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Antiterrorism Measures

WHILE PRESS REPORTS of responses to the Sept. 11 attacks tend to concentrate on military and diplomatic cooperation, multinational companies also face important new coordinated regulatory requirements arising from U.S. and international action.

Since Sept. 11, the United States and other nations, acting in compliance with United Nations resolutions, have implemented antiterrorism measures that directly affect the international operations of these companies. The so-called Bush Doctrine—nations that harbor terrorists will be treated as terrorists—has undoubtedly contributed to establishing this collaborative regime. Actions by the U.S. and other governments pursuant to U.N. resolutions are creating a framework for combating terrorism and also the first draft of what may become new uniform international trade and investment norms for defeating terrorism.

Further, the Sept. 11 attacks have led many companies to conduct limited, focused audits to confirm their controls over equipment, materials and technology that could potentially contribute to the development of biological, chemical or nuclear weapons. These steps follow news reports that al-Qaeda manuals showed plans to purchase from open sources items potentially usable for building weapons of mass destruction. Further, the U.S. Commerce Department has contacted some U.S. companies about these concerns. By

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adopting this proactive approach, these companies minimize the risk of inadvertently violating U.S. laws and of creating embarrassing public relations problems.

Executive order targeting terrorists around the world

On Sept. 23, President Bush signed Executive Order 13224, which requires "U.S. persons" to block the assets of a new category of sanctioned parties, known as specially designated global terrorists (SDGTs). The order designated 11 individuals, 12 organizations, three charities and one business entity. For these purposes, "U.S. persons" include U.S. citizens and permanent residents, U.S. corporations and their non-U.S. branches and anyone in this country. Also prohibited are any business or other transactions by U.S. persons with SDGTs.

The Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury is responsible for implementing the executive order. In the past two months, OFAC has added to the initial list of SDGTs 39 individuals, organizations and entities (Oct. 12), 22 groups already designated as foreign terrorist organizations (Nov. 2) and 46 entities and 16 individuals connected with suspected terrorist financing networks (Nov. 7). On Dec. 4, OFAC named three new Hamas-connected entities.

Because many SDGTs operate under multiple names, the official OFAC antiterrorism list has become lengthy, with multiple designators for the same individual

or entity. The current list appears at the OFAC Web site, where OFAC also maintains its master list of "specially designated nationals" that includes agents of sanctioned governments and drug traffickers: www.treas.gov/ofac.

At this point, OFAC has four different sets of regulations directed at terrorists, with additional regulations anticipated to implement the executive order. OFAC would greatly assist U.S. industry and their counsel by consolidating these measures in a single set of user-friendly regulations.

Bush threatened to freeze the assets and transactions of banks and other financial institutions that refuse to share information about terrorists or freeze their assets. Sec. 1(d) of the Sept. 23 executive order includes as the target of the sanctions persons who "provide...financial or other services to or in support of" designated terrorists. Sec. 5 broadly authorizes the secretary of the treasury, in consultation with the secretary of state and the attorney general, to take actions short of the blocking of property against those whose acts cause them to fall within the scope of § 1(d).

Unilateral action by the United States to carry out this threat against parties in other nations would risk a breakdown of the cooperation with those nations that Bush has explicitly relied on in the military and economic action against the Taliban and other terrorists. That surely explains U.S. efforts to persuade U.N. Security Council members to adopt antiterrorism resolutions and to convince U.S. allies in Europe to act within their existing institutions—e.g., the European Union—to achieve a coordinated response.

The United States' action against the

Taliban and al-Qaeda has not been unilateral. In October 1999, the U.N. Security Council acted to mandate under Chapter VII of the U.N. Charter that all member states freeze Taliban funds and other financial resources. S.C. Res. 1267 (Oct. 15, 1999). In December 2000, the council took similar action against Osama bin Laden and his associates, including those in al-Qaeda. S.C. Res. 1333 (Dec. 19, 2000). The Security Council resolutions are implemented through the Taliban Sanctions Committee, which designates those individuals, organizations and entities subject to blocking.

The European Union implemented these U.N. resolutions through Council and Commission Regulations that are directly applicable to E.U. member states. Council Reg. 467/2001 (March 6, 2001) and Comm'n Reg. (EC) No. 1354/2001 (July 4, 2001). Thus, before Sept. 11, E.U. member states were obligated to block assets of the Taliban and al-Qaeda leaders, although the extent of implementation and enforcement may have varied within member states.

After Sept. 11, the U.N. Security Council approved a new resolution mandating continued blocking of assets of "persons who commit, or attempt to commit, terrorist acts or participate in or facilitate" such acts. S.C. Res. 1373 (Sept. 28, 2001). It also called for freezing assets of entities "owned or controlled" by such persons and funds "derived or generated" from property such persons own.

On Oct. 6 and 17, the U.N. Taliban Sanctions Committee added to its designation list all those persons and entities that the United States had added under Bush's Sept. 23 executive order. Further, the committee expanded the list promptly on Nov. 9 to include the 46 entities and 16 individuals that the United States had named as involved in financing terrorist networks. The European Commission issued new regulations to create a binding obligation on E.U. member states to freeze the assets of those entities and individuals so designated. Comm'n Regs. 1996/2001 (Oct. 11, 2001), No. 2062/2001 (Oct. 19, 2001) and 2199/2001 (Nov. 12, 2001).

Finally, the European Commission

proposed on Oct. 2 a far-reaching antiterrorism regulation to implement U.N. Resolution 1373, but the council has not yet acted upon the draft. Under that proposal, the E.U. would not only cut off financial services to designated terrorists but also require a national government ruling before dealing with an undesignated entity about which there is a "reasonable suspicion" that it is acting for or on behalf of those that are designated. COM (2001) 713 final (2001/0228/CNS) (Nov. 30, 2001). Such a measure would impose under Art. 6 a rigorous compliance standard and verification procedure, in some respects more stringent than those existing under U.S. sanctions regulations.

Multinational companies face new coordinated regulatory requirements arising from U.S. and global action.

Under U.N. Resolution 1373, all U.N. member states are obligated to report by late December to the Sanctions Committee established under that resolution on the steps that they have taken to implement the resolution. If the United Nations were to make this information public, all cooperating parties would better understand the pattern of global implementation of the antiterrorism measures.

Due diligence to implement blocking requirements

U.S. companies must ensure that they do no business with any of the SDGTs (or other OFAC-designated parties) and have blocked any property of SDGTs that happens to be in their possession or control, including goods or accounts payable. For a number of years, U.S. financial institutions, with OFAC

encouragement, have installed interdiction software to screen funds transfers that are executed electronically. This permits U.S. banks and non-U.S. banks with U.S. operations to determine whether particular transactions require blocking or rejection. As the OFAC designation lists grow, and with the addition of the global terrorists, many manufacturing and non-banking service companies are considering installation of interdiction software to assist in reviewing sales transactions and vendor purchases.

In defense and other high-technology industries, American companies are accustomed to adopting strict security procedures to prevent unauthorized access to equipment and technology. Reports about the workings of the al-Qaeda network, however, reveal that it was prepared to find targets of opportunity for developing biological, chemical and even nuclear weapons. As a result, some U.S. companies have initiated limited and focused audits to determine whether, for example, their laboratories and testing facilities have equipment that terrorist groups might attempt to take or use.

Included in such a review might be requirements to list equipment or technology of potential utility to such groups, and to determine who has access or authority to grant access; how the items or data are secured; and where responsibility rests for acquisition, transfer or disposition. Good record-keeping of such efforts would presumably demonstrate good-faith compliance efforts in the unlikely event that any employees (or others with access to company facilities) were, in fact, collaborating with such groups or that equipment or technology had fallen into the hands of terrorists.

Finally, the tough U.S. stance on cooperation explains why some U.S. companies are requiring their non-U.S. subsidiaries to receive parent company approval before entering into any transaction with an entity that is the target of the terrorism sanctions applicable to U.S. persons. Local law, implementing the U.N. measures, will likely bar any proposed foreign-subsidiary transaction with a designated terrorist, and there would be severe public relations consequences resulting from any other course.