

Afghanistan has Fallen: U.S. Taliban Sanctions Now Present a Critical Risk to Entities with Operations in Afghanistan.

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This is the second article from Nichols Liu regarding how U.S. Government contractors and grant recipients can minimize risks associated with operations in Afghanistan following Taliban control. Nichols Liu's [first article](#) focused broadly on actions contractors and grantees should take immediately to minimize risks associated with the fall of Afghanistan. This article focuses on U.S. sanctions risks associated with Taliban control and the key sanctions compliance issues that contractors and grantees planning to continue operations in Afghanistan should consider now.

Current Taliban Sanctions

In 2002, the U.S. Government designated the Afghanistan Taliban a Specially Designated Global Terrorist (SDGT) under [Executive Order 13268](#) and [Executive Order 13224](#). Executive Order 13324, updated by [Executive Order 13886](#) in 2019 and implemented in the Global Terrorism Sanctions Regulations, [31 C.F.R. Part 594](#), among other things, prohibits U.S. persons, directly or indirectly, from engaging in any transaction or dealing in property or interests in property of the Taliban (or any other SDGT), including but not limited to, making any contribution or provision of funds, goods, or services by, to, or for the benefit of the Taliban or receiving any contribution or provision of funds, goods, or services from the Taliban. The sanctions apply to the designated entity, in this case the Afghanistan Taliban. Executive Orders and the Global Terrorism Sanctions Regulations make clear that the Secretary of the Treasury can designate entities that are owned or controlled by Taliban.

Additional Legal Requirements for U.S. Government Contractors and Grantees

U.S. Government grants and contracts already prohibit contractors and recipients from providing any form of material support to the Taliban. The "Never Contract with the Enemy Act" allows the U.S. Government to suspend or debar any contractor that does not exercise due diligence to prevent U.S. Government funds from going, directly or indirectly, to the Taliban.

For USAID grantees, the mandatory USAID Counterterrorism Certification requires grantees to certify that, for the past three years, they have not provided material support to the Taliban (or any other SDGT, Foreign Terrorist Organization or entity subject to U.N. counterterrorism sanctions). This certification applies regardless of whether U.S. Government funds were involved. A false certification also raises potential False Claims Act liability risks. In fact, USAID has already suspended a recipient for alleged indirect payments to the Taliban.

Key Taliban Sanctions Risks #1– Application of Sanctions to the Government of Afghanistan

It remains unclear whether the U.S. Government (1) will sanction the entire Government of Afghanistan and all of its agencies via a new sanctions regime, perhaps an embargo; (2) will apply the SDGT designation to the entire Government of Afghanistan; or (3) will simply designate certain elements of

the Government of Afghanistan. In addition, recent articles indicate that Treasury Secretary Janet Yellen will freeze the Central Bank of Afghanistan's assets. Presumably this would occur by designating the Central Bank as an entity under Taliban control.

Key Taliban Sanctions Risks #2 – Effective Compliance Measures vs Safety and Security Risks

Even if the Secretary of the Treasury does not specifically designate the entire Government of Afghanistan, it will be very difficult for contractors and grantees to know whether standard transactions with the Government of Afghanistan, such as paying taxes, permit fees, utility fees, import duties, or other routine payments will result in funds passing to the Taliban or its leaders in control of various branches of the Afghan government. Likewise, funding social services or providing services to the Government of Afghanistan will now present significant compliance risks. For example, most Government of Afghan Ministry of Public Health facilities across Afghanistan are funded by international donors and most are administered by NGOs and INGOs under grants issued by the Ministry of Public Health. Such humanitarian efforts will present significant sanctions compliance risks absent swift clarity from the U.S. Government.

This is not to say that, absent specific designations or new sanctions applicable to Government of Afghanistan agencies, contractors and grantees cannot conduct adequate due diligence and determine that payments and services provided to Government of Afghanistan agencies is compliant in specific situations. However, given how the Taliban historically exercised control, establishing sufficient separation between the Taliban and government agencies under its control will be particularly challenging.

Standard compliance measures, such as requiring all vendors and subgrantees to sign counterterrorism financing certifications, compliance training, and reporting and investigating potential violations may now create significant safety and security risk for contractor and grantee staff and partners on the ground. Adapting due diligence and compliance measures to ensure that they are both effective and do not create safety and security risks in Afghanistan will be a unique, but not insurmountable challenge. This is a challenge that humanitarian aid organizations have had to address in other contexts, but each context is unique to the sanctioned entity in control.

Key Taliban Sanctions Risk #3 – Financial System De-Risking

Aside from the direct compliance risks facing contractors and grantees, international financial institutions, including U.S. and intermediary banks around the world, insurance companies and any financial entity interested in doing business with the U.S., or with banks located in the U.S., likely will quickly de-risk from Afghanistan. This has been the case in other countries that end up subject to control of a designated terrorist entity. Contractors and grantees should anticipate that funds transfers to or from Afghanistan will be intercepted by intermediary banks and blocked until the contractor or grantee can demonstrate that the specific transfer to and the use of funds in Afghanistan will comply with U.S. sanctions. Typically, this requires showing an applicable OFAC specific or general license or providing a memo from counsel explaining compliance. Even then, many financial institutions will simply refuse to process transactions or transfers involving Afghanistan and will cease relationships with financial institutions in Afghanistan. Many may also terminate accounts of entities, including non-profits, with operations in Afghanistan.

Contractors and grantees that plan to continue operations in Afghanistan should quickly establish contingency plans for transferring funds into Afghanistan in a compliant manner. Unfortunately, in other contexts, such as Syria and Somalia, this often means using informal money transfer services after extensive due diligence.

Solutions Require U.S. Government Action

As should be apparent, real solutions that will allow contractors, grantees and other humanitarian aid providers to continue operations will require action by the U.S. Government. Nichols Liu is actively working with many contractors, grantees and key representatives in the Government to understand the new sanctions environment for Afghanistan and to find workable solutions.

In many respects, although the political realities may differ, the legal situation in Afghanistan will be similar to the situation in Yemen during the short-lived SDGT and Foreign Terrorist Organization (FTO) designation of Ansarallah. In Yemen, as in Afghanistan now, the U.S. Government was asked to issue General Licenses that authorized non-profit operations and other forms of aid and development. The Global Terrorism Sanctions Regulations and related Executive Orders that apply to the Taliban allow OFAC to issue specific and general licenses. In the case of Afghanistan, to prevent a humanitarian catastrophe, including the near immediate shut down of health facilities across the country, the U.S. Government can choose to:

- (1) apply a new sanctions regime to the Government of Afghanistan that allows for aid and development activities and the critical flow of food, medicine and other commercial items necessary to prevent a humanitarian catastrophe;
- (2) take a very targeted approach, selectively designating Government of Afghanistan agencies under Executive Order 13224 and clarifying that non-designated entities are not subject to SDGT sanctions;
- (3) issue a series of Office of OFAC general licenses under the Global Terrorism Sanctions Regulations that broadly authorize:
 - a. non-profit activities, including, among other things, providing social and humanitarian services to and for the Government of Afghanistan (e.g. running health facilities and schools);
 - b. U.N. and other multilateral donors and U.S. Government funded activities; and
 - c. commercial activities necessary to meet the populations basic needs, such as importation of food and medicine; and/or
- (4) clarify its policy on issuing OFAC Specific Licenses, particularly as they relate to aid and development.

In other situations where Foreign Terrorist Organizations control territory, the U.S. Government has only issued Specific Licenses to U.S. Federal Agencies that those Agencies flow down to contractors and grantees. However, these licenses do not outright authorize transactions with the designated entity and merely provide protection if, after best efforts to prevent them, transactions occur without contractor or grantee complicity. This solution likely will not work in Afghanistan given the level of control that both the Government of Afghanistan and the Taliban exercise and the likely need to engage in some level of standard transactions knowingly.

Steps to Take Now to Mitigate Risks

Until the U.S. Government clarifies its position, contractors and grantees should consider taking the following practical steps to minimize sanctions compliance risks:

- (1) Catalog the transactions with Government of Afghanistan entities that might lead to violations of the SDGT sanctions and develop contingency plans to immediately halt such activities pending clarification from the U.S. Government;
- (2) Consider submitting Specific License applications to OFAC as soon as possible - specific Licenses undergo interagency review and can take substantial time to process, particularly when they involve an SDGT;
- (3) Review and strengthen due diligence processes to both ensure that they will not draw the ire of the Taliban and increase security risks for team members, a very real concern that requires a great deal of care, and can still effectively ensure compliance;
- (4) Put in place contingency plans for funds transfers into and out of Afghanistan should the international banking system de-risk the country;
- (5) Prepare to communicate compliance measures being taken with your U.S. bank and other financial institutions, including with insurance brokers; and
- (6) Consider reporting obligations and voluntary self-disclosures should potential sanctions violations arise during this difficult period of uncertainty;
- (7) Pay close attention to how the U.S. Government will apply sanctions to the Government of Afghanistan.

Nichols Liu attorneys are well-versed in these areas and regularly work with U.S. Government Agencies, including the Treasury Department to ensure that aid and development programs can continue in high-risk environments. We understand Afghanistan well and have spent significant time in the country and working on due diligence and investigations related to sanctions violations in Afghanistan. We have also successfully guided clients in seeking OFAC specific licenses and developing sanctions compliance regimes that satisfy U.S. and international sanctions requirements in ways adapted to the local safety and security context in high-risk environments. We can assist contractors and grant recipients in taking necessary actions. We will also keep clients and others informed as developments occur. In the interim, if you have any questions or need any additional information, please do not hesitate to contact

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