



The “Foreign Terrorist Organization” Designation Scheme

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), the federal government can impose severe sanctions on an organization that the Secretary of State designates a “Foreign Terrorist Organization” (“FTO”). Any assets of the organization that are held by U.S. financial institutions are frozen and its non-citizen members or representatives are barred from entry into the United States. Moreover, U.S. and foreign financial institutions, organizations, and individuals can be criminally prosecuted for knowingly providing “material support,” broadly defined to include services, resources, or “expert advice or assistance,” to the designated FTO. Judicial review of FTO designation is highly limited and deferential, and may be based on secret information that the designated organization cannot see. Administrative review is not available until two years after the designation.

This background paper provides an overview of the FTO designation scheme.

Legal Authority and Criteria for FTO Designation

AEDPA gives the Secretary of State broad discretion to designate FTOs.¹ The Secretary of State may designate an organization an FTO upon determining that:

- (1) the organization is a foreign organization;
- (2) the organization engages in terrorist activity, terrorism, or material support of terrorism, or retains the capability and intent to engage in terrorist activity or terrorism;² and
- (3) the terrorist activity or terrorism of the organization threatens the security of U.S. nationals or the national security of the United States.³

Consequences of FTO Designation

The consequences of designation as an FTO are severe. Any assets of the organization held by U.S. financial institutions may be frozen completely, even before the organization has notice that it has been designated.⁴ FTO designation has immigration consequences as well: Non-citizen members or representatives of a designated FTO are barred from entry into the United States and those present in the United States may face removal.⁵

¹ Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in relevant part at 8 U.S.C. § 1189).

² 8 U.S.C. § 1189(a)(1). “Terrorist activity” is defined for the purpose of FTO designation in 8 U.S.C. § 1182(a)(3)(B) and “terrorism” is defined in 22 U.S.C. § 2656f(d)(2).

³ 8 U.S.C. § 1189(a)(1).

⁴ 8 U.S.C. § 1189(a)(2)(C).

⁵ U.S. Department of State, Bureau of Counterterrorism, *Foreign Terrorist Organizations*, <https://www.state.gov/j/ct/rls/other/des/123085.htm> (citing 8 U.S.C. § 1182(a)(3)(B)(i)(IV)-(V)).

U.S. and foreign financial institutions, organizations, and individuals can face criminal charges for knowingly providing “material support”—including services, resources, or “expert advice or assistance”—to FTOs.⁶ The Treasury Department may also freeze those other entities’ and individuals’ U.S. assets if it investigates them under a separate designation regime—as a potential Specially Designated Global Terrorist (“SDGT”) because of alleged support for or association with an FTO. If the Treasury Department determines that the entities or individuals meet the criteria for SDGT designation, it may block their assets indefinitely.⁷

FTO Designation Procedure

The Secretary of State initiates a designation by assembling an administrative record with information supporting the statutory FTO designation criteria.⁸ Before making a designation, the Secretary of State must consult the Secretary of the Treasury and the Attorney General, and send certain Congressional leaders a classified communication notifying them of the intent to designate the organization and including the grounds and factual basis for designation.⁹ At this time, the Treasury Secretary may block any assets of an organization held by a U.S. financial institution.¹⁰

Seven days after the congressional notification, the Secretary of State must publish the designation in the *Federal Register* and designation of the organization takes effect upon publication.¹¹ Publication in the *Federal Register* may be the only official notification that a designated FTO receives.

Post-Designation Administrative Review

A designated FTO may only seek administrative review two years after it has been designated, and the administrative review process is limited.¹² The designated FTO may submit to the Secretary of State a petition for revocation with evidence that the organization’s circumstances are “sufficiently different” from the circumstances that were the basis for designation in the first place.¹³ Within 180 days of receiving the petition, the Secretary must make a determination whether revocation is warranted and publish that decision in the *Federal Register*.¹⁴ In making the determination, the Secretary may rely on classified evidence that the designated entity cannot see.¹⁵

⁶ 18 U.S.C. § 2339B; *see also* 18 U.S.C. § 2339A and 8 U.S.C. 1189.

⁷ *See* Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001), *amended in part by* Exec. Order No. 13,372, 70 Fed. Reg. 8,499 (Feb. 16, 2005); *see also* 31 C.F.R. 594.201.

⁸ 8 U.S.C. § 1189(a)(3)(A).

⁹ 8 U.S.C. §§ 1189(a)(2)(A)(i), (d)(4).

¹⁰ 8 U.S.C. § 1189(a)(2)(C).

¹¹ 8 U.S.C. §§ 1189(a)(2)(A)(ii), (a)(2)(B)(i).

¹² 8 U.S.C. § 1189(a)(4)(B).

¹³ 8 U.S.C. § 1189(a)(4)(B)(i)-(iii).

¹⁴ 8 U.S.C. § 1189(a)(4)(B)(iv).

¹⁵ 8 U.S.C. § 1189(a)(4)(B)(iv)(II).

If the organization does not submit a petition for revocation, the Secretary of State reviews the designation every five years, and publishes the outcome in the *Federal Register*.¹⁶

FTO designations can also be revoked if the Secretary of State determines that there are grounds for doing so and notifies Congress.¹⁷ Congress can also pass legislation to revoke designations.¹⁸

Post-Designation Judicial Review

A designated FTO may seek judicial review far more quickly than administrative review, although judicial review is circumscribed, in timeframe, venue, and scope. The organization must seek judicial review within 30 days of FTO designation, and may only seek review in the U.S. Court of Appeals for the District of Columbia Circuit.¹⁹

In previous challenges to FTO designation, the Court of Appeals has held that it will limit its review to the first two criteria for designation—i.e., whether the organization is foreign, and whether it engages in terrorism or material support for terrorism, or has the capability and intent to engage in terrorism or terrorist activity. According to the court, the third criterion—whether the designated FTO’s activities threaten U.S. nationals or national security—is an unreviewable political question.²⁰

The court’s review is generally limited to the administrative file that the State Department compiled in making its determination, although the government may present additional classified evidence to the court *ex parte* and *in camera*, meaning that the organization or its lawyers may not see that information or meaningfully contest it.²¹

The Court of Appeals may only overturn a designation if it concludes that the designation was: (1) arbitrary or capricious; (2) unconstitutional (but the court will likely only adjudicate constitutional questions if the designated entity has property in the United States, or if it has a presence and substantial connections here); (3) lacks substantial support in the administrative record (as supplemented by classified information submitted to the court); or (4) does not comply with the procedures established by AEDPA.²²

¹⁶ 8 U.S.C. § 1189(a)(4)(C).

¹⁷ 8 U.S.C. § 1189(a)(6).

¹⁸ 8 U.S.C. § 1189(a)(5).

¹⁹ 8 U.S.C. § 1189(c)(1).

²⁰ *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 613 F.3d 220, 223 (D.C. Cir. 2010).

²¹ 8 U.S.C. § 1189(c)(2).

²² 8 U.S.C. § 1189(c)(3); *see also Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 203 (D.C. Cir. 2001) (finding that due process protections apply where a foreign organization “entered the territory of the United States and established substantial connections with this country”); *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999); *32 Cty. Sovereignty Comm. v. Dep’t of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (declining to review the constitutionality of a designation because the designated entity demonstrated neither a property interest nor a presence in the United States); *People’s Mojahedin Org. of Iran*, 613 F.3d at 222 (finding due process violation when Secretary of State redesignated organization as FTO without meaningful notice or opportunity for organization to rebut unclassified administrative record).