorizes financial penalties of $50,000 per day. Foreign subpoena recipients also run the risk of being held in contempt, notwithstanding an assertion that foreign law prohibits production, as we discussed in our Dec. 19, 2024 article on foreign sovereign immunity in criminal cases.

Given the potential harm to foreign relations caused by forcing foreign banks into this dilemma, DOJ policy has historically required prosecutors to obtain approval from OIA before serving such subpoenas. OIA is the component of DOJ tasked with coordinating between individual prosecutors' offices and foreign law enforcement, and, because of comity concerns, typically denies requests for Section 5318(k) subpoenas, instead directing prosecutors to pursue other options, such as obtaining records through mutual legal assistance treaties. But with respect to Hamas-related investigations conducted by JTF 10-7, the October 7 Memo now suspends the OIA-approval requirement. As a result, the review that previously was intended to avoid foreign-relations headaches is no longer mandated.

For now, the roll-back of OIA approval applies only to Section 5318(k) subpoenas issued as part of a JTF 10-7 investigation—a limited, specific pool. But that should be cold comfort to financial institutions. For one, terrorism-financing investigations can be sprawling and involve financial transactions in dozens of countries, particularly when dealing with sophisticated actors like Hamas.

Such investigations can also expose banks to potential criminal charges, including sanctions evasion, money laundering, and even providing material support to terrorists, as DOJ is now permitted to pore through financial records from around the globe. Moreover, the fact that DOJ is willing to remove the OIA-approval requirement for one category of high-priority investigations suggests that it would be willing to do so for other types of investigations that the administration determines to be sufficiently important.

For instance, given the Cartel Order and Cartel Memo, it is likely that a number of Mexican cartels will be designated as FTOs. Should DOJ conclude that its investigation of those groups is hampered through the OIA approval requirement, it may seek to similarly excise that requirement for investigations of those groups.

Similarly, given the administration's commitment to sanctions against Iran (and likely other countries as well), there may soon be a push to suspend the approval requirements for prosecutors conducting certain sanctions investigations as well. Given that the approval requirement is simply a matter of DOJ policy, it can, and likely will, be suspended to suit the new administration's law-enforcement prerogatives.

What To Do?

So, in light of this, what can foreign banks do to mitigate these risks?It is impractical for most financial institutions to exempt themselves from the demands of an Section 5318(k) subpoena by foregoing a U.S. correspondent bank account. Instead, banks should work proactively with counsel to get ahead of the situation.

First, given the administration's intense focus on Hamas, cartels, and TCOs, banks need to ensure that their compliance and KYC programs are as robust as possible, so as to prevent these groups from using the bank's services.

Second, companies should review their data- and document-retention practices to see if there are practical changes that can be made to try to reduce the likelihood of a conflict between subpoena compliance and foreign law, such as housing certain categories of documents in a jurisdiction that permits disclosure in response to a U.S. subpoena.

Third, where possible, foreign banks should engage with their local regulators and law experts to be able to cogently explain the conflict, should one arise, to a U.S. court. While local law issues will not be dispositive if a bank seeks to quash a Section 5318(k) subpoena, the conflict can still be one in a series of arguments made by a subpoena recipient.

Fourth, in the event a bank receives a Section 5318(k) subpoena, they should consult counsel as soon as possible, so that counsel can attempt to negotiate a more palatable solution with DOJ.

The new administration has moved quickly and demonstrated its intention to take an aggressive approach to combating Hamas and cartels. How that approach will play out remains unclear—but, one thing that is apparent is that foreign financial institutions need to think ahead about these issues to avoid being caught in a no-win situation.

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