

## Preparing For Mexican Drug Cartels' Terrorist Designation

By **Grant Nichols, Brandt Leibe and Michael Galdo** (January 13, 2025, 5:55 PM EST)

On Dec. 22, President-elect Donald Trump gave a speech in Arizona in which he reiterated his pledge to designate Mexican drug cartels as terrorist organizations: "I will immediately designate the cartels as foreign terrorist organizations."

Below, we discuss the legal authority and consequences of such a designation, and the compliance and legal risks that businesses should carefully consider based on Trump's pledge.

### Legal Background

To date, the Mexican drug cartels have not been designated as foreign terrorist organizations, or FTOs. However, many drug cartel leaders have been designated under the Foreign Narcotics Kingpin Designation Act, which provides for sanctions on specific designated foreign narcotic traffickers.

By contrast, FTO designations target entire organizations. An organization may be designated an FTO by the secretary of state if it is:

- A foreign organization;
- Engaged in terrorism or retaining the capability and intent to engage in a terrorist activity, with terrorism defined as the use of explosives or firearms to endanger others, kidnapping to compel actions, or assassination; and
- A threat to the security of U.S. nationals, or U.S. national security, which includes national defense, foreign relations or U.S. economic interests.[1]

It is unlawful for a U.S. person, a person in the U.S. or an entity subject to U.S. jurisdiction to provide material support to an FTO. Material support includes the giving of tangible or intangible property, or the provision of services — with certain very limited exceptions related to direct medical or religious support.

Financial institutions must freeze and notify the U.S. Department of the Treasury's Office of Foreign Assets Control of any funds in which an FTO or its agent has an interest.



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Under the material support statute, the U.S. has jurisdiction over conduct that occurs overseas when:

- The matter involves U.S. citizens;
- If after conduct occurs overseas, the offender is brought into or found in the territory of the U.S.;
- The offense occurs in or affects U.S. interstate or foreign commerce; or
- A person aids or abets another person that qualifies under the statute.

In addition to government enforcement, the Anti-Terrorism Act, at Title 18 of the U.S. Code, Section 2333, authorizes persons whose property or business has been injured by an act of international terrorism committed by an FTO to bring civil lawsuits.

The U.S. Supreme Court's 2023 opinion in *Twitter Inc. v. Taamneh*, explained that under the ATA aiding and abetting liability is confined to "a conscious, voluntary, and culpable participation in" someone else's wrongdoing.

### **Designating Mexican Drug Cartels as FTOs**

Elected officials in the U.S. have long suggested designating Mexican drug cartels as FTOs, with bills introduced in the U.S. House of Representatives as early as 2011 and 2012.[2]

During his first presidency, Trump announced that he had gone through the process to designate the cartels as terrorist groups.[3] In December 2019, Trump declared that he was prepared to make the legal terrorist designation, but said he had put the plans on hold at the request of the president of Mexico.[4]

President Joe Biden did not pursue the FTO designation for Mexican drug cartels, but calls for the designation continued, with bills being introduced in Congress in 2023.[5] In 2024, Tom Homan, named as Trump's so-called border czar in November, announced that Trump would designate Mexican drug cartels as FTOs.[6] Trump reaffirmed this commitment in the previously noted December speech.[7]

From a legal perspective, many of the Mexican drug cartels likely meet the FTO criteria. The drug cartels are foreign, and despite changing leadership and structure, they are an organization.

Many drug cartels have engaged in terrorist activity, and have long track records of kidnappings, use of firearms and explosives, and assassinations.

Finally, many of the drug cartels threaten the security of U.S. nationals, both in Mexico and the U.S., by direct violence and by trafficking powerful drugs like fentanyl, which led to overdoses in the U.S. And because the statutory definition of national security now includes the economic security of the U.S., the billions of dollars in illicit proceeds from drug trafficking flowing through U.S. financial institutions poses a threat to U.S. national security as well.

### **Practical Implications**

The practical implications of designating the Mexican drug cartels as FTOs are myriad. The cartels are deeply intertwined with elements of Mexican political and business structures. Mexican drug cartels are not merely drug trafficking organizations. There are dozens of cartels across Mexico, with varying affects on cross-border commerce.[8]

The major cartels control core territories, and they also operate in a competitive environment. Each cartel competes for more profits and more market share, often through violence and control of key border-crossing areas.[9] The cartels have also diversified their sources of illicit income, in 2022 making an estimated \$13 billion just from human trafficking and smuggling.[10]

High-ranking Mexican officials have been indicted in U.S. courts for their roles in drug cartel networks.[11] And Mexican businesses have been charged for their role in laundering the proceeds of drug trafficking.[12]

The cartels are also intertwined with elements of Mexico's legitimate economy, and directly or indirectly participate in cross-border commerce. A 2023 study by the Complexity Science Hub estimated that over 160,000 Mexicans work for the cartels. If that estimate is accurate, the drug cartels are Mexico's fifth-largest employer.[13]

Within parts of Mexico, cartels are de facto rulers that extort and control local economies, reaching down even to tortilla makers.[14] In 2020 the Mexican Secretariat of Environment and Natural Resources reported that About 70% of lumber production in Mexico is illicit.[15] Onexpo, a national gas station group, estimates that around 30% of gasoline is stolen or smuggled in Mexico.[16]

Reports indicate that the drug cartels have imposed illegal taxes on everything from potatoes to avocados,[17] and multiple witnesses have testified at trial about drug cartels controlling everything from shopping malls to horse racing.[18]

Mexican newspapers have reported that the Gulf Cartel taxes U.S. importers through control of border cities and corrupt local officials. In May 2024, one Mexican newspaper published a list of 215 items on which so-called import taxes are imposed by the Gulf Cartel in Matamoros, including taxes imposed on everything from cosmetics to horses.[19]

### **Historical Examples of Material Support Enforcement**

The U.S. Department of Justice has a long history of criminally charging entities and individuals with materially supporting FTOs. Many of those cases are brought against individual terrorists or those involved with financing widely recognized terrorist organizations.

However, the DOJ has shown itself capable of using anti-terrorism legal tools to investigate and bring charges against businesses that make payments to FTOs in order to operate otherwise legitimate businesses.

For example, the DOJ prosecuted Chiquita Brands International Inc. in 2003 for payments to the Autodefensas de Columbia, a violent paramilitary group designated as an FTO. Chiquita's Colombian subsidiary paid the AUC directly and through intermediaries between 1997 and 2004. Executives at Chiquita authorized corporate payments to the AUC starting in 1997 to ensure safety and security in certain parts of Colombia.

The U.S. designated the AUC as an FTO in 2001, but payments continued for several years, hidden and via cash, all with senior executive knowledge. Chiquita self-disclosed and in 2004 pled guilty in the U.S. District Court for the District of Columbia to providing material support to the terrorist group.[20]

The DOJ also charged the French company Lafarge SA with providing material support to ISIS and the al-Nusrah Front, or ANF, in Syria in 2013 and 2014. Lafarge pled guilty to those charges in the U.S. District Court for the Eastern District of New York in 2018.[21]

In that case, a Syrian subsidiary of Lafarge paid ISIS and ANF to maintain operations at a Syrian cement factory. After the civil war in Syria started in 2011, Lafarge paid various armed groups in exchange for the security to operate.

As ISIS and the ANF gained power across Syria in 2013 and 2014, Lafarge's senior executives approved a plan to share revenue with ISIS and ANF based on continued production and sale of cement. Lafarge's Syrian subsidiary earned \$70.3 million in revenue in Syria across that year, giving \$5.92 million in revenues to ISIS and ANF, and over \$1 million to third-party intermediaries involved in negotiations.

### **Risks for U.S. Businesses**

Even if the Trump administration does not formally designate drug cartels as FTOs, it can use the existing authorities of the Kingpin Act in a robust way, exercising OFAC's authorities to target businesses, as the first Trump administration did.[22]

However, if the new Trump administration keeps its promise to designate Mexican drug cartels as FTOs, the broad reach of the designation will create additional and unique challenges for companies operating in Mexico and Central America, or through a Mexican or Central American subsidiary.

Many situations will require careful analysis, knowledge of the full scope of the criminal and administrative enforcement tools related to terrorism and terrorist financing, and the ability to conduct internal investigations with the protections of attorney-client privilege. Given the added emphasis on corporate compliance, including the role of vendors and subsidiaries, companies should carefully consider these scenarios.[23]

### ***Political Will to Enforce May be High***

Given Trump's focus on border security, enforcement bodies may be motivated to starve cartels of resources through enforcement of Title 18 of the U.S. Code, Section 2339(B). The Chiquita and Lafarge precedents demonstrate the U.S. can aggressively charge companies that directly or indirectly support FTOs.

Companies operating in Mexico or along the border will need to revisit their operations in Mexico and ensure compliance with the law, or they risk being used as an example what happens when a corporation runs counter to a key item in the administration's national security agenda.

### ***Existing Practices May Raise Liability Concerns***

Practices need to be evaluated continuously. Whether due to the increased pace of specially designated nationals listings under the Kingpin Act, or of FTO designations, the legality of common practices like paying an import tax or paying for protection to guarantee safe delivery of goods may suddenly change.

Businesses should begin assessing their compliance footprint in Mexico, accounting for these new risks. In some cases, it may be impossible to operate without making payments to entities designated as FTOs. In those situations, past material support prosecutions indicate that U.S. enforcement authorities will expect companies to cease doing business, instead of making such payments.

### ***Financial and Trade-Facilitating Businesses Have Extra Exposure***

Whether by traditional finance, fintech, cryptocurrency, point of sale, instant payments or trading in goods, the drug cartels have used every method imaginable to move drug proceeds from the U.S. to overseas locations.

Also, Section 2339B(a)(2) places additional obligations on financial institutions to retain possession of "any funds in which a foreign terrorist organization, or its agent, has an interest." In a world of increasingly instant payments, it may be a difficult to meet that obligation.

Both the rising number of SDN listings and, especially, FTO designations will increase the need for robust systemic compliance practices, especially with know-your-customer issues becoming more difficult online and when working with fintech vendors.

### ***All International Companies May be Prosecuted***

As the Lafarge case demonstrates, the DOJ is willing to pursue violations for material support of FTOs against foreign companies and subsidiaries. Non-U.S. companies operating in Mexico directly or through a subsidiary also need to assess their exposure.

Importantly, many Mexican drug cartels have deep ties in central and South America, which only heightens the risk of exposure in multiple countries throughout the region.

### **Conclusion**

The incoming administration has made its intent to designate Mexican drug cartels as FTOs clear. Members of the administration stated it during the campaign and have reiterated it since the election. Trump will have the legal authority and factual basis to make the FTO designation.

U.S. businesses should begin a careful analysis of their exposure, assessing the risks particular to their industry, while keeping in mind the level of policy uncertainty that lies ahead.

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[1] See 8 U.S.C § 1189.

[2] <https://www.texastribune.org/2011/04/22/lawmaker-seeks-to-label-cartels-terrorists/>.

[3] <https://icct.nl/publication/el-chapo-bin-laden-why-drug-cartels-are-not-terrorist-organisations>.

[4] <https://www.bbc.com/news/world-us-canada-50697635>.

[5] <https://www.congress.gov/bill/118th-congress/senate-bill/698/all-actions>.

[6] See: <https://www.npr.org/2024/11/11/nx-s1-5186522/tom-homan-border-czar-trump>.

[7] See: <https://www.reuters.com/world/americas/trump-vows-launch-anti-drug-ad-campaign-designate-mexican-cartels-terrorists-2024-12-22/>.

[8] <https://www.start.umd.edu/tracking-cartels-infographic-series-major-cartel-operational-zones-mexico>.

[9] Id.

[10] <https://www.nytimes.com/2022/07/25/us/migrant-smuggling-evolution.html>.

[11] E.g., <https://www.justice.gov/opa/pr/former-mexican-state-attorney-general-sentenced-20-years-prison-participation-international> and <https://edition.cnn.com/2020/11/18/americas/mexican-defense-secretary-drug-trafficking-investigation/index.html>.

[12] E.g., <https://www.justice.gov/usao-wdtx/pr/mexican-businessman-sentenced-federal-prison-role-los-zetas-money-laundering-scheme> and <https://www.justice.gov/archive/usao/txs/1News/Releases/2012%20May/120522%20Cano.html>.

[13] <https://english.elpais.com/international/2023-09-22/study-reveals-organized-crime-is-the-fifth-largest-employer-in-mexico.html>.

[14] <https://www.washingtonpost.com/world/2024/05/23/mexico-cartels-tortilla-exortion-crime/>.

[15] <https://www.washingtonpost.com/world/2024/05/23/mexico-cartels-tortilla-exortion-crime/>.

[16] Id.

[17] Id.

[18] See <https://justiceinmexico.org/several-arrested-in-alleged-zetas-money-laundering-horse-racing-scheme/>.

[19] <https://www.crashoutmedia.com/p/how-the-gulf-cartel-taxes-the-us>, citing a Spanish language

report in Mexico's Reforma newspaper.

[20] [https://www.justice.gov/archive/opa/pr/2007/March/07\\_nsd\\_161.html](https://www.justice.gov/archive/opa/pr/2007/March/07_nsd_161.html). Notably, Chiquita admitted to making payments after the FTO designation, but the plea was to engaging in transactions with a specially-designated global terrorist, not material support of an FTO.

[21] <https://www.justice.gov/usao-edny/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist>.

[22] <https://home.treasury.gov/news/press-releases/sm936>.

[23] See DOJ's revised Evaluation of Corporate Compliance Programs Policy, available here: <https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl>.