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LEGAL CHALLENGES TO MIDDLE EAST BUSINESSES AND INDIVIDUALS IN A TRUMP PRESIDENCY

As the reality of the impending Trump presidency sets in around the globe, many are scrambling to predict and plan for the consequences of the inevitable policy shifts of the next four years. The difficulties in this endeavor are myriad – namely the lack of specifics provided on many issues during the campaign, or the legal obstacles the new administration would face implementing proposals that clearly implicate established domestic and international law. But it is clear that a host of likely legal challenges will confront Middle East businesses and individuals that do business in or with the United States or American companies under a Trump Presidency.

Because President-elect Trump has said little in detail about foreign policy or the Middle East, the tenor of his administration can only be anticipated based on his comments on the campaign trail and in the early days of the transition. These statements include bans on Muslim visitors and proposals for a national registration of Muslims, among other things. The aggressive tone likely signals policies of increased scrutiny of Muslims and a ratcheting up of pressure on organizations doing business with the Middle East. Groups doing business in the region – banks, financial institutions/advisory services, businesses, and charities – may anticipate finding themselves increasingly at the cross-hairs of criminal investigations and civil actions in this environment if policies are instituted to match Trump's fiery campaign rhetoric.

And one does not have to search back far in the history books for clues as to how this may play out. Within days of the 9/11 attacks, an energized Bush executive branch expanded the Treasury Department's unilateral authority to unilaterally freeze assets that it considered related to terrorist organizations and Federal authorities began investigating tens of Muslim charities. Today, the Treasury Department retains its virtually unchecked power to designate groups as terrorist organizations and law enforcement has incredible discretion to conduct investigations into their activities. While in recent years the United Nations instituted clear procedures to review adverse actions, no such procedure was implemented by the Obama administration, leaving the U.S. process as opaque as it was under the Bush administration at the dawn of a Trump presidency.

The effect of the Trump administration's likely increased scrutiny of trade with the Middle East and of Muslims in general will be magnified by recent legislation designed to make suits related to terrorist financing easier to bring. Congress recently passed Justice Against Sponsors of Terrorism Act ("JASTA"), which expands liability under the Anti-Terrorism Act ("ATA") to include persons and entities who aid, abet, or conspire with Foreign Terrorist Organizations as liable for damages under the ATA. This expansion is likely to make it easier for victims of terrorism to sue banks, remittance companies, charities and other organizations that are frequently alleged to have provided financing for terrorist organizations.

The interplay of this expansion of ATA liability with potential increased investigation of Islamic and Arab organization under a Trump presidency will pose significant challenges, as cases

brought under the ATA often include allegations that the defendants have already been investigated by the government. The complaints use "where there's smoke, there's fire" strategies and rely on reports of office raids or investigations to lend credibility to their assertions of knowing assistance to a terrorist group, even when those actions failed to uncover any evidence of misconduct. And judges have ruled in numerous instances that such governmental actions provide sufficient bases to allow otherwise flimsy claims to proceed, amplifying the potential consequences of a Trump executive into the civil arena as well.

U.S. banks also face increasing pressure in the form of escalating regulatory oversight into their anti-money laundering controls, potential reputational risk should they mistakenly provide financial services to an entity associated with terrorism, and the threat of suit for processing transactions that fund terrorism. This has led to systematic "de-risking," in which banks aggressively terminate relationships with foreign correspondent banks, money services businesses, and individual clients that pose perceived risks of money laundering or terrorist financing, effectively placing heavy strain on Middle East related business.

So, what to do?

First, each entity – not just banks but also businesses and charities -- should consider its risk and how to mitigate it. If U.S. regulatory expectations are increased, it will present greater opportunities for banks and other entities that have more sophisticated compliance programs. Given that the U.S. cannot simply stop doing business with the Middle East, organizations with the best compliance—and can demonstrate its best practices-- will have a distinct advantage in maintaining and even increasing their business.

Second, companies and banks should plan for de-risking by making sure their compliance is up-to-date and being ready to provide compliance-related information in a detailed and transparent form. Organizations dependent on relationships with U.S. banks must not only be willing to provide compliance information; that information must also be of a certain caliber and crafted in accordance with their U.S. partner's expectations and regulatory obligations. If, for example, a non-U.S. bank is located in a high-risk jurisdiction, the U.S. bank will expect forthright recognition of that risk and commensurate compliance controls designed to mitigate it.

Third, individuals and entities who believe they may be targeted for increased scrutiny should obtain experienced counsel and should ask for a full briefing on their rights. Certain forms of discrimination are illegal in the United States. But more importantly, many actions – particularly actions by government agencies – can be challenged either through administrative procedures or in court.

Organizations are well served to work with counsel familiar with the issues facing the banks, as well as third party accountants, to develop reporting protocols and compliance regimes that satisfy the highest reporting standards. If direct inquiries or allegations of impropriety have been made by either government agencies or financial institutions there may still be a window to

assuage their concerns and competent counsel should be retained prior to adverse actions. And in the event that an adverse action is taken – either by the government, a risk-averse bank, or a private citizen suing your organization – there still remains a bevy of laws and courts tasked with enforcing those laws. Even in a Trump presidency.

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