

International Trade Alert

New Sanctions Program on Somali Piracy Has Broad Implications for Marine Insurers and Parties to International Shipments by Sea

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On April 12, 2010, President Obama issued [Executive Order 13536](#) (“the Order”), which targets persons who engage in acts of piracy at sea and prohibits any transaction in which the persons designated in that Order have a direct or indirect interest. The Order has broad implications for parties with an interest in vessel cargo shipments that may transit waters where Somali pirates have been active—including maritime insurers, sellers and buyers of cargo shipped through international waters, non-vessel operating common carriers and others involved in international shipments by sea.

In light of the significant penalties associated with violation of the new Order, as well as the potential legal risks associated with the interpretive issues identified below, it is critical that parties involved in international vessel transactions through routes that are at risk for piracy be well prepared to respond in a manner that protects their legal interests. Shippers/charterers, insurers, vessel owners and other interested parties should ensure they consider these issues early in the process and incorporate the following into their legal risk management and preparedness strategy—

- assess the risk that ransom payments or transactions involving Somali piracy may violate the Order before proceeding with such payments
- assess potential issues arising from contract or maritime legal principles such as the law of “general average” and manage any potential commercial disputes that may arise as a result of potential restrictions imposed by the Order
- manage communications with the implementing agency—the Treasury Department’s Office of Foreign Assets Control (OFAC)—and with other parties and obtaining licenses where necessary.

BACKGROUND

Executive Order 13536 of April 12, 2010 blocks any payment or other transaction involving property or property interests of persons or entities who are: (1) listed by the president in an annex attached to the Order or (2) determined by the secretary of the treasury in consultation with the secretary of state to have engaged in certain specifically identified acts that destabilize the country. The list currently includes the names of several individuals and one entity; however, future designations are certain to come.

Notably, the Order specifically determines that “acts of piracy or armed robbery at sea off the coast of Somalia threaten the peace, security, or stability of Somalia.” In addition, the Order provides for the designation of additional persons on the grounds that they are either engaged in the specified activities of concern or are owned or controlled by or have acted directly or indirectly on behalf of any persons who are already designated.



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MANAGING LEGAL RISK UNDER THE ORDER

Assess the risk that ransom payments or related transactions involving Somali piracy may violate the Order. Any ransom payment involving Somali pirates may potentially violate the Order. It is, therefore, critical to bring clarity to that issue in a given set of facts as quickly as possible. Unfortunately for parties dealing with the potential loss of life, cargo and other property in a tense and fluid situation, it may be difficult to answer the question of whether a ransom payment is compliant with the Order with any degree of certainty under current agency guidance. While the prohibitions only apply to transactions involving “designated” parties, there are a number of reasons not to take false comfort in that limitation:

- The law applies on a strict liability basis to any ransom payment or other transaction in which a designated pirate has an interest. Cargo owners, vessel owners and charterers, insurers and others involved in the transaction will not find any “safe harbor” language in the Order, and duress, extortion and reason to know do not constitute affirmative defenses to a prohibited payment.

Even assuming a cargo owner or insurer could ascertain with certainty the identity of the pirates on board a vessel—presumably, asking for a driver’s license or local Pirate’s Union card to verify identity is not a viable option—a ransom payment to individuals who are not identified as blocked may still violate the Order. Under long-standing agency interpretation of executive orders such as this one, a party making or participating in a payment would be in violation if it turns out that a named person who is not a party to the “transaction,” i.e., among the group of pirates negotiating for and receiving the ransom, nonetheless has an “interest” in the transaction, e.g., will take a share of the bounty, whether or not the payor had any reason to know that person had any such interest.

- The standard of conduct the agency expects from a party faced with a ransom situation is unclear. Because, in principle, the prohibitions apply only where a designated party has an interest (even if indirect and contingent) in the ransom, OFAC does recognize, in theory, that not all ransom payments involving piracy are prohibited under the Order. The problem for the victim, however, is that the standard of conduct the agency expects from a party facing a ransom situation is unclear. In other contexts that are arguably, although not clearly, analogous, OFAC has in the past issued guidance to the banking industry in an effort to clarify the agency’s expectations with respect to whether and under what circumstances it is sufficient to merely check the names of parties to a transaction to ensure that they are not listed, and when it is necessary, instead, to conduct further “research” to determine whether a party that is not listed may have relevant ties to a listed party. No such guidance has been made available here. Accordingly, parties proceed at some peril in considering a ransom payment and the way in which the agency may view the facts and circumstances surrounding such a payment in hindsight.
- Other interested parties may create legal risk. The involvement of multiple parties—various layers of insurance interests, charterers and re-charterers of varying nationalities, cargo owners, family members of the crew, logistics service providers and others—may complicate matters further and create risk. Even where it is clear the individuals behind a particular ransom demand are the targets of the Order, some of the insurers, the vessel owner or other interested parties may be non-U.S. persons who are not subject to the prohibitions of the Order. This may present difficult issues not only of coordination, but also of potential liability exposure for U.S. persons who have strong interests in participating in decision-making with respect to the seized vessel, crew and cargo.

Assess potential issues arising from contract or maritime legal obligations like “general average.” Depending on the circumstances, even a payment made independently by a non-U.S. party to a person subject to the Order may give rise to claims against the U.S. cargo owners, insurers and other U.S. persons in the transaction for compensation under established principles of maritime law. For example, under the maritime law of “general average,” a non-U.S. party who pays a ransom to save the vessel and its crew and cargo may seek to hold other interested parties responsible for contributing equally to the ransom amount. To the extent the Order applies to the transaction, it would appear to prohibit payment in satisfaction of such a claim in the absence of authorization from the agency. At the same time, lack of clarity as to application of the Order may lead to disputes among the parties with respect to their respective obligations.

Manage communications with third parties and engage agency officials early regarding the issues, risks and potential licensing considerations. Given the fluid nature of the situation, as well as the stakes at issue, consideration should be given to engaging agency officials as soon as possible, assessing potential licensing needs and positioning the company to obtain expedited review where necessary. To the extent the company believes there are grounds to assert that the Order does not

apply, it should be prepared to support that position in a manner that reflects careful consideration of the facts available and should closely monitor the situation for potential changes (e.g., new evidence of designated party interest; new designation of the individuals involved in the current negotiation). Finally, it is important that U.S. persons manage communications with other interested parties in the transaction to make clear any potential limitations on their role (including limitations imposed under terms and conditions of a specific OFAC license) and ensure their personnel act in accordance with those limitations.

CONCLUSION

Presumably, the Order was not intended to make a bad situation worse for parties who are already faced with potential loss of life and/or property, as well as potential ransom demands in the tens or hundreds of millions of dollars. Unfortunately, however, the Order creates legal uncertainty for such parties. It is critical to assess these issues carefully and early in the process with experienced sanctions counsel in order to manage the company's risk and ensure its ability to respond quickly and appropriately under the circumstances.

CONTACT INFORMATION

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