

Staying Off the 'No-Fly' List



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Can the federal government's watch lists have an impact on your client's business? The answer is a resounding "yes." Whether they are traveling for an important client meeting, doing business outside of U.S. borders, or simply trying to receive hard-earned revenue into their merchant bank account, the federal government's terrorist watch list can bring those activities to a grinding halt.

According to the U.S. government, the watch list is a consolidated list of known or suspected terrorists maintained by the Terrorist Screening Center (TSC) and administered by the Federal Bureau of Investigation and Department of Justice, with the help of the Department of Homeland Security, Central Intelligence Agency, Defense, State and Treasury departments. The Transportation Security Administration's "no-fly" and "selectee" lists, for example, are subsets of the consolidated watch list provided to the TSA by the TSC.

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The TSC funnels information from its watch list to a whole host of federal, state and local entities to "keep an eye out" for matching names. Information from the watch list can be shared with anyone, from the Treasury Department's Office of Foreign Assets Control (OFAC) — the federal agency regulating financial transactions with any targeted government, country or persons — to your local bank. Having received such information, financial institutions might refuse to accept transfers of money, or simply freeze the subject's account. If your client is doing business with the government, and their name (or a similar name) happens to appear on the watch list, they may lose some business. Whether your client is a sole proprietor or an executive at a large corporation may not make a difference. Any company with a business executive whose name matches a name on the watch list may suffer the consequences.

This issue is complicated further by the cloud of secrecy surrounding the consolidated watchlist. The federal government will never confirm or deny that a particular name is in fact on its list. Moreover, no member of the public is quite clear as to how a name is selected, how it is classified, or why the government does not simply get a warrant for the person's arrest if they are "known or suspected" terrorists. One likely cause for being placed on the watch list may be supporting, doing business or exchanging any money, or having any connection with, any country, individual, organization, or financial institution, on one of the federal government's several "public" lists.

The Treasury Department, for example, maintains a list of Designated Charities and Potential Fundraising Front Organizations for Foreign Terrorist Organizations; OFAC keeps a

475-page long list of Specially Designated Nationals; and the State Department posts a Terrorism Exclusions List, a Designated Foreign Terrorist Organizations list and a number of press releases of newly added names. These lists are found on the pertinent agency's website, and put your client on constructive notice of hundreds of names of individuals, organizations and financial institutions your clients should avoid. These lists are particularly important for anyone doing business outside of the United States, or simply engaged in charitable giving.

So what will help protect your client's business? Clients can start by having some clear internal written policies and procedures, including detailed record keeping and periodic audits, for screening any recipient of their charitable giving, any financial institutions from which they receive money, and any individual or entity with which they do business. Clients might also consider educating their upper management on how to screen their own charitable giving. Unfortunately, while this may give the client a viable claim to acting in "good faith," it does not guarantee protection.

Should your client suspect his or her name, or the name of a key employee, made its way to the watch list, the remedies are also not entirely clear. In 2007, the TSC entered into a Memorandum of Understanding (MOU) with a number of federal agencies to try and standardize a watch list redress process. Essentially, under this procedure, you first have to identify which agency is the subject of your client's grievance and file a complaint with that particular agency. The only agency that currently has a formal complaint process is the DHS Traveler Redress Inquiry Program (TRIP) which is the grievance process for anyone denied or delayed

boarding an airline flight. If your troubles are with OFAC, for example, you may simply have to call and write letters until you get a response.

Under the TSC's MOU, that agency will then consult with the TSC's independent Redress Unit to determine whether the name at issue is in fact on the watch list or if it is simply a matter of misidentification. The agency will eventually provide you with a standard noncommittal response informing you that "if" the case was a matter of misidentification, it has been cleared. The

only way of knowing then whether this was all a big misunderstanding or if the name really is on the watch list is to wait and see if the troubles clear.

Once your client has exhausted the administrative remedies, whatever those may be, the next option is to pursue a claim in court. Time is of the essence and depending on the agency being challenged, the deadlines will vary. Also, the challenge could be a petition for review before an appellate court, or a direct complaint filed in a federal district court. In 2008, in *Ibrahim*

v. Dept. of Homeland Security, 538 F.3d 1250, the Ninth Circuit U.S. Court of Appeals held that an action to remove one's name from the watch list could properly be brought against the TSC in a federal district court, but any action against the TSA had to be pursued in a United States appellate court.

The ultimate lesson here is to advise your client to tread carefully, take whatever precautionary measures they can to carry out their business in good faith, document it and educate their key employees.

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