

Hijacked: The Unlikely Interface Between Somali Piracy and the U.S. Regulatory Regime

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I. INTRODUCTION

As of March 4, 2011, 33 vessels and 711 crew members were being held hostage by pirates.¹ The international community has engaged in various efforts to address the continuing problem of pirate hijackings with seemingly little success. The United States has also taken its own swipe at piracy through Executive Order 13,536, entitled

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1. *Piracy News & Figures*, ICC COMMERCIAL CRIME SERVS. (Mar. 16, 2011), <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures>.

“Blocking Property of Certain Persons Contributing to the Conflict in Somalia” (Order), that was issued by President Barack Obama on April 12, 2010.² Upon its issuance, the Order created a great deal of confusion and consternation with respect to whether it prohibited the payment of ransom to pirates. The answer as it emerged has proved to be “yes,” “no,” and “maybe” and has resulted in a process whereby applications for guidance with respect to the payment of certain ransoms (and related insurance payments) are made to the Office of Foreign Assets Control of the U.S. Treasury Department (OFAC). The authors of this Article have both been actively involved in the development of the application process and have represented numerous clients seeking guidance with respect to ransom-related payments. This Article explains the Order and its import for piracy situations, and details the authors’ experience with both the OFAC guidance process and related procedural and substantive issues that have arisen.

II. EXECUTIVE ORDER 13,536

The Order became effective immediately³ upon issuance and just as immediately caused a great stir in shipping, insurance, and related industries.⁴ The question in the air was: “Does the Order outlaw the payment of ransom to pirates?” While the Order does not per se prohibit the payment of ransom to pirates—it contains no such blanket provision—it does contain language causing some to argue that the Order has, in effect, done so. In its preamble, the Order finds:

2. Exec. Order No. 13,536, 75 Fed. Reg. 19,869 pmb1. (Apr. 12, 2010).

3. With respect to a person listed on the Annex to the Order, the interim regulations implementing the Order (Regulations) became effective at the same time as the Order—at 12:01 a.m. Eastern daylight time on April 13, 2010. 31 C.F.R. § 551.302(a) (2010). With respect to a person who was not listed on the Annex to the Order, but who was otherwise blocked pursuant to the Order, the Regulations became effective on “the earlier of the date of actual or constructive notice that such person’s property and interests in property are blocked.” *Id.* § 551.302(b).

4. The President’s authority to issue the Order was drawn from the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706 (2006); the National Emergencies Act, Pub. L. No. 94-412, 50 U.S.C. §§ 1601-1651 (2006); section 5 of the United Nations Participation Act, as amended, 22 U.S.C. § 287(c) (2006); and section 301 of Title 3 of the United States Code, 3 U.S.C. § 301 (2006). The Provisions of Executive Order 12,866 and the Administrative Procedure Act (5 U.S.C. pt. I, ch. 5 (2006)), requiring notice of proposed rulemaking, an opportunity for public participation, and a delay in the effective date of the Order and its implementing regulations did not apply because they involve a foreign affairs function. Somalia Sanctions Regulations, 75 Fed. Reg. 24,394-02, 24,395 (May 5, 2010).

[T]he deterioration of the security situation and the persistence of violence in Somalia, and acts of piracy and armed robbery at sea off the coast of Somalia [as well as violations of the arms embargo imposed by certain United Nations Security Council Resolutions] constitute an unusual and extraordinary threat to the national security and foreign policy of the United States, and [the President] declare[d] a national emergency to deal with that threat.⁵

The Order identifies categories of “blocked” persons (Blocked Person(s)) based on their engagement in certain conduct prohibited by the Order. The Order states:

- (a) All property and interests in property⁶ that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any overseas branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:
 - (i) the persons listed in the Annex to this order; and
 - (ii) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

5. Exec. Order No. 13,536, 75 Fed. Reg. 19,869; OFFICE OF FOREIGN ASSETS CONTROL, DEP’T OF THE TREASURY, SOMALIA: WHAT YOU NEED TO KNOW ABOUT SANCTIONS AGAINST PERSONS CONTRIBUTING TO THE CONFLICT IN SOMALIA (Sept. 30, 2010) [hereinafter SOMALIA], *available at* <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/Somalia.pdf> (“The [Order] blocks the property and property interests of specific individuals and entities listed in its Annex and of specific individuals and entities determined by OFAC to have engaged in acts that threaten the peace, security, or stability of Somalia, to have obstructed the delivery of humanitarian assistance to or within Somalia, to have supplied arms or related materiel in violation of the United Nations arms embargo on Somalia, or to have provided support for any of these activities.”).

6. The Order states that the terms “property” and “interests in property”:

[I]nclude, but are not limited to, money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness, obligations, notes, guarantees, debentures, stocks, bonds, coupons, any other financial instruments, bankers acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, letters of credit and any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors’ sales agreements, land contracts, leaseholds, ground rents, real estate and any other interest therein, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, services of any nature whatsoever, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent.

- (A) to have engaged in acts that directly or indirectly threaten the peace, security, or stability of Somalia, including but not limited to:
 - (1) acts that threaten the Djibouti Agreement of August 18, 2008, or the political process; or
 - (2) acts that threaten the Transitional Federal Institutions,⁷ the African Union Mission in Somalia (AMISOM),⁸ or other international peace keeping operations related to Somalia;
- (B) to have obstructed the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia;
- (C) to have directly or indirectly supplied, sold, or transferred to Somalia, or to have been the recipient in the territory of Somalia of, arms or any related materiel, or any technical advice, training, or assistance, including financing and financial assistance, related to military activities;
- (D) to have materially assisted, sponsored, or provided financial, material, logistical, or technical support for, or goods or services in support of, the activities described in subsections (a)(ii)(A), (a)(ii)(B), or (a)(ii)(C) of this section or any person whose property and interests in property are blocked pursuant to this order.⁹

Such Blocked Persons are listed on the Annex to the Order as well as on the OFAC's Specially Designated Nationals List (SDN List) and in the Federal Register.¹⁰ The Annex to the Order identifies the following

7. "Transitional Federal Institutions' means the Transitional Federal Charter of the Somali Republic adopted in February 2004 and the Somali federal institutions established pursuant to such charter, and includes their agencies, instrumentalities, and controlled entities." Exec. Order No. 13,536, 75 Fed. Reg. 19,869, § 3(d).

8. "African Union Mission in Somalia' means the mission authorized by the United Nations Security Council in Resolution 1744 of February 20, 2007, and reauthorized in subsequent resolutions, and includes its agencies, instrumentalities, and controlled entities." *Id.* § 3(e).

9. *Id.* § 1(a)-D.

10. 31 C.F.R. § 551.201 n.1. The SDN List is available on OFAC's Web site in various searchable formats. See *Resource Center*, U.S. DEP'T OF THE TREASURY (Apr. 8, 2011), <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>. The SDN List is an important resource to consult because OFAC regularly updates the SDN List by adding and subtracting names and also because the SDN List provides various aliases used by blocked persons that are not necessarily identified on the Annex to the Order.

If a Blocked Person believes that he was blocked due to a mistaken identity, or would like administrative reconsideration of his status, he can appeal the determination rendering him a Blocked Person pursuant to the procedure laid out in the Regulations. See 31 C.F.R. § 551.201 n.3; *id.* §§ 501.806-.807.

eleven individuals and one entity whose property and interests in property were henceforth blocked:

1. Abshir Abdillahi (born circa 1966)
2. Hassan Abdullah Hersi Al-Turki (born circa 1944)
3. Hassan Dahir Aweys (born 1935)
4. Ahmed Abdi Aw-Mohamed (born July 10, 1977)
5. Yasin Ali Baynah (born circa 1966)
6. Mohamed Abdi Garaad (born circa 1973)
7. Yemane Ghebreab (born July 21, 1951)
8. Fuad Mohamed Khalaf (born circa 1965)
9. Bashir Mohamed Mahamoud (born circa 1979-1982)
10. Fares Mohammed Mana'a (born February 8, 1965)
11. Mohamed Sa'id (born circa 1966)

Entity: al-Shabaab¹¹

Numbers 1 and 6 on the list—Abshir Abdillahi and Mohamed Abdi Garaad—had previously identified themselves as pirates. Initially there was no information provided about the individuals and al-Shabaab in connection with the Order. However, OFAC subsequently provided background information on September 22, 2010, issuing a document entitled *Somalia Sanctions: Information on Persons Listed in the Annex to E.O. 13536 of April 12, 2010*.¹² OFAC explained that both Abdillahi and Garaad had claimed personal involvement in specific hijackings as well as direct control over hundreds of other pirates responsible for hijackings off the coast of Somalia.¹³

According to OFAC, Abshir Abdillahi “Boyah”¹⁴ “has been described as ‘a key organizer, recruiter, financier and commander of a maritime militia consisting of approximately 500 operating pirates, with responsibility for hijacking between 25 and 60 shipping vessels since the mid-1990s.’”¹⁵ OFAC noted that in an April 2009 article on Somali piracy in the United Kingdom’s *The Times*, Abdillahi

11. Exec. Order No. 13,536, 75 Fed. Reg. annex.

12. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF THE TREASURY, SOMALIA SANCTIONS: INFORMATION ON PERSONS LISTED IN THE ANNEX TO E.O. 13536 OF APRIL 12, 2010 (Sept. 22, 2010) [hereinafter SOMALIA SANCTIONS], available at http://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13536_pr.pdf.

13. Exec. Order No. 13,536, 75 Fed. Reg. annex.

14. In the Annex to the Order, this individual was identified as “Abshir Abdillahi.” *Id.* In the subsequent guidance, his name was listed as “Abshir Abdillahi ‘Boyah.’” SOMALIA SANCTIONS, *supra* note 12, at 2.

15. *Id.*

identified himself as the “‘chairman’ of approximately 500 pirates operating as a ‘loose confederation’ in the Eyl area.”¹⁶

Mohamed Abdi Garaad was described by OFAC as “a principal organizer and financier of pirate activities” who has claimed responsibility for multiple hijackings, including that of the M/V MAERSK ALABAMA and the M/V LIBERTY SUN.¹⁷ OFAC noted that both vessels were carrying food aid bound for Somalia and that “[t]he attacks on these vessels represented the obstruction of humanitarian assistance for Somalia.”¹⁸

A. *Blocked Persons*

The concept of a Blocked Person is a cornerstone of most U.S. sanctions programs. Blocked Persons are listed both on annexes to their corresponding executive orders as well as on the SDN List, which is maintained by OFAC.¹⁹ Section 203 of the International Emergency Economic Powers Act (IEEPA), one of the sources of the Order’s authority, authorizes the blocking of property and interests in property of a person during the pendency of an investigation.²⁰ “Blocked” is a broad concept, which essentially means that a Blocked Person’s assets are frozen and cannot be transferred if they come within the United States or within the possession or control of a U.S. person.²¹ The Order specifically explains:

All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any overseas branch . . . may not be transferred,²² paid, exported, withdrawn, or otherwise dealt in.²³

16. *Id.*

17. *Id.*

18. *Id.*

19. *See* SOMALIA, *supra* note 5, at 11.

20. Somalia Sanctions Regulations, 75 Fed. Reg. 24,394-02, 24,395 (May 5, 2010); 31 C.F.R. § 551.201 n.2 (2010) (citing 50 U.S.C. §§ 1701-1706 (2006)).

21. 31 C.F.R. § 551.301 (“The terms blocked account and blocked property shall mean any account or property subject to the prohibitions in [the Order] held in the name of a person whose property and interests in property are blocked pursuant to [the Order], or in which such person has an interest, and with respect to which payments, transfers, exportations, withdrawals, or other dealings may not be made or effected except pursuant to an authorization or license from [OFAC] expressly authorizing such action.”).

22. The Regulations provide the following explanation of the term “transfer”:

The term transfer means any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release,

It is important to note that entities related to Blocked Persons may also be considered blocked even if those entities are not listed on the Annex or the SDN List and have not otherwise been identified in connection with the Order. An entity in which a Blocked Person owns a fifty percent or greater interest, whether directly or indirectly,²⁴ will be considered by OFAC to be a Blocked Person.²⁵ Moreover, a party

convey, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property. Without limitation on the foregoing, it shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the making of any payment; the setting off of any obligation or credit; the appointment of any agent, trustee, or fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or levy of or under any judgment, decree, attachment, injunction, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition; the exercise of any power of appointment, power of attorney, or other power; or the acquisition, disposition, transportation, importation, exportation, or withdrawal of any security.

Id. § 551.308.

23. Exec. Order No. 13,536, 75 Fed. Reg. 19,869, § 1(a) (Apr. 12, 2010). As with other U.S. sanctions programs, there are particular practical consequences for U.S. financial institutions when dealing with the property of a Blocked Person. A U.S. financial institution is defined as “any U.S. entity (including its foreign branches) that is engaged in the business of accepting deposits, making, granting, transferring, holding, or brokering loans or credits, or purchasing or selling foreign exchange, securities, commodity futures or options, or procuring purchasers and sellers thereof, as principal or agent.” 31 C.F.R. § 551.310.

Examples of U.S. financial institutions include: “depository institutions, banks, savings banks, trust companies, securities brokers and dealers, commodity futures and options brokers and dealers, forward contract and foreign exchange merchants, securities and commodities exchanges, clearing corporations, investment companies, employee benefit plans, and U.S. holding companies, U.S. affiliates, or U.S. subsidiaries of any of the foregoing.” *Id.* The term “U.S. financial institution” “includes those branches, offices and agencies of foreign financial institutions that are located in the United States, but not such institutions’ foreign branches, offices, or agencies.” *Id.*

If any payment of funds or transfer of credit in which a Blocked Person has an interest comes within the possession or control of a U.S. financial institution, then the institution must block the funds or credit in an account on that financial institution’s books. *Id.* § 551.504. Most U.S. and foreign financial institutions employ special OFAC “filters” so that they are alerted whenever property of a Blocked Person passes through the institution.

24. 31 C.F.R. § 551.406; *see also id.* § 551.304 (“[T]he term *interest*, when used with respect to property (e.g., ‘an interest in property’), means an interest of any nature whatsoever, direct or indirect.” (emphasis added)); OFFICE OF FOREIGN ASSETS CONTROL, DEP’T OF THE TREASURY, GUIDANCE ON ENTITIES OWNED BY PERSONS WHOSE PROPERTY AND INTERESTS IN PROPERTY ARE BLOCKED (2008) [hereinafter GUIDANCE], http://www.treasury.gov/resource-center/sanctions/Documents/licensing_guidance.pdf.

25. 31 C.F.R. § 551.406. A person whose property and interests in property are blocked pursuant to an Executive Order or regulations administered by OFAC (a Blocked Person) is considered to have an interest “in all property and interests in property of an entity in which it owns, directly or indirectly, a 50 percent or greater interest. The property and

must still use caution if a potential transaction concerns an entity in which a Blocked Person has a less than fifty percent interest or exerts any control. Any interest by a Blocked Person is a red flag that the entity may later be subject to designation.²⁶

The fact that these two pirates were listed on the Annex to the Order means that their property and interests in property are blocked and that no U.S. persons can enter into transactions for the benefit of these two pirates. This, in turn, means that no U.S. person can pay a ransom that is for the benefit of either of those two pirates.

B. The Order's Prohibitions and OFAC Guidance Regarding Those Prohibitions

As discussed *supra*, and of particular relevance to piracy issues, the Order's prohibitions include, but are not limited to:

- (i) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to [the] [O]rder; and (ii) the receipt of any contribution or provision of funds, goods, or services from any such person.²⁷

This is the prohibition that is cited to prohibit the payment of ransom to a Blocked Person. Arguably, it is not just the ransom payment itself which is prohibited. The Order, like many other OFAC sanctions programs, also includes provisions regarding evasion of the prohibited conduct and conspiracy to evade the prohibited conduct. Specifically, the Order prohibits “[a]ny transaction by a U.S. person or within the United States that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the

interests in property of such an entity, therefore, are blocked . . . regardless of whether the entity itself is listed in the Annex [to an Executive order or otherwise placed on the SDN List].” GUIDANCE, *supra* note 24; *see also* SOMALIA, *supra* note 5, at 2 (“Entities that a person on the SDN List owns (defined as a direct or indirect ownership interest of 50% or more) are also blocked, regardless of whether that entity is separately named on the SDN List.”).

26. OFAC has specified:

U.S. persons are advised to act with caution when considering a transaction with a non-blocked entity in which a blocked person has a significant ownership interest that is less than 50% or which a blocked person may control by means other than a majority ownership interest. Such entities may be the subject of future designation or enforcement action by OFAC. Furthermore, a U.S. person may not procure goods, services or technology from, or engage in transactions with, a blocked person directly or indirectly (including through a third-party intermediary).

GUIDANCE, *supra* note 24.

27. Exec. Order No. 13,536, 75 Fed. Reg. 19,869, § 1(d)(i)-(ii).

prohibitions set forth in [the] Order.”²⁸ The Order also prohibits any conspiracy formed to violate any of its prohibitions.²⁹

The Order authorizes the Secretary of the Treasury, in consultation with the Secretary of State, to promulgate rules and regulations as necessary to implement the Order.³⁰ On May 5, 2010, OFAC issued regulations with respect to the Order (Regulations) but noted that it intended to supplement those regulations with a more comprehensive set of regulations.³¹ Those more comprehensive regulations could include additional interpretive and definitional guidance as well as additional general licenses and statements of licensing policy.³² A set of further regulations has not yet been issued. However, on September 30, 2010, likely in response to continuing questions from the public, OFAC issued a document entitled *Somalia: What You Need To Know About Sanctions Against Persons Contributing to the Conflict in Somalia*. The document is a single page containing an introduction to the Order and a summary of prohibited transactions and applicable penalties.³³

III. QUESTIONS RAISED BY THE ORDER

The Order, whether intentionally or not, was vaguely written and its implementing Regulations have not provided much additional clarity. Some of the issues raised herein have been resolved in practice. However, they have been resolved for the authors’ purposes through informal communications with government agencies; they have not been resolved through formal clarifications to the Order or supplements to the Regulations. The issues highlight the vagueness of the Order and could be examples used in connection with a future judicial challenge.

28. *Id.* § 2.

29. *Id.*

30. *Id.* § 5.

31. Somalia Sanctions Regulations, 75 Fed. Reg. 24,394-02, 24,395 (May 5, 2010); 31 C.F.R. § 551.101 note (2010) (“This part has been published in abbreviated form for the purpose of providing immediate guidance to the public. OFAC intends to supplement this part with a more comprehensive set of regulations, which may include additional interpretive and definitional guidance and additional general licenses and statements of licensing policy.”); SOMALIA, *supra* note 5. The Order is attached as an appendix to the Regulations and all transactions prohibited by the Order are also prohibited by the Regulations. 31 C.F.R. § 551.201.

32. Somalia Sanctions Regulations, 75 Fed. Reg. 24,394-02, 24,395.

33. The document is explanatory only. It does not have the force of law and does not supplement the Executive Order or the Regulations. As a result, as will be discussed *infra*, interpretation of the Order, and compliance with the Order, are still subject to significant open questions.

A. *Who Does the Order Apply To?*

Like most of OFAC's sanctions programs, the Order and the Regulations apply to United States persons. The United States "means the United States, its territories and possessions, and all areas under the jurisdiction or authority thereof."³⁴ The term "United States person," or "U.S. person," "means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States."³⁵

At first glance, the Order's application to U.S. persons seems fairly straightforward. It would seem that if the party responsible for paying the ransom was not a U.S. person, then that party would not be subject to the Order and could pay a ransom without concern for the Order's prohibitions—even if that ransom was paid to one of the two pirates identified on the Annex to the Order. However, the authors have learned through their practice that this is simply not the case. Non-U.S. persons also should be concerned with the prohibitions contained in the Order.

B. *Does the Order Outlaw the Payment of Ransom to All Pirates or Just to the Pirates Listed on the Annex?*

Assuming that a person is subject to the Order, does the Order *per se* outlaw the payment of ransom to pirates responsible for the hijacking of vessels off the coast of Somalia? The answer to this question was not clear from the actual language of the Order and points could be raised in support of a "yes" or a "no" answer, and in some cases the same point could support either conclusion.

First, the Order blocks all property and interests in property of persons listed on the Annex to the Order and the Annex included two known pirates.³⁶ Therefore, it would seem clear that at least the payment of ransom to either of these individuals was prohibited. However, was the payment of ransom prohibited *only* to these two pirates or to all other pirates as well? Perhaps the Order intended to also ban ransom payments to Somali pirates generally and had listed only these two pirates initially, later planning to identify additional pirates. OFAC maintains the SDN List, which it updates on a regular basis with respect to other sanctions programs. On the other hand, as

34. 31 C.F.R. § 551.309.

35. *Id.* § 551.311.

36. Exec. Order No. 13,536, 75 Fed. Reg. 19,689 annex (Apr. 12, 2010).

of April 2010 the government likely knew of other pirates whose names could also have been included at the time if piracy had been the true intended focus of the Order.

Second, the Order blocked all property and interests in property of “any person determined by the Secretary of the Treasury, in consultation with the Secretary of State: to have engaged in acts that directly or indirectly threaten the peace, security, or stability of Somalia”³⁷ and the President specifically determined that “acts of piracy or armed robbery at sea off the coast of Somalia threaten the peace, security, or stability of Somalia.”³⁸ So, were all pirates by definition *de facto* Blocked Persons? There is not a clear answer to this question but, based on our experience with respect to other sanctions programs, we considered it unlikely. Generally a person³⁹ is not considered “blocked” until they are listed on the SDN List.⁴⁰ The public is then considered to have fair notice of the identity of such Blocked Persons.⁴¹

Third, regardless of whether *all* pirates were Blocked Persons pursuant to the Order, or only the two pirates listed on the Annex were Blocked Persons, there was a question as to whether the payment of

37. *Id.* § 1(a)(ii).

38. *Id.* § 1(b); SOMALIA, *supra* note 5, at 2 (“The [Order] also includes a determination by the President that piracy threatens the peace, security or stability of Somalia. This determination provides authority to target for sanctions those who engage in or support acts of piracy off Somalia’s coast, including those who provide weapons, communication devices, or small boats and other equipment to pirates. The [Order] therefore imposes targeted sanctions only; it does not impose any broad-based sanctions against the people or the country of Somalia.”).

39. Throughout this Article, we refer to “persons.” The term includes both individuals and entities. The Order states that a “‘person’ means an individual or entity” and that an “‘entity’ means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization.” Exec. Order No. 13,536, 75 Fed. Reg. 19,869, § 3(a)-(b); *see also* 31 C.F.R. § 551.303 (defining “entity”).

40. *But see* discussion *supra* Part III.A (discussing Blocked Persons and entities who are blocked but not listed on the SDN List).

41. It is interesting to note that based on the nature of the emergency underlying the Order, the Order clarifies that Blocked Persons would not necessarily receive prior notice of their blocked status or any actions taken pursuant to that status—e.g., the freezing of a bank account. Section 4 of the Order states:

For those persons whose property and interests in property are blocked pursuant to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render those measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to section 1(a) of this order.

Exec. Order No. 13,536, 75 Fed. Reg. 19,869, § 4.

ransom was even prohibited conduct pursuant to the Order. The Order's prohibitions with respect to Blocked Persons include the prohibition of "the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any" Blocked Person.⁴² Some would argue that it is implied in this prohibition that the "contribution or provision of funds" would be made voluntarily.⁴³ Based on this premise, the payment of a ransom would not be a prohibited act because it would not be a voluntary payment in the sense that it was made under duress—it was a payment made for the purposes of freeing a vessel and its crew under the threat that both would be harmed.⁴⁴

The government later informally clarified that the Order did not per se prohibit the payment of ransom but only prohibited it if a person or entity listed on the Annex had an interest in the payment and there was a U.S. nexus somewhere in the continuum of related transactions. However, as will be addressed further in the sections below, this clarification raises at least two issues. First, the very fact that this explanation is not present in the Order or in its implementing Regulations highlights their vagueness. Second, the clarification raises yet more questions—e.g., what does it mean in practical terms that someone has an "interest" in the payment? Also, what does the "continuum of transactions" mean—e.g., where does it begin and end and does it include events or transactions involving non-U.S. persons? The next section explores the application of the Order, the Regulations, and how the "continuum" concept has played out in practice.

IV. THE PROCESS OF RANSOM PAYMENT UNDER THE ORDER

In the case of a vessel hijacking off the coast of Somalia, a ransom payment is almost always necessary to effect the safe release of the vessel and its crew. A specialized response consultant is generally hired by the vessel owner to negotiate the ransom payment

42. *Id.* § 1(d).

43. *Id.*

44. It could also be argued whether or not the payment of ransom is a voluntary act. Merriam-Webster's Dictionary defines ransom as "a consideration paid or demanded for the release of someone or something from captivity." *Ransom Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/ransom> (last visited Apr. 18, 2011). Two of the examples given by Merriam-Webster illustrate this issue: "The kidnappers demanded a ransom of one million dollars" and "[t]he family is willing to pay ransom for his release." *Id.* Although the request for a ransom is made based on a threat, e.g., holding a vessel and its crew hostage, the decision to pay a ransom is ultimately a voluntary one—a decision to choose one option instead of another, i.e., a decision to attempt to ensure the safety of a vessel and its crew by the payment of a ransom.

with the pirates. At this point, even an owner who is a non-U.S. person must consider his exposure under the Order. The government has informally taken the position that the Order is applicable, and that there is potential exposure, wherever there is a U.S. nexus with a ransom payment or a U.S. connection anywhere in the continuum of transactions that occur in connection with a ransom payment. This is a much broader applicability than was suggested in the Order and in the Regulations by the definition of “U.S. person.” The requisite U.S. nexus is present in almost every ransom-related transaction. This can occur, for example, where the vessel owner has U.S. insurers, reinsurers, or perhaps merely where the ransom payment involves a currency conversion into U.S. dollars (and therefore currency passes through U.S. money center banks). If there is any such U.S. nexus, the owner of the vessel may seek guidance from OFAC, by way of an application, with respect to the ransom payment—even if the owner does not believe that the pirates are either of the persons listed on the Annex to the Order.⁴⁵

A. Application to OFAC for Guidance with Respect to a Ransom Payment

While there is no published process for obtaining guidance with respect to ransom-related payments, the authors have been able to work out a process with OFAC for expedited consideration of guidance requests and have handled numerous such requests to date.⁴⁶ This process takes time, although it can move more quickly in a live situation where a ransom payment is imminent and may affect the safety of detained crew members. Although the Order itself is murky, OFAC has made significant efforts to be accessible and has emphasized that it understands the very real peril faced by a hijacked vessel’s crew and that the crew’s safety is of utmost concern.

45. For the purposes of this analysis we assume that the relevant party in interest is the vessel owner and that the vessel owner is responsible for the payment of the ransom. The authors of this Article have represented numerous vessel owners in this context but have also represented other parties involved in ransom situations, such as insurers and reinsurers, who were concerned about the applicability of the Order to them.

46. Subpart E of the Regulations describes licenses, authorizations, and statements of licensing policy with respect to the Order. 31 C.F.R. §§ 551.501-.507 (2010). Sections 501 and 502 of Subpart E have been reserved, and it is anticipated that the more comprehensive regulations that will be issued in the future will provide supplementary information.

B. The Mechanics of the Application

Upon a client's request, the authors prepare a guidance application for submission to OFAC. An application to OFAC for guidance with respect to a ransom payment contains variations of the following information depending on the particular situation:

- Vessel name
- Vessel call sign
- Vessel IMO number
- Vessel satellite telephone number
- Vessel owner, including address and corporate citizenship
- Vessel manager, including address and corporate citizenship
- Insurers, including address and corporate citizenship
- Reinsurers, including address and corporate citizenship
- Date of hijacking
- Date of release
- Name and cell phone of any pirate negotiator/consultant
- Whether a ransom was paid and the amount of that ransom
- Whether the ransom was paid in U.S. dollars
- Whether any part of the ransom payment was processed through U.S. money center banks
- Any relevant wire information with respect to a ransom payment
- Name and contact information of the response consultant
- Letters, e.g., from the response consultant, stating that the parties have conducted due diligence and, to the best of their knowledge, no ransom payment was or will be made to or for the benefit of a Blocked Person
- Explanation of any possible U.S. nexus with respect to the ransom payment or any other related payments

Perhaps the most important part of the application is the owner's provision of information with respect to the identity of the pirates. This raises some difficulty as it is very difficult in practice to determine the actual identity of the pirates. Often the pirate negotiator provides only a one-word name or nickname to identify himself simply for negotiation purposes. Therefore it is rare for an owner to know definitely that he is not dealing with a Blocked Person, and therefore that he is in compliance with the Order. In practice this has resulted in owners making the representation to OFAC that they have no reasonable cause to believe that the vessel's pirate hijackers are either of the individuals identified in connection with the Order. Often this

representation is supported by a letter from the owner providing the limited information that he does have regarding the identity of the pirates as well as a similar letter from the response consultants.

After submission of the application, if there is a U.S. nexus, the government uses the information provided in the application to determine whether the ransom or ransom-related payment is being made to or for the benefit of a Blocked Person. OFAC may request additional information after the initial application, provide written guidance, or say nothing.

C. The Application and Timing Issues

Compliance with the Order is a moving target for at least two reasons. First, although it is counterintuitive, an application may be submitted to OFAC even if the ransom payment took place prior to the existence of the Order, especially if insurance or other related payments took place after the Order's existence. The government has informally taken the position that each ransom payment and related transactions constitute a continuum of transactions and that each separate transaction must be analyzed for compliance with the Order, even if the relevant ransom payment was made prior to the Order's existence.

Second, the government's enforcement of the Order is based on the concept of changing information in the Government's possession that makes it difficult to assess potential exposure. Indeed, it is possible that a ransom payment, for instance, will itself be proper but that a later reinsurance payment with respect to that ransom will raise exposure issues because new information about the identity of the beneficiary of the ransom payment becomes available.

These timing issues mean that conduct which was legal at the time it was done (for example, a ransom payment) could still result in potential exposure (in connection, for example, with a later insurance payment) because information becomes available that the pirate involved is one listed in the Annex. The Order's vagueness makes it difficult to assess reliably potential exposure and has created practical difficulties and frustration for both vessel owners and their insurers.

V. THE ORDER'S PENALTIES

A violation of the Order or the Regulations carries the potential for both civil and criminal penalties. Civil penalties range up to the

greater of \$250,000 or twice the value of the underlying transaction.⁴⁷ Criminal fines for willful violation of the Order or the Regulations range, upon conviction, up to \$1 million and individuals may also face up to twenty years imprisonment.

VI. THE FUTURE OF THE ORDER

The future of the Order and its enforcement is unclear. Potential grounds for judicial testing of the Order include its vagueness and the ex post facto quality of its application to transactions relating to ransom payments that were made prior to the Order's existence. The results of any such potential challenge remain to be seen.

47. SOMALIA, *supra* note 5, at 2.