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Keywords

The Maersk Alabama, Piracy, Maritime Terrorism, Piracy and Maritime Terrorism, Federal Anti-Money Laundering Laws, Bank Secrecy Act

MUGGED TWICE?: PAYMENT OF RANSOM ON THE HIGH SEAS

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INTRODUCTION

The subject of modern piracy has now become well-known and involves an age-old crime—kidnap for ransom. According to an annual piracy report issued by the Piracy Reporting Centre of the International Chamber of Commerce's International Maritime Bureau, a total of 406 incidents of piracy and armed robbery were reported in 2009, with 153 vessels boarded, 49 vessels hijacked, 84 attempted attacks, and 120 vessels fired upon.¹ Shipowners have used industry Best Management Practices—e.g., training of crew, implementation of the Ship Security Reporting System,² use of military escort and crisis management services—to thwart pirate attacks.³ Nevertheless, in the event of a successful hijacking, payment of ransom is nearly always the only way to save the lives of crew and free the ship.⁴

I. BACKGROUND

A. The Maersk Alabama

Perhaps the only exception to this rule is the outcome of the pirate hijacking of the 1098-TEU U.S. flagged *Maersk Alabama* on April 8, 2009.⁵ The crew initially fought off the attack, but the pirates fled with the captain as a hostage. U.S. naval forces then killed three of the pirate kidnapers, arrested one, and saved the captain, all without American casualty.⁶ Despite the success of the *Maersk*

1. ICC Commercial Crime Services, *2009 Worldwide Piracy Figures Surpass 400*, Jan. 14, 2010, http://www.icc-ccs.org/index.php?option=com_content&view=article&id=385:2009-worldwide-piracy-figures-surpass-400&catid=60:news&Itemid=51 [hereinafter *Piracy Figures*].

2. See *Tackling the Costs of Piracy*, 368 FAIRPLAY 18, 18 (2010).

3. For a further explanation on Best Management Practices see *Practical Measures to Combat Pirates*, 367 FAIRPLAY 14, 14 (2009). Self-help deterrents available to seafarers include using barbed wire, empty forty-five gallon drums, wood, and/or netting to cut off access to primary areas or to the vessel's deck. *Id.*

4. Cf. Samantha Kenny, Comment, *Regional Shortcomings and Global Solutions: Kidnap, Ransom and Insurance in Latin America*, 14 CONN. INS. L.J. 557, 577–81 (2008) (arguing that payment of ransom greatly increases the likelihood of a safe return for kidnap victims in South America).

5. See *2009 Review Month by Month*, TRADE WINDS, Dec. 18, 2009, at 37, available at <http://www.tradewinds.no/weekly/w2009-12-18/article550163.ece?service-printArticle>; see also Mark Mazzetti & Sharon Otterman, *U.S. Captain Is Hostage Of Pirates, Navy Ship Arrives*, N.Y. TIMES, Apr. 8, 2009, available at <http://www.nytimes.com/2009/04/09/world/africa/09pirates.html> (detailing further accounts of the *Maersk Alabama's* encounter with pirates).

6. In fact, Captain Richard Phillips' life rights have been acquired by Columbia Pictures Studio, which has also optioned the film rights to Phillips' upcoming

Alabama rescue campaign, repeats of such a highly coordinated and risky maneuver will not be common.

The jurisdiction of the U.S. Navy in the case of *Maersk Alabama* was clear. The vessel was registered with the United States flag and employed a crew of American citizens.⁷ Given the international nature of the shipping industry, however, there are numerous other situations in which the jurisdiction of the United States to act could be muddled. For example, a hijacked vessel may well be flagged, as many are, in one of the several nations that maintain ship registries, such as the Republic of the Marshall Islands or the Republic of Liberia.⁸ Or the vessel may be owned by a single-purpose corporation incorporated under the laws of Norway and organized as a subsidiary of a United States parent corporation organized under the laws of Delaware.

The Authors of this Article faced a similar set of circumstances in November, 2008, with the hijacking of the Liberian-flagged *Biscaglia*. We assisted Industrial Shipping Enterprises Corp., a corporation organized and existing in the Republic of the Marshall Islands but based in Connecticut, in the company's negotiations with pirates over the payment of ransom and the safe release of the company's international crew and vessel. These negotiations, to our surprise, were conducted in a somewhat business-like manner with the Somali pirates, and happily resulted in the safe release of the crew, the ship, and its cargo.

In addition, since the *Maersk Alabama* hijacking, it has been suggested that aggressive responses to pirate attacks and hijackings will lead to an escalating risk of reprisal from the pirates.⁹ In fact, there appears to be a trend of increasing risk of violence associated with hijacking and ransoming of a vessel's crew.¹⁰ In terms of the gross numbers during 2009, sixty-eight crew members were injured

memoir. Tatiana Siegel, *Columbia Hooks Pirate Tale*, VARIETY, May 28, 2009, <http://www.variety.com/article/VR1118004256.html>.

7. See 18 U.S.C. § 7 (2006) (granting jurisdiction to federal courts over vessels belonging to the United States or its citizens, as well as any vessel registered under the laws of the United States).

8. See generally John T. Oliver, *Legal and Policy Factors Governing the Imposition of Conditions on Access to and Jurisdiction Over Foreign-Flag Vessels in U.S. Ports*, 5 S.C. J. INT'L L. & BUS. 210 (2009); Constantine G. Papavizas, *U.S.-Flag Vessel Financing and Citizenship Requirements Update*, 32 TUL. MAR. L.J. 35 (2007) (detailing international ship registries and U.S. jurisdiction concerns).

9. See, e.g., Corey Flintoff, *Somali Pirates Threaten Revenge*, NPR, Apr. 13, 2009, <http://www.npr.org/templates/story/story.php?storyId=103035759&ft=1&f=1001> (discussing how Somali pirates will specifically target American ships and officials).

10. See *Piracy Figures*, *supra* note 1; see also John Drake, *Violent Attacks on the Rise Off Africa*, LLOYD'S LIST, Dec. 4, 2009, at 13 (describing the Somali pirates' escalating use of violence and increasing aggression).

and eight were reported killed by pirates—much higher than previous years.¹¹ In fact, after the *Maersk Alabama* hijacking, Somali pirates threatened to target U.S. vessels and crew in specific retaliation.¹²

B. Response

While the *Maersk Alabama* incident brought the modern face of piracy into the media spotlight, not all the effects of this publicity have been positive. Up until the *Maersk Alabama* incident, virtually all hijackings in the Gulf of Aden had played out in a similar manner—primitive business negotiations with the pirates eventually leading to a safe release.¹³ Other than coverage in the trade press, Somali piracy was not front page news. The detentions followed a similar pattern: a hijacking occurred, the parties negotiated for release of the hostages for a forty-five to sixty-day time period, and an agreement was eventually reached on the amount of the ransom and the drop-off mechanics.¹⁴ In most cases, there were few reports of violence following the initial attack.¹⁵

Although governments became involved as the piracy problem increased, by protecting ships transiting the Gulf of Aden, there were few calls for action to resolve the problem. That changed with the *Maersk Alabama* incident. Before long, mass media and political players, perhaps thoughtlessly, were equating piracy with terrorism.¹⁶

11. *Piracy Figures*, *supra* note 1.

12. See, e.g., Flintoff, *supra* note 9 (noting that some pirates consider America and American ships their “No. 1 enemy”).

13. The Article will sometimes make reference to incidents of piracy off the coast of Somalia as examples in order to provide a pertinent real-world application of the analysis used herein. See *supra* text accompanying note 1 (listing 406 incidents of piracy that occurred in 2009, 217 of which were attributed to Somali pirates). Such analysis can be applied to pirate hijackings in other areas of the world.

14. See, e.g., Jeffrey Gettleman, *Somali Pirates Said to Be Near Arms Cargo Deal*, N.Y. TIMES, Oct. 9, 2008, <http://www.nytimes.com/2008/10/09/world/africa/09pirates.html>; Sharon Otterman, *Pirates Said to Ask for \$25 Million Ransom*, N.Y. TIMES, Nov. 20, 2008, <http://www.nytimes.com/2008/11/21/world/africa/21pirates.html>.

15. This matter of course does not always hold true. After hijackers of the Greek-owned vessel *Maran Centaurus* received what is to be believed as the largest ransom ever delivered, in the amount of approximately \$6,000,000, a fight between pirate factions over the funds reportedly led to the deaths of two pirates. Nigel Lowry, *Hijackers Hit Jackpot with Record \$6m Ransom Win*, LLOYD'S LIST, Jan. 19, 2010, at 1; see also Abdi Guled & Abdi Sheikh, *Somali Pirates Free Oil Tanker for Record Ransom*, REUTERS, Jan. 18, 2010, <http://www.reuters.com/article/idUSTRE60H3WB20100118> (reporting that four pirates died in the incident and that the amount was between \$5.5 million and \$7 million).

16. See, e.g., Joshua London, Commentary, *Somalia's Muslim Jihad at Sea*, WASH. TIMES, Apr. 22, 2009, at A19 (criticizing the government's refusal to treat pirates as terrorists); Cal Thomas, *Terror on the Seas*, MIAMI HERALD, Apr. 18, 2009, at A21

This concept had particular significance for companies, like the owner of the *Biscaglia*, that have a presence in the United States. The pirates are kidnappers, and as the legal analysis in this Article indicates, for now at least, ransom payments by U.S. entities to pirates not blocked on the Office of Foreign Assets Control's ("OFAC") list of Specially Designated Nationals and Blocked Persons (the "SDN List") are unlikely to result in any kind of sanction—civil or criminal—to the payer of the ransom. As discussed below, this analysis will change if the government eventually deems pirates to be terrorists or promulgates further regulations to that effect pursuant to Executive Order 13536 issued by President Barack Obama dated April 12, 2010 (the "Executive Order"), issued just before the publication of this Article.¹⁷

The development of a secured transit corridor through the Gulf of Aden reduced pirate activity there, but pirates have responded by expanding the range of their attacks.¹⁸ At the end of November, 2009, the Joint War Committee of Lloyd's extended the war-risk zone in the region.¹⁹ International forces now need to cover not only the Gulf of Aden, but also the Somali Basin, with attacks taking place as far as one thousand miles off the Somali coast in an area covering 1.5 million square miles of ocean.²⁰ As one commentator has described: "[A] transit system, as in operation in the Gulf of Aden, cannot be applied to the Indian Ocean. Some 35,000 ships cross the Somali Basin annually operating on a complex set of trade routes, as compared with the two-way system through the Gulf of Aden."²¹

Accordingly, with no overall strategic resolution, military or otherwise, to the increasingly serious problem of piracy, the only practical way that shipowners can save the lives of their crew members is to pay a ransom. And, if payment of ransoms is made illegal while

(comparing pirates to Islamic terrorists and arguing that they should be dealt with in the context of the larger operation against terrorists).

17. Exec. Order No. 13,536, 75 Fed. Reg. 19,869 (Apr. 15, 2010) [hereinafter Executive Order].

18. See Adam Corbett, *Navies 'Overstretched' in Piracy Fight*, TRADE WINDS, Dec. 18, 2009, at 54, available at <http://www.tradewinds.no/weekly/w2009-12-18/articles550192.ece?service=printArticle> (noting that as sites of pirate attacks widen, the naval presence in the Gulf of Aden and around Africa has thinned to the point where it may take up to two days for a vessel to reach the site of an attack).

19. See Adam Corbett, *Pirates Target Tanker Corridor*, TRADE WINDS, Dec. 4, 2009, at 46, available at <http://www.tradewinds.no/weekly/w20091204/article549327.ece?service=printArticle> (providing the latitude and longitude of the extended boundaries).

20. See *Navies 'Overstretched' in Piracy Fight*, *supra* note 18 at 54 (discussing the difficulty of reaching attacked vessels due to the ever-widening area of such occurrences).

21. *Id.*

the overall problem of piracy is still unsolved, shipowners will be placed in an untenable position.

II. LEGAL ANALYSIS

A December, 2008, report by the United Nations Monitoring Group on Somalia, which oversees an arms embargo on militias in that country, described how a typical ransom payment is distributed once it is paid: thirty percent is split equally among the maritime militia that seizes the vessel (exceptions being that the first pirate to board is given a double take of proceeds and a fine is imposed on pirates that fight other pirates), ten percent goes to the ground militia guarding the vessel while it is anchored offshore, ten percent is distributed to the local community, and the remaining fifty percent goes to Somali investors, who are said to sponsor and finance the attacks.²²

In most instances, federal law cannot be construed to prohibit an entity, be it a vessel owner or its insurers, from making a ransom payment to pirates to secure the release of a hijacked vessel and its crew. This Article explores whether there could be any violation of U.S. federal law in the event that a vessel owner and its insurers pay a ransom to pirates such as those that operate off the coast of Somalia. At least three important sources of federal law and regulation must be considered: the Foreign Corrupt Practices Act ("FCPA"),²³ executive orders, and the regulations promulgated by OFAC.²⁴ Additionally, examination of the legality of ransom payments to pirates raises the question of whether such payments implicate violations of other federal laws that prohibit either the funding of terrorist groups or money laundering. The following Sections explore how the various laws affecting the payments of ransom would apply to both domestic and foreign companies.

A critical consideration is that ransom payments must not go to any person, organization, or foreign government on OFAC's SDN List.²⁵ The SDN List is a lengthy and growing document that includes a number of Somali citizens and other individuals residing in Somalia

22. U.N. Sec. Council, Sec. Council Comm. Established Pursuant to Resolution 751 (1992) Concerning Somalia, *Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1811 (2008)*, ¶ 140, U.N. Doc. S/2008/769 (Dec. 10, 2008), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/604/73/PDF/N0860473.pdf?OpenElement>.

23. 15 U.S.C. §§ 78dd-1 to -3 (2006).

24. 31 C.F.R. §§ 500.101-500.314 (2009).

25. Office of Foreign Assets Control, Specially Designated Nationals and Blocked Persons, <http://www.ustreas.gov/offices/enforcement/ofac/sdn/> (last visited May 24, 2010) [hereinafter "SDN List"] (as of the date last visited, containing 454 pages).

(including those on the Annex to the Executive Order). The list is primarily intended to be used by banks and regulatory agencies, and is predominately so used, but it also serves as the default list of those persons to whom payments are restricted in any capacity.²⁶

A. *Distinction Between Piracy and Maritime Terrorism*

Both piracy and maritime terrorism exist separately, and it is dangerous to equate the two. They are two separate and distinct manifestations of non-state violence at sea. Commentators have distinguished the two occurrences as follows: Piracy is predicated upon pecuniary gain while terrorism is motivated by political goals beyond the immediate act of attacking a maritime target; the former will eschew attention and aim to sustain their trade while the latter will court publicity and inflict as much damage as possible.²⁷

Kevin Jon Heller, a Senior Lecturer at the University of Auckland Faculty of Law in New Zealand, whose areas of expertise include international criminal law, notes that while pirates may be enemies of all states, that does not make them the same as terrorists:

The defining feature of terrorism is precisely that it is committed *not* for private ends, but to intimidate a civilian population or to influence government policy. Indeed, over the long and troubled history of efforts to create a general definition of terrorism, that is perhaps the *only* aspect of the definition that has never seriously been in doubt.²⁸

Another commentator has described terrorism as “the threat or use of physical coercion, primarily against noncombatants, especially civilians, to create fear in order to achieve various political objectives.”²⁹ In contrast, pirates are involved in the venture purely for financial gain and generally have no discernable politics, and they can therefore be distinguished from terrorists.

While speculation and conjecture about an emerging nexus between piracy and terrorism complicates the legality of ransom payments, as witnessed with the Executive Order, which treats them

26. See, e.g., Kathryn A. Ruff, Comment, *Scared to Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 447, 458 (2005) (discussing the statutory framework and operation of the SDN List).

27. Adam Young & Mark Valencia, *Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility*, 25 CONTEMP. SOUTHEAST ASIA 269, 270–74 (2003).

28. Posting of Kevin Jon Heller to Opinio Juris, *Why Piracy is Not Terrorism*, <http://opiniojuris.org/2008/12/05/why-piracy-is-not-terrorism/> (Dec. 5, 2008, 15:53 EDT) (emphasis in original).

29. BARD E. O'NEILL, *INSURGENCY & TERRORISM: FROM REVOLUTION TO APOCALYPSE* 33 (2d ed. 2005).

together in the context of Somalia, credible evidence to support this presumed convergence has yet to emerge.³⁰ It is important to discern that the objectives of the two remain entirely distinct. The business of piracy is dependent on a thriving and active global shipping industry. In contrast, terrorists, in the context of the contemporary maritime world, would seek the disruption of the global maritime trade network to further their political ends.³¹ As will be seen from the analysis in the following Section, this distinction between piracy and terrorism is paramount to the conclusion that the payment of ransom to pirates not specifically identified on the SDN List does not violate U.S. federal law.

B. *Foreign Corrupt Practices Act*

The fundamental provision of the FCPA that defines outlawed conduct is found at 15 U.S.C. §§ 78dd-1 to -3. The FCPA expressly prohibits any “domestic concern,”³² or its officers, directors, employees, or agents, from making payments intended to undermine the rule of law in a foreign country. This gives rise to the question: Would the payment of ransom to pirates undermine the rule of law, in Somalia for example, and thus run afoul of the FCPA?

Specifically, the FCPA prohibits:

[M]ak[ing] use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of

30. See PETER CHALK, THE MARITIME DIMENSION OF INTERNATIONAL SECURITY xiv (RAND Corp. 2008), available at http://www.rand.org/pubs/monographs/2008/RAND_MG697.pdf (“The presumed convergence between maritime terrorism and piracy remains highly questionable . . .”).

31. See *id.* at 22 (discussing the fears of government officials that maritime terrorism would shut down an important port or otherwise disrupt the delicate supply chain). Al-Qaida has developed a strategy for maritime terrorism under the direction of Abdel Rahim al-Nashiri. *Id.* at 20 n.4. The strategy involved ramming ships with explosives, detonating medium sized vessels in the vicinity of larger ones, crashing planes into ships, and commissioning underwater demolition teams. *Id.* After he was arrested in 2003, he confessed to masterminding the attacks on the USS *Cole* and M/V *Limburg*. *Id.*

32. For purposes of 15 U.S.C. §§ 78dd-1 to -3, the term “domestic concern” means:

(A) any individual who is a citizen, national, or resident of the United States; and (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

15 U.S.C. § 78dd-2(h) (1) (2006).

anything of value to—(1) any foreign official . . . (2) any foreign political party . . . or (3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office [for enumerated prohibited purposes].³³

It is important to note that the question of whether the FCPA applies would be stopped short if it could not be proven that the ransom was paid to a political entity.³⁴ The list of prohibited purposes includes:

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.³⁵

It is clear from the text of the FCPA that Congress intended to prevent U.S. entities and public companies trading on the U.S. markets from engaging in acts intended to influence the acts or decisions of foreign officials, political parties, or government entities.³⁶ Nowhere does the statute refer to payments to private persons, except in the context of foreign government officials and foreign political parties, including officials thereof. Payment to those individuals is prohibited in that context only if such individuals are expected to “affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.”³⁷ Given that Somali pirate gangs have generally

33. 15 U.S.C. § 78dd-2(a).

34. See, e.g., Bruce Zagaris, *Avoiding Criminal Liability in the Conduct of International Business*, 21 WM. MITCHELL L. REV. 749, 757 n.36 (1996) (clarifying that the FCPA only applies to political entities and does not prohibit the bribing of foreign private individuals to gain non-political business advantages).

35. 15 U.S.C. § 78dd-2(a).

36. Provisions of the FCPA apply to “any issuer which has a class of securities registered pursuant to [15 U.S.C. § 78l] or which is required to file reports under [15 U.S.C. § 78o(d)], or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer.” 15 U.S.C. § 78dd-1(a). The term “issuer” means any person who issues or proposes to issue any security subject to certain exclusions. 15 U.S.C. § 78c(a)(8). Similar to the jurisdiction of federal securities laws, the relevant provisions of the FCPA should apply to foreign companies publicly trading in the U.S. markets.

37. 15 U.S.C. § 78dd-1(a)(1)(B).

consisted solely of freelancers or tribal groups and clans operating wholly outside the laws of Somalia or any other nation, ransom payments do not appear to be intended to influence or undermine any government's actions or policies. Therefore, the FCPA would not apply to ransom payments to pirates. The fact is that the rule of law in Somalia, to the extent there is any, is not impacted by ransom payments.

C. Office of Foreign Assets Control Regulations

OFAC administers a series of regulations (the "OFAC Regulations") that impose economic sanctions against hostile targets to further U.S. foreign policy and national security objectives.³⁸ OFAC is also responsible for promulgating, developing, and administering for the U.S. Department of the Treasury economic sanctions under several federal statutes regarding embargoes.³⁹ A close reading of the OFAC Regulations makes it evident that the sanctions target certain foreign governments, political parties, terrorist groups, and enumerated individuals. All U.S. banking regulatory agencies cooperate in ensuring financial institutional compliance with the OFAC Regulations. This is widely seen as the basis from which the United States would be able to regulate the payment of ransom to pirates.⁴⁰

Due to an explosion of maritime attachment litigation in the United States District Court for the Southern District of New York in 2008,⁴¹ it became common knowledge in the shipping industry that wire transfers made in U.S. dollars will pass through a clearing house system made up of a number of intermediary money center banks, most of which are located in New York City.⁴² If a wire transfer

38. 31 C.F.R. §§ 500.101–500.314 (2009).

39. See Office of Foreign Assets Control, U.S. Department of Treasury, <http://www.ustreas.gov/offices/enforcement/ofac/> (last visited Apr. 27, 2010).

40. See, e.g., Jonathan Spencer, *Hull Insurance and General Average—Some Current Issues*, 83 TUL. L. REV. 1227, 1266–67 (2009) (recognizing the OFAC regulations and SDN list as the "critical step" in ensuring the legality of ransom payments).

41. Previously, electronic funds transfers were subject to attachment in New York under *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002). On October 16, 2009, the United States Court of Appeals for the Second Circuit explicitly overruled *Winter Storm*, ruling that electronic funds transfers that are in transit located with an intermediary bank are not property of the defendant that is subject to attachment pursuant to Rule B. See *Shipping Corp. of India, Ltd. v. Jaldhi Overseas Pte, Ltd.*, 585 F.3d 58, 67–71 (2d Cir. 2009) *cert. denied* 78 U.S.L.W. 3447 (U.S. Mar. 22, 2010). Since then, the number of maritime attachment cases has fallen off and many existing attachments have been vacated.

42. See, e.g., Ian F. Taylor, Comment, *Rule B, Electronic Funds Transfers, Maritime Contracts, and the Explosion of Admiralty Litigation in the Southern*

payment is to be sent directly or indirectly to the legal or beneficial ownership of a recipient on the SDN List, then the payment would be blocked in transit while passing through the clearing house system. Banks utilize government-mandated OFAC filters to seize these funds and they used the same filters in maritime attachment cases before electronic funds transfers (“EFTs”) were judged not to be attachable property for such purposes.⁴³

As of the date this Article went to print, there are no specific OFAC Regulations that address the issue of ransom payments to kidnappers or pirates operating off the coast of Somalia.⁴⁴ Similarly, Somalia currently is not one of the nations whose government is targeted by U.S. sanctions or the OFAC Regulations, with only certain specified individuals being blocked.⁴⁵

At the time of this Article’s writing, there is legitimate concern that, through a U.S. Department of State initiative, OFAC will use U.N. Security Council Resolution 1844⁴⁶—one of several resolutions dealing with Somalia—and the Executive Order discussed below to enforce financial sanctions against the payment of ransom in Somalia, or that it will otherwise amend legislation to make the payment of ransom illegal.⁴⁷ Resolution 1844 reaffirms previous resolutions with respect to Somalia by condemning all acts of violence within the country and incitement of violence therein, and by expressing concern about all acts intended to prevent or block a peaceful political process.⁴⁸ Although it expresses concern over piracy and armed robbery at sea in the region, it grants great deference to the Committee formed by U.N. Resolution 751 in the determination of individuals and entities to which the sanctions shall

District of New York, 34 TUL. MAR. L.J. 211, 217 (2009) (detailing the operation of the EFT clearing house system in New York).

43. The court in *Jaldhi Overseas* ruled, with the consent of all the judges in the Southern District of New York, to overturn the court’s prior holding in *Winter Storm*, which created the precedent that EFTs are attachable property. *Jaldhi Overseas*, 585 F.3d 58, 67–71; *Winter Storm*, 310 F.3d 263.

44. The Authors of this Article rely on information provided in the CFR and on OFAC’s website as of the date this Article was sent to publication.

45. Countries currently targeted include the Balkans, Belarus, Burma, the Ivory Coast, Cuba, Democratic Republic of the Congo, Iran, Iraq, Liberia, Lebanon, North Korea, Sudan, Syria, and Zimbabwe. OFAC Sanctions Program Summaries, <http://www.ustreas.gov/offices/enforcement/ofac/programs/> (last visited Apr. 27, 2010).

46. S.C. Res. 1844, ¶¶ 3, 8, U.N. Doc. S/RES/1844 (Nov. 20, 2008).

47. See Keith Wallis, *Hong Kong Owners Sound Alarm Over Talk of US Ban on Ransoms*, LLOYD’S LIST, Feb. 22, 2010, at 4 (anticipating that a proposal to make payment of ransoms illegal will be met with a strong backlash); see also Adam Corbett, *Worries Over US Plan on Ransoms*, TRADEWINDS, Feb. 19, 2010 (discussing the negative implications of banning the payment of ransom in Somalia).

48. S.C. Res. 1844, *supra* note 46, at ¶ 6.

apply.⁴⁹ The U.N. Security Council recently issued Resolution 9913⁵⁰ which calls on all states to criminalize piracy under national laws. As the United States already criminalizes piracy under various federal antipiracy statutes,⁵¹ Resolution 9913 is unlikely to have much effect on U.S. law, but it nonetheless serves as further evidence of the growing attention to piracy in the region.

D. Executive Order Issued by the White House

Effective as of April 13, 2010,⁵² the Executive Order specifically prohibits “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 this order.”⁵³ To the extent that a pirate has been identified as a blocked person, this provision prohibits the payment of ransom to that person. However, there should be no retroactive liability if a shipowner is currently dealing with an individual or entity that later becomes identified.

The Annex attached to the Executive Order identifies eleven individuals and the terrorist organization al-Shabaab as “blocked persons,” two of the individuals being self-identified pirates. To the extent that a payment of ransom is being made to a blocked person, the payment of that ransom is prohibited by the Executive Order. The current list of blocked persons may be expanded at any time by the President or by the U.S. Department of the Treasury in consultation with the U.S. Department of State. The Executive Order specifically authorizes further regulations⁵⁴ to be promulgated, and in other U.S. sanction programs, the Treasury Department has regularly promulgated rules to supplement the SDN List.

On May 5, 2010, the Treasury Department promulgated Somalia Sanctions Regulations⁵⁵ and stated in the summary that it further intends to supplement the regulations in order to, inter alia, provide further interpretive guidance, additional licenses, and statements of licensing policy. The Somalia Sanctions Regulations extend the list

49. *Id.* at ¶ 8.

50. S.C. Res. 9913, ¶ 2, U.N. Doc. S/RES/9913 (Apr. 27, 2010).

51. *See, e.g.*, 18 U.S.C. §§ 1651–61 (establishing sentencing guidelines for various acts of piracy).

52. Executive Order, *supra* note 17, § 9.

53. *Id.* § 1(d)(i).

54. *Id.* § 5.

55. Somalia Sanctions Regulations, 75 Fed. Reg. 24,394 (May 5, 2010) (to be codified at 31 C.F.R. pt. 551).

of blocked persons to entities owned by the blocked persons listed on the Annex of the Executive Order.⁵⁶

Several portions of the Somalia Sanctions Regulations are reserved, and, consistent with the language in the Executive Order, additional supplements of the Somalia Sanctions Regulations may specifically address the issue of ransom—a topic that the Executive Order and current Somalia Sanctions Regulations do not expressly address. For example, the Executive Order blocks the property of all persons listed in the Annex as well as any person determined “to have engaged in acts that directly or indirectly threaten the peace, security, or stability of Somalia.”⁵⁷ Included on this list are leaders of the Islamic group al-Shabaab and two, or perhaps three, persons considered to have engaged in acts of piracy or attempted acts of piracy.⁵⁸ To what extent the Somalia Sanctions Regulations extend this mandate remains to be seen.

Despite speculation that there would be many names listed, to date there are reports on the SDN List of only two affiliates of Somali pirates who received ransom payments.⁵⁹ A U.S. “person” that contemplates the payment of ransom to pirates will need to ensure that, if he or she obtains any information as to the identity or identities of the group who will be the ultimate beneficiaries of the ransom payment, none of those recipients are listed on the SDN List. Since ransom payments to pirates are generally delivered in cash directly to pirates, it is highly unlikely that any wire transfer from a shipowner or its insurer will be caught by a bank as payment to a blocked person. The Authors of this Article doubt that the pirates will be accepting payments by wire transfer any time soon.

In accordance with guidance provided by OFAC, all “U.S. persons” must comply with OFAC regulations, including: all U.S. citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States, and all U.S. corporations and their foreign branches.⁶⁰ This is the same definition that is used in the Executive Order.⁶¹ For certain programs, such as those regarding Cuba and North Korea, all foreign subsidiaries

56. *Id.* at 24,398 (to be codified at 31 C.F.R. pt. 551.406).

57. Executive Order, *supra* note 17, § 1(a)(ii)(A).

58. Executive Order, *supra* note 17, Annex.

59. SDN List, *supra* note 25; Executive Order, *supra* note 17, Annex. Two persons on the Annex are considered to be known affiliates of Somali pirates.

60. OFAC, U.S. Department of the Treasury Frequently Asked Questions and Answers, <http://www.ustreas.gov/offices/enforcement/ofac/faq/answer.shtml#10> (last visited Feb. 24, 2010).

61. Executive Order, *supra* note 17, § 3(c).

owned or controlled by U.S. companies also must comply.⁶² Certain programs further require foreign persons in possession of U.S. origin goods to comply.⁶³ Unlike the FCPA, the OFAC Regulations do not normally apply to a foreign company where the activities in question have no relation to the United States; however, the level of contacts with the United States must be analyzed on a case-by-case basis.

E. Federal Statutes Prohibiting the Financing of Terrorism

The relevant restrictions on financing terrorism are contained in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).⁶⁴ One provision in the Act, 18 U.S.C. § 2339B, specifically prohibits those subject to the jurisdiction of the United States from conducting activities that would result in providing material support or resources to a formally designated foreign “terrorist organization.”⁶⁵ The list of groups is designated by the U.S. Secretary of State and is sometimes referred to as the “FTO List.”⁶⁶ A payor should ensure that a recipient of a ransom payment is not on the FTO List. To violate § 2339B, “a person must have *knowledge* that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism.”⁶⁷

The other pertinent AEDPA provision is 18 U.S.C. § 2339C, as it specifically deals with the prohibitions against financing terrorism. It explicitly prohibits a party from

provid[ing] or collect[ing] funds with the intention that such funds be used, or with the *knowledge* such funds [will] be used . . . to carry out—(A) an act which constitutes an offense within the scope of a treaty specified in subsection (e)(7), as implemented by the

62. 31 C.F.R. §§ 515.201, 515.329 (2009).

63. See United States Dep’t of the Treasury, Office of Foreign Assets Control, Frequently Asked Questions and Answers, <http://www.ustreas.gov/offices/enforcement/ofac/faq/answer.shtml> (last visited May 24, 2010) (detailing who must comply with OFAC regulations).

64. Pub. L. No. 104-132, 110 Stat. 1214 (codified in part at 18 U.S.C. §§ 2331–2339D (2006)).

65. For purposes of AEDPA, the term “terrorist organization” means “an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act [8 U.S.C. § 1189].” 18 U.S.C. § 2339B(g)(6).

66. See U.S. Dep’t of State, Foreign Terrorist Organizations, Jan. 19, 2010, <http://www.state.gov/s/ct/rls/other/des/123085.htm> (describing in detail the State Department’s designation process for Foreign Terrorist Organizations and providing the current list of such organizations which includes forty-five formally designated foreign terrorist organizations).

67. 18 U.S.C. § 2339B(a)(1) (emphasis added). As used in this context, the term “terrorist activity” is defined within § 212(a)(3)(B) of the Immigration and Nationality Act, while the term “terrorism” is defined within § 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989. *Id.*

United States, or (B) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.⁶⁸

It is apparent from the statute's legislative history that Congress viewed this provision as one intended to prevent financing of terrorist organizations.⁶⁹

In *Weiss v. National Westminster Bank PLC*,⁷⁰ the United States District Court for the Eastern District of New York interpreted § 2339C in a case that involved an English bank that was sued by Israeli victims of a terrorist act conducted by Hamas.⁷¹ The plaintiffs argued that the bank was liable under the statute's civil liability provisions because it knew that one of its customers, an Islamic charity with known ties to Hamas, was a conduit for funneling funds to the terrorist organization.⁷² The district court held that the bank was potentially liable under § 2339C because it could reasonably be inferred that the bank was sufficiently aware of its customer's links to Hamas to know that the funding would be used to support terrorist activities.⁷³ The district court clearly based its decision on the fact that Hamas is a known and designated terrorist organization and that the Islamic charity's ties to Hamas should have been known by the bank based on "know your customer" requirements.⁷⁴

The broad language in § 2339C raises concerns that the statute could be interpreted as prohibiting the payment of ransoms to pirates engaged in activities that violate the scope of the various treaties, particularly the Convention for the Suppression of Unlawful

68. 18 U.S.C. § 2339C(a)(1) (emphasis added).

69. See, e.g., H.R. REP. NO. 107-307, at 6-7 (2001), reprinted in 2002 U.S.C.C.A.N. 521, 521-22 (denoting the federal government's willingness to bind itself to prosecute or extradite those who fund terrorism).

70. 453 F. Supp. 2d 609 (E.D.N.Y. 2006).

71. *Id.* at 612. Hamas is a formally designated terrorist organization on the FTO List. *Id.* at 616.

72. See *id.* at 612 (explaining that victims of the attacks sought civil liability and damages under 18 U.S.C §§ 2333(a), 2339B, and 2339C).

73. *Id.* at 630.

74. See *id.* (reiterating that the bank was required to investigate their customers, as well as any organization that transferred to or received funds from those customers). The BSA, which was subsequently amended by the USA PATRIOT Act, now requires banks to conduct rigorous "know your customer" customer identification programs. See generally 18 U.S.C. §§ 5318(i), (l) (2006) (announcing mandatory customer identification and due diligence requirements that oblige banks to scrutinize account holders and report suspicious transactions).

Acts Against the Safety of Maritime Navigation.⁷⁵ If the statute were enforced in such fashion, it would mean that ransom payments to pirates by a U.S. shipping company, insurance company, or foreign entity later found to be within the jurisdiction of the United States, could be prosecuted under this provision even though the payments are not made to any actual terrorists or terrorist organizations.⁷⁶

The legislative and case history demonstrates that the statute has not yet been read in this manner, as the statute has only been used in respect of funding activities involving known and designated terrorist organizations. To date, § 2339C has never been used to prosecute corporations or individuals who provided or collected funds to be paid as ransom. The U.S. district courts—which would have jurisdiction—have not utilized this statutory provision to prosecute the payment of ransoms to pirate gangs. Moreover, there has been no announcement by the Executive Branch that it would seek to prosecute pirates as terrorists under the AEDPA. Although federal authorities have restricted enforcement of § 2339C to cases involving terrorist acts, if federal authorities decide to treat pirates as terrorists, paying a ransom to pirates could readily be construed as a violation of § 2339C.

Further, under 18 U.S.C. § 2333, with respect to a civil claim,

[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.⁷⁷

The term “international terrorism” is explicitly defined in 18 U.S.C. § 2331(1). That definition includes, *inter alia*, an element with respect to the purpose of the prohibited activity.⁷⁸ Accordingly, to be “international terrorism” within the meaning of the statute, the prohibited activity must “be intended—(i) to intimidate or coerce a

75. See 18 U.S.C. § 2339C(a)(1)(A) (expressing in expansive terms the offense prohibiting the financing of terrorism). The main purpose of the Convention is “to ensure that appropriate action is taken against persons committing unlawful acts against ships . . . includ[ing] the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it.” INT’L MARITIME ORG., CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION, 1988, at 1, http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686.

76. See 18 U.S.C. § 2339C(a)(1)(A).

77. 18 U.S.C. § 2333(a).

78. See 18 U.S.C. §§ 2331(1)(B)(i)–(iii) (requiring that before an activity may be deemed international terrorism, it must appear to be aimed at intimidating a population or government or affecting the conduct of a government).

civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.”⁷⁹ Thus, by its own terms, the statute does not apply to activity intended solely for one’s private or personal pecuniary gain. In contrast, private or personal gain is a required element to the crime of piracy under the various U.S. federal antipiracy statutes.⁸⁰

The current interpretation of AEDPA militates against prosecutions of companies for paying ransoms to Somali pirates. If that interpretation were to change, foreign corporations may also enjoy other jurisdictional protections. The question of whether AEDPA applies to a foreign shipowner or insurance company will hinge on whether there are sufficient contacts to find personal jurisdiction.

In two recent AEDPA cases, courts reached different results on this question. In *In re Terrorist Attacks on September 11, 2001*,⁸¹ the Second Circuit held that four Saudi Arabian princes and a Saudi banker, who had each donated to a Muslim charity alleged to have funded the terrorist organization al-Qaida, did not have sufficiently systematic and continuous minimum contacts to establish personal jurisdiction under state and federal laws.⁸² In *Estates of Ungar v. Palestinian Authority*,⁸³ another case brought under 18 U.S.C. § 2338, the Palestinian Authority (“PA”) and the Palestine Liberation Organization (“PLO”) were found to have sufficient minimum contacts with the United States to justify the exercise of personal jurisdiction by a district court. The PLO maintained an office in Washington, D.C. headed by the chief representatives of both groups, employed nine staff members, and spent more than \$200,000 in six months on activities conducted in the United States.⁸⁴ Additionally, the court considered that the PLO maintained an Observer Mission to the United Nations in New York that engaged in fundraising

79. *Id.*

80. *See, e.g.*, 18 U.S.C. §§ 1651–61 (outlining elements of piracy and forbidding, generally, the plundering of money or property of any vessel belonging to another); *see also* *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163 (1820) (affirming the piracy conviction of a seaman who mutinied with his crew and helped hijack another vessel that was subsequently used to plunder a third ship at sea). Furthermore, it should be noted that none of these federal antipiracy statutes make any mention of the payment of ransoms.

81. 538 F.3d 71 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2859 (June 29, 2009).

82. *Id.* at 95–96 (holding that the plaintiffs had not demonstrated that these individuals had “‘expressly aimed’ intentional tortious acts at residents of the United States”).

83. 153 F. Supp. 2d 76 (D.R.I. 2001).

84. *Id.* at 88.

activities and speaking engagements, the PA employed a lobbying firm in the United States, and both groups maintained several bank accounts in New York.⁸⁵ Based on the holdings of these two cases, the applicability of the statute to a foreign-based shipowner will depend on its contacts in the United States, including those in connection with the payment of the ransom.

F. Federal Anti-Money Laundering Laws

The Money Laundering Control Act of 1986 (“MLCA”)⁸⁶ is the statute that formally defines money laundering as a federal crime. The elements that constitute a violation of the MLCA are as follows: (1) the defendant conducted a financial transaction; (2) the financial transaction involved the use of “proceeds of specified unlawful activity;” (3) the defendant knew the property involved in the transaction were “proceeds of some form of unlawful activity;” and (4) the defendant knew such transaction was “designed . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds.”⁸⁷ A “specified unlawful activity” is defined in § 1956(c) and includes such offenses as violence against maritime navigation (18 U.S.C. § 2280), kidnapping (18 U.S.C. § 1201), and hostage taking (18 U.S.C. § 1203).⁸⁸ The courts uniformly hold that “proceeds” are “funds obtained from [some] prior, separate criminal activity.”⁸⁹

The statute focuses on the *source* of the funds used rather than *how* they are likely to be used. If ransom funds are to be derived from a vessel owner’s own assets, insurance proceeds, or a loan from a legitimate bank, then such ransom payment is almost certainly not derived from one of the specified unlawful activities listed in § 1956(c). Consequently, it is doubtful that any federal prosecutor could prove a violation of the second and third elements of the MLCA, which require the funds to be known to be from a “specified unlawful activity.” Moreover, the fourth element would be difficult to prove because the purpose of any such ransom payment would not be a financial transaction intended to conceal or disguise the source or

85. *Id.*

86. Pub. L. No. 99-570, 18 U.S.C. §§ 1956–57 (2006).

87. 18 U.S.C. § 1956(a)(1); *see* United States v. Maher, 108 F.3d 1513, 1526 (2d Cir. 1997) (dissecting the elements of the MLCA, in regards to a narcotics trafficking charge, to find the statute requires both that a defendant generally knew the proceeds from the transaction were derived from criminal activity and that they were to be used to cover up this activity).

88. 18 U.S.C. § 1956(c)(7).

89. United States v. Savage, 67 F.3d 1435, 1441 (9th Cir. 1995), *partially abrogated on other grounds by* United States v. Van Alstyne, 584 F.3d 803, 813 (9th Cir. 2009).

ownership of the proceeds. Given the court decisions cited above and the text of the MLCA, it is evident that payment of a ransom to the pirates would not in itself constitute a violation of the MLCA.

The scope of the MLCA has the jurisdictional hooks to apply against a foreign company.

For purposes of adjudicating an action filed or enforcing a penalty ordered under [18 U.S.C. § 1956], the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and—(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States; (B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or (C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.⁹⁰

18 U.S.C. § 1957 states that

[w]hoever, in any of the circumstances set forth [below], knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than \$10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b) [of 18 U.S.C. § 1957] The circumstances referred to . . . are—(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or (2) that the offense under [18 U.S.C. § 1957] takes place outside the United States and such special jurisdiction, but the defendant is a United States person⁹¹

Therefore, the MLCA should not apply, under normal cases, to a foreign shipowning company.

G. Bank Secrecy Act

The principal federal statute detailing the rights and obligations of individuals, banks, and financial institutions in the United States to assist U.S. government agencies in the detection and prevention of

90. 18 U.S.C. § 1956(b)(2).

91. 18 U.S.C. §§ 1957(a), (d).

money laundering is the Bank Secrecy Act of 1970 (“BSA”),⁹² which is administered by the Financial Crimes Enforcement Network (“FinCEN”) at the Treasury Department. The BSA provides extensive guidance for the filing of various required reports for certain kinds of transactions. Since Congress passed the BSA, several other federal statutes have been enacted to enhance and amend its provisions.⁹³ A review of the text of these statutes (contained in the FinCEN index) reveals that their primary focus is on establishing the fundamental requirements for record-keeping and reporting by private individuals, banks, and financial institutions to aid the U.S. government in identifying transfers of U.S. currency and money instruments into or out of the United States.

The BSA requires that transfers of U.S. “monetary instruments” be reported.⁹⁴ The most pertinent section of the BSA imposes reporting requirements on any “person or an agent or bailee of the person . . . [who knowingly transfers] monetary instruments of more than \$10,000 at one time [] from a place in the United States to or through a place outside the United States”⁹⁵ Such reports are to be filed at a time and place determined by the Secretary of the Treasury.⁹⁶ The statute further forbids failing—or causing another person to fail—to file a report required under § 5316.⁹⁷ Failure to report such transfers may lead to civil or criminal forfeiture of the property to the United States government.⁹⁸

The applicable regulations relating to the BSA (“BSA Regulations”) are contained in 12 C.F.R. § 21 and 31 C.F.R. § 103. The BSA Regulations are intended to apply to banks, mutual funds, insurance

92. Pub. L. No. 91-508, 84 Stat. 1114, 1114–24 (codified as amended in scattered sections of Titles 12, 15, and 31 of the United States Code).

93. See FinCEN, Bank Secrecy Act, http://www.fincen.gov/statutes_regs/bsa/ (last visited Mar. 23, 2010) (detailing the range of money laundering provisions that have been enacted to amend the BSA). FinCEN’s website provides a complete index of all the federal anti-money laundering and financial reporting statutes passed since 1970. See *id.*

94. Within the BSA, “monetary instruments” means—

(A) United States coins and currency; (B) as the Secretary may prescribe by regulation, coins and currency of a foreign country, travelers’ checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and similar material; and (C) as the Secretary of the Treasury shall provide by regulation for purposes of [31 U.S.C.] sections 5316 and 5331, checks, drafts, notes, money orders, and other similar instruments which are drawn on or by a foreign financial institution and are not in bearer form.

31 U.S.C. § 5312(a)(3).

95. 31 U.S.C. § 5316(a)(1)(A).

96. 31 U.S.C. § 5316(b).

97. 31 U.S.C. § 5324(c)(1).

98. 31 U.S.C. § 5317(d).

companies, stock and commodities brokers, and other financial service providers so that such financial intermediaries do not hide the transfer or deposit of money derived from criminal activity.⁹⁹ Additionally, the BSA and the regulations promulgated thereunder apply for the most part only to domestic financial agencies and domestic financial institutions that perform the reporting.¹⁰⁰ Thus, these parts of the BSA Regulations should not apply to a shipowner because the shipowner is not a financial agency or institution. While one would need to closely inspect each provision separately, two of the BSA Regulations merit further analysis.

BSA Regulation 31 C.F.R. § 103.16 requires an insurance company within the United States involved as a business in the issuing or underwriting of any “covered product”¹⁰¹ to file a Suspicious Activity Report by Insurance Companies (“SAR-IC”) if an insurance payout transaction is

conducted or attempted by, at, or through an insurance company, and involves or aggregates at least \$5,000 in funds or other assets, and the insurance company knows, suspects, or has reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part) . . . (iv) Involves use of the insurance company to facilitate criminal activity.¹⁰²

Under a *very* broad reading of the word “facilitate,” a payment by a U.S. underwriter to pirates may require the filing of SAR-IC by the insurance company for the payout of an underwritten covered product. However, FinCEN provided guidance in FIN-2008-G004, issued on March 20, 2008, stating that a contract of indemnity would not be considered a covered product.¹⁰³ FinCEN further stated that such an insurance policy, which could provide kidnap and ransom coverage, would otherwise not be considered a covered product—even if a direct payout were made by the insurer—because the policy lacks a cash value or an investment feature, which means that it poses less risk of being utilized for money laundering.¹⁰⁴

99. See 31 C.F.R. §§ 103.15–103.22 (listing the suspicious transaction reporting requirements for various financial institutions).

100. 31 U.S.C. § 5312 (b)(1).

101. See 31 C.F.R. § 103.16(a)(4) (defining a “covered product” as a permanent life insurance policy, an annuity contract, or “other insurance product with features of cash value or investment”).

102. 31 C.F.R. §§ 103.16(b)(2), (2)(iv) (2009).

103. See DEP’T OF THE TREASURY FIN. CRIMES ENFORCEMENT NETWORK, GUIDANCE FIN-2008-G004 3 (2008), http://www.fincen.gov/statutes_regs/guidance/pdf/fin-2008-g004.pdf (clarifying that several products, including contracts of indemnity, are not considered “covered products” because they are less likely to be used for money laundering purposes).

104. As described by FinCEN:

BSA Regulation 31 C.F.R. § 103.23 mandates that *all* individuals or organizations make a report of the transportation of more than \$10,000 anytime they physically transport monetary instruments from a place in the United States to or through a place outside the United States.¹⁰⁵ That regulation states that “[a] person is deemed to have caused such transportation . . . when he aids, abets, counsels, commands, procures, or requests it to be done by a financial institution or any other person.”¹⁰⁶ For this reason, a payer of a ransom to pirates will clearly need to ensure that if U.S. currency is transported from the United States to the designated payoff spot, a report of the transfer is filed. If funds originating outside the United States are used for ransom payments, federal anti-money-laundering laws are generally not implicated.

CONCLUSION

If ransom payments were known to be made to terrorists or used to fund terrorist activities, then such payments are likely to be illegal and would likely be prosecuted. However, in early February, 2009, Rear Admiral Ted Branch, Director of Information, Plans, and Security at the Office of the Chief of Naval Operations, testified at a Congressional hearing on piracy, stating that “agencies had been looking for a link between terrorism and the piracy taking place off the Somali Coast but had not detected any.”¹⁰⁷ This statement supports the conclusion that the payment of ransom to pirates, who

The definition [of covered product] incorporates a functional approach, and encompasses any insurance product having the same kinds of features that make permanent life insurance and annuity products more at risk of being used for money laundering, *e.g.*, having a cash value or investment feature. To the extent that . . . other kinds of insurance do not exhibit these features, they are not products covered by the rule.

See id. at 3.

105. 31 C.F.R. § 103.23(a). Note, however, that the required reporting is subject to several exceptions, which are set forth in § 103.23(c).

106. *Id.*

107. JORGE ROMERO ET AL., *THE PIRATES OF PUNTLAND: PRACTICAL, LEGAL AND POLICY ISSUES IN THE FIGHT AGAINST SOMALI PIRACY* 6 (K&L Gates 2009). In contrast, in March, 2009, Ban Ki-moon, United Nations Secretary-General, reported:

[G]overnment officials in the northeastern Somali region of Puntland as well as those in the ‘Transitional Federal Government’ [] of Somalia are complicit in piracy and the fairly clear indications that al-Shabaab, an al-Qaeda-linked Somali group that was formally designated a ‘foreign terrorist organization’ last year by the U.S. Department of State, is getting at least a part of the ransom proceeds in exchange for allowing the pirates to operate in areas it controls

J. Peter Pham, *Strategic Interests: Pondering Somali Piracy*, *WORLD DEF. REV.*, Apr. 23, 2009, <http://worlddefensereview.com/pham042309.shtml>.

are not terrorists, is allowable in most circumstances under the laws of the United States.

As discussed in the Introduction of this Article, however, following the taking of the *Maersk Alabama* in the spring of 2009, officials in the federal government, including Secretary of State Hillary Clinton, made comments about how Somali pirates could potentially be treated as terrorists and made subject to monetary sanctions.¹⁰⁸ This call has since grown into rumors of possible legislative or regulatory action to make ransom payments illegal, either specifically in Somalia or as a more blanket policy. This speculation, if realized, would have the unfortunate consequence of making the United States treat ransom payments by a shipowner, manager, or insurance company that is trying to save the lives of the ship operator's crew as criminal activity.

As of now, paying the ransoms is the only dependable way a shipowner has to ensure the safe release of its crew. There is a fear that the successes of piracy have helped fuel the practice. The average ransom settlement has gradually increased over the past year, and it is expected that the average ransom settlement may reach \$3,000,000 during 2010.¹⁰⁹

If ransom payments are made illegal, if pirates are deemed to be terrorists, or if the number of persons blocked pursuant to the Executive Order is expanded to include most known pirate associates, shipowners will be placed in an untenable position: they must either pay a ransom to ensure the safety of their crews and consequently face a risk of prosecution for violating U.S. law, or refuse payment and risk the lives of their crew.¹¹⁰ Fortunately, this is

108. See John Whitesides, *Clinton Calls for Expanded Global Response to Piracy*, REUTERS, Apr. 15, 2009,

<http://www.reuters.com/assets/print?aid=USTRE53E5ZU20090415> (“[Secretary of State Hillary Clinton] said the United States also would step up efforts to track and freeze the monetary assets of the pirates, just as it does with drug traffickers and terrorist groups.”).

109. See John Drake, *Ships Face Greater Attack Risk in Indian Ocean*, LLOYD'S LIST, Feb. 19, 2010, at 13 (speculating that the average ransom payment could soon reach three million dollars in light of the fact that the average payment not only reached a record high in 2009 but has continued to swell since that time).

110. Other countries have already taken note of this problem. For example, “[H]ong Kong shipowners have written to the Chinese government warning of the possible consequences if the U.S. goes ahead with plans to make ransom payments to pirates illegal.” See Wallis, *supra* note 47 (discussing the likelihood of a strong backlash if the payment of ransoms are made illegal). The UK High Court of Justice recently ruled that the payment of ransom for the safe release of vessel and crew should not be categorized as contrary to public policy. See *Masefield AG v. Amlin Corporate Member Ltd.* [2010] EWHC (Comm) 280, ¶ 95 [Eng.] (rejecting an argument advanced by an insurer of cargo that was held for ransom that payment of said ransom should be deemed to be against public policy).

not the current state of affairs, but there is a possibility that the current state of affairs may soon change from discouraging ransom payments to prohibiting them. While payment of ransom may foster piracy, criminalizing the victim cannot be the answer.

As the current state of affairs exists, there are limits to what a vessel owner or its insurers might know about the identity of the pirates or the intended purposes or final recipient of ransom proceeds. The FCPA will generally not be implicated by the payment of ransom to pirates, and so long as an entity does not know that the proceeds of any ransom paid do not go directly to any person on the SDN List or FTO List, it should avoid liability for violation of the OFAC Regulations and the federal laws prohibiting support of terrorism.¹¹¹ Lastly, a U.S. entity should be aware that the payment of ransom is not a violation of the federal anti-money-laundering statutes in and of itself, but that the payment must comply with federal reporting requirements with respect to the transfer of U.S. currency. If the United States determines that pirates are terrorists, however, it has a broad arsenal at its disposal to swiftly sanction those who pay ransoms to pirates.

111. While some of the laws relating to the payment of ransom may be similarly applicable to U.S. and non-U.S. entities, two of the more significant laws and regulations, the OFAC Regulations and the MLCA, should not apply to a foreign shipowning company without sufficient contacts to the United States.