

# Treasury Designations Webinar

## For Charity and Security Network

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# Designation Regime Legal Frameworks

# Legal Authority and Criteria for Foreign Terrorist Organization (FTO) Designation

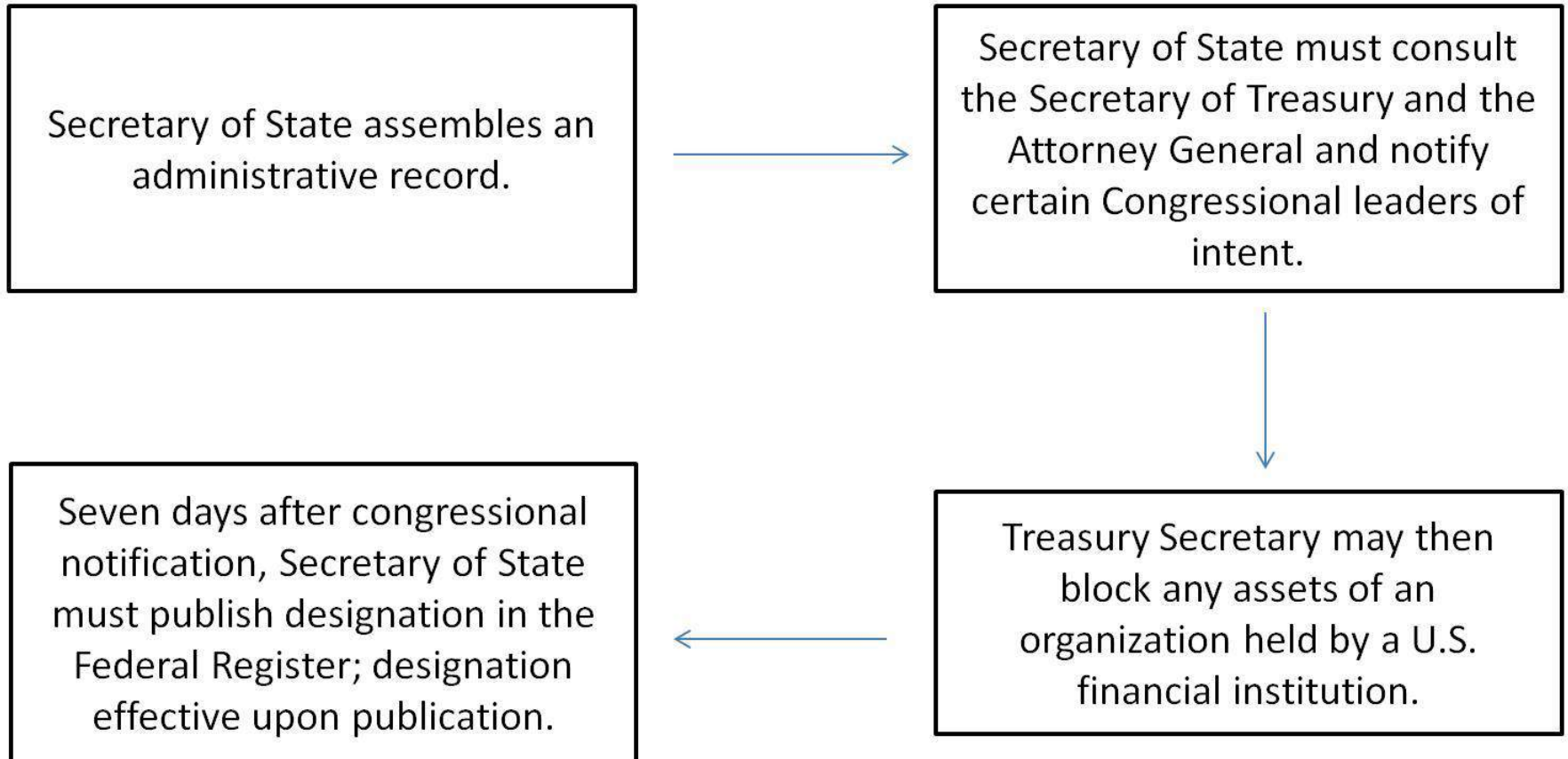
The Anti-Terrorism and Effective Death Penalty Act (AEDPA) gives the Secretary of State broad discretion to designate FTOs. The Secretary of State may designate an organization an FTO upon determining that:

- (1) the organization is a foreign organization;
- (2) the organization engages in terrorist activity, terrorism, or material support of terrorism, or retains the capability and intent to engage in terrorist activity or terrorism; and
- (3) the terrorist activity or terrorism of the organization threatens the security of U.S. nationals or the national security of the United States.

8 U.S.C. § 1189



# FTO Designation Procedure



# Consequences of FTO Designation

The consequences of designation are severe, and include:

- (1) Any assets of the organization held by U.S. financial institutions may be frozen completely.
- (2) U.S. and foreign financial institutions, organizations, and individuals can face criminal charges for knowingly providing “material support.”
- (3) Treasury Department may also freeze those other entities’ and individuals’ U.S. assets if it investigates them under SDGT regime.
- (4) If the Treasury Department determines that the entities or individuals meet the criteria for SDGT designation, it may block their assets indefinitely.
- (5) FTO designation has immigration consequences.

# Post-Designation Administrative Review

- Designated FTO may only seek administrative review two years after it has been designated; review process is limited.
- Designated FTO may submit to Secretary of State a petition for revocation with evidence that the organization's circumstances are "sufficiently different."
- Within 180 days, Secretary of State must make a determination whether revocation is warranted and publish that decision in the *Federal Register*.
- Secretary of State may rely on classified evidence that the designated entity cannot see.
- FTO designations can also be revoked if the Secretary of State determines that there are grounds for doing so and notifies Congress. Congress can also pass legislation to revoke designation.

# Post-Designation Judicial Review

- Judicial review is circumscribed, in timeframe, venue, and scope.
- The designated organization must seek judicial review within 30 days of designation, and may only seek that review in the D.C. Circuit.
- The D.C. Circuit has held that it will limit its review to the first two criteria for designation—i.e., whether the organization is foreign, and whether it engages in terrorism or material support for terrorism, or has the capability and intent to engage in terrorism or terrorist activity.
- According to the D.C. Circuit, the third criterion—whether the designated FTO’s activities threaten U.S. nationals or national security—is an unreviewable political question.
- Judicial review generally limited to administrative file that State Department compiled, although government may present additional classified evidence to the court.

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# Post-Designation Judicial Review

## (continued)

The D.C. Circuit may only overturn a designation if it concludes that the designation was:

- (1) arbitrary and capricious;
- (2) unconstitutional (but the court will likely only adjudicate constitutional questions if the designated entity has property in the United States, or if it has a presence and substantial connections here);
- (3) lacks substantial support in the administrative record (as supplemented by classified information submitted to the court); or
- (4) does not comply with the procedures established by AEDPA.



# Legal Authority for Specially-Designated Global Terrorist (SDGT) Designation

- The International Emergency Economic Powers Act (IEEPA) gives the president broad authority to declare a national emergency with respect to a specified threat, and to take action in response to it. Invoking this authority, President Bush issued Executive Order 13224 in 2001, and claimed the power to impose broad sanctions on any person or organization designated a “specially designated global terrorist.”
- **Executive Order 13244 can apply to U.S. and foreign organizations and individuals.**

## Criteria for SDGT Designation or Block Pending Investigation

- E.O. 13224's criteria for designation as an SDGT are vague, and may rest on guilt by association.
- There is no set evidentiary standard that the government must meet.
- The USA PATRIOT Act of 2001 amended IEEPA to permit the Secretary of the Treasury to block the assets of an entity pending investigation. The same criteria apply if an entity is blocked pending investigation.

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# Criteria for SDGT Designation or Block Pending Investigation (continued)

These criteria apply to entities and individuals (both referred to as “persons”):

- (1) foreign persons on an annexed list created at the time the order was issued and added to thereafter (“the SDGT list”);
- (2) foreign persons determined by the Secretary of State to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States;

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## Criteria for SDGT Designation or Block Pending Investigation (continued)

- (3) foreign or U.S. persons determined by the Secretary of the Treasury to be owned or controlled by, or to act for or on behalf of the persons included in the SDGT list;
- (4) foreign or U.S. persons the Secretary of the Treasury determines (a) assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to, such acts of terrorism or the persons listed on the SDGT list, or (b) are “otherwise associated” with persons on the SDGT list

E.O. 13224 and implementing regulations at 31 C.F.R. § 594

# SDGT Designation Procedure

- The process for designating a person or organization as an SDGT is somewhat unclear, as it is not laid out in any statute or regulation.
- The Treasury Department's descriptions of the process on its website, in litigation filings, and in congressional testimony do not comport with the past experience of some designated organizations and individuals.

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# SDGT Designation Procedure

## (continued)

As described by the Treasury Department:

- SDGT designation involves an investigation into the party to be designated, creation of an administrative record (which can include classified information), and consultations with the Secretary of State and the Attorney General.
- If the Treasury Department deems the administrative record “legally sufficient”—meaning the record demonstrates “a reasonable basis” to determine that the designee meets “the criteria for designation”—the entity can be designated as an SDGT, its assets can be frozen without prior notice, and the designation will be published in the *Federal Register*.

# SDGT Designation Procedure

## (continued)

- The Treasury Department's blocks pending investigation have been imposed without prior notice. The effect and consequences are the same as SDGT designation.

# Consequences of SDGT Designation or Block Pending Investigation

The consequences of designation are severe, and include:

- (1) All property and interests in property in the United States—or that later come within the United States or within the possession or control of U.S. persons—are blocked.
- (2) E.O. 13224 prohibits “any transaction or dealing” with an SDGT by a U.S. person or within the United States, including making or receiving any contribution of funds, goods, or services to or for the benefit of a designated entity.
- (3) The same consequences apply for an entity or person blocked pending investigation. Criminal and civil penalties may apply for violations.
- (4) Under Office of Foreign Assets Control (“OFAC”) regulations, a designated entity or an entity that is blocked pending investigation is subject to certain licensing constraints in paying for legal services; a license is not needed for pro-bono representation.



# Administrative Review

The process is set forth in very general terms in 31 C.F.R. § 501.807:

- The entity may submit arguments or evidence to attempt to establish that there is not a sufficient basis for the designation or block. The entity may also propose remedial steps, “such as corporate reorganization, resignation of persons from positions in a blocked entity,” or similar steps that the entity believes would negate the basis for designation.
- A designated or blocked entity may request a meeting with the Treasury Department, but the Treasury Department reserves the right to refuse a meeting.
- After considering the entity’s submission, the Treasury Department will issue a written decision.
- There are no time limits for an entity to seek this relief, or for the Treasury Department to respond to a request for relief.

# Judicial Review

- Judicial review for U.S. Person entities is not subject to the constraints of the FTO regime.
  - No timeframe, scope, or venue limitations.
- U.S. Person entities have full range of constitutional protections and should assert them.
- Key cases are *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 647 F. Supp. 2d 857 (N.D. Ohio 2009) and *Al Haramain Islamic Foundation, Inc. v. United States Department of Treasury*, 686 F.3d 965 (9th Cir. 2012).

# Final Notes

- SDGT regime applies to U.S. Person entities; FTO does not.
- Since KindHearts designation in 2006 and subsequent litigation and court rulings in 2009-10, the U.S. government has not designated or blocked a U.S. Muslim civil society organization under the SDGT regime.
- IEEPA is an extremely broad statute. As President Bush did in 2001 with E.O. 13224, another president could create another designation regime applicable to U.S. individuals or entities.
  - Constitutional protections would still apply.