

Telebriefing: Meeting the Humanitarian Imperatives in Somalia

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Speakers:

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Q&A starts on page 8

KG: Welcome everyone to this briefing on meeting the humanitarian imperative in Somalia. We've very pleased that Eric Johnson, the Associate General Counsel at Care USA, has agreed to join us today. This is a very busy time for everyone and we appreciate his attention and yours, too, for calling in. The agenda for the briefing: The subject matter will focus on the impact U.S. legal restrictions have had and are having on humanitarian aid to address the famine. Many other issues, including the primary problems of the drought and the al-Shabaab armed conflict, also factor in, but our focus will be on the impact of U.S. legal restrictions today. You can find general information about the famine in the Horn of Africa at interaction.org.

I will do a brief introduction and summarize the events, then Eric will speak and we'll, as we said, move to questions and answers and comments. We will be having an audio file made of this telebriefing, so if you ask a question or make a comment, it will be part of that file, which will be posted on our website after the event. You received a PowerPoint to go along with my introductory comments. It's not necessary to have it. It's just something to keep you from multitasking too much while you're listening to our presentation, so...

First, some background. The U.S. is the bigger donor in aid to Somalia, a country that has been plagued by armed conflict and political instability. It's been twenty years since there's been a functioning government there, and that has contributed greatly to the famine situation. Between February 2007, and March 2008, USAID says they gave \$319 million in assistance, both through NGOs and the UN. In 2010, that dropped to just under \$30 million. So that huge, huge drop requires some explanation of what happened. Al-Shabaab, a terrorist...listed terrorist organization, which controls parts of southern and central Somalia, was listed as a foreign terrorist organization by the Department of State. But sixty percent of Somalis needing assistance live in territories or are trapped in territories that are occupied or controlled by al-Shabaab. So the sharp drop in aid is, in part, a function of the U.S. material support laws. The law prohibits providing material support to a listed terrorist group, regardless of the intent. So the fact that the support might be meant to address famine is not relevant to the legal prohibition. There is only a humanitarian exemption for religious materials and medicine. It does not include food, water or other essentials. The definition of "material support" is very broad. It includes nontangible items such as expert advice and assistance, training, personnel, but also the

tangible items and financial support. So with al-Shabaab controlling the territory and the danger of aid and resources to being diverted to them caused the U.S. government to drop aid and change its approach to Somalia.

The fourth slide in the PowerPoint has some details from an October 2009 story in the *New York Times*, which was, to me, quite startling when I read it. They reported that the U.N. officials said in order to get aid into people in Somalia, they had no choice but to work with local Shabaab commanders to distribute the aid, but the American government has been withholding millions of dollars in shipments, trying to work out a new set of rules to better police the distribution and avoid diversion of aid to al-Shabaab. The law was so strictly interpreted that even the State Department was not able to go forward without requesting confirmation from the Office of Foreign Assets Control, or OFAC, at Treasury, to get a letter saying that their employees would not be prosecuted or sanctioned if accidental, unintentional or incidental benefits went to Al-Shabaab. Treasury's response was to say that any kind of transaction for any purpose is still prohibited, but it would not prosecute American aid officials if they act in good faith. And as of late 2009, the U.S. and U.N. were at an impasse over the language. It should be noted that the material support law is a criminal statute under the *Anti-Terrorism and Effective Death Penalty Act*. The executive order that put al-Shabaab on the terrorist list is under another statute, the *International Emergency Economic Powers Act*, which has a completely different set of additional sanctions. So, violating the material support prohibition could get you prosecuted in criminal court or it could subject you and your organization to sanctions by the Treasury Department, which includes freezing and seizing of assets, being shut down, listed as a supporter of terrorism, and, also, possible criminal prosecution under that sanctions program.

Fast forward to 2011. And this is like five in the PowerPoint. The combination of the drought, the armed conflict, and al-Shabaab's extreme interference with aid delivery, and the U.S. material support laws have all brought us to this crisis where famine has officially been declared. The U.S. aid groups have been pushing very hard for the government to loosen the restrictions so that aid can get in to people trapped in al-Shabaab territories, including Mercy Corp and International Rescue Committee, both publicly called for the Treasury Department to use its licensing procedure.

The next slide, number six, has details about Treasury's licensing procedures and this is supposed to be the escape valve for aid to get through or for transactions that are otherwise illegal under the economic sanctions program. It does not have any effect on the criminal material support statute, which is enforced by the Department of Justice. There are two kinds of licenses: A general license, which is published and authorizes otherwise prohibited transactions for anyone who undertakes them, if they meet the criteria in the general license. The specific license is a case-by-case review for individual applicants which would also allow prohibited transactions, but it's a very time-consuming process and has not been a functional and realistic way for the aid groups to get aid into Somalia.

On July 7th, this issue came up before a joint congressional hearing and testimonies from State Department officials and NGOs all underscored the need for something to be done. And, then, now, on slide eight, a new policy was announced on August 2nd and the State Department in a press briefing with anonymous spokespersons announced that aid groups that provide famine [relief] in al-Shabaab controlled areas will not be prosecuted under Treasury regulations if they act in good faith to reach victims of the famine. That was very welcome news that left a lot of questions unanswered, in particular, whether or not this guarantee or commitment not to prosecute under Treasury regulations would also include not to prosecute by the Department of Justice under the material support criminal statute. There is some clarification on August 4th, when Treasury released their frequently asked questions document, but it seemed to backpedal on the statements that were made August 2nd, where it said that only U.S. government agencies and their grantees would benefit from the new policy, so that private charities using private money would still need to get a specific license or they could go to al-Shabaab controlled territories, but there's no guarantee they wouldn't be subject to sanctions or prosecutions if there was some kind of inadvertent diversion of aid to al-Shabaab. And the Department of Justice remains quiet on these issues, which is, since they do the criminal prosecutions, cause for concern.

The next slide, on August 9th, Senator Leahy of Vermont, Chair of the Senate Judiciary Committee, sent a letter to Secretary of State Clinton and Attorney General Holder that urged them to go forward with exemptions for relief organizations providing aid in Somalia. He also expressed general concerns about the material support statute, including the impact it has on peacebuilding, conflict resolution work, and he urged a dialogue to develop a new set of guidelines going forward – something that would be better than the dysfunctional licensing system. There's also bipartisan support for allowing aid. In a Senate hearing held August 3rd, Republican Johnny Isakson made a strong statement that, although it is important to enforce laws, antiterrorist financing rules, and make sure aid does not get into the hands of terrorist organizations, he said, “When you reach a crisis point in a humanitarian problem like this, it seems like there ought to be expedited procedures or else the people you are trying to help are going to be dead.”

Then just Monday, Senators Kerry and Coons urged expansion of humanitarian relief efforts in the Horn of Africa, and, in particular, asked that the Administration expand the pool of those licensed to provide assistance in southern Somalia to include U.S. humanitarian groups funded by private donors or other countries. In other words, this is a situation that is so dire, we need every available resource and not to limit things to just USAID and its grantees.

That is my summary of the events in the last month and the last few years in a nutshell, and, from here, I'll turn it over to Eric Johnson of Care USA. Thank you, Eric.

EJ: Yeah, thank you, Kay, for that really thorough introduction. You know, I don't think you stole all my thunder, you know. I can bring you, bring the group more up-to-date in a number of ways, really on almost the daily, if not a little less frequently, kind of updates on this that would be helpful for the group on this call. So I'm very glad to do

that. It's very much an evolving situation and it is also one that has not been fully resolved in any real meaningful way yet. So, what I'd planned to do is just offer some general reflections of the legal status in Somalia and U.S. organizations' and persons' ability to operate there. You know, bring, really add some more detail to Kay's remarks on what exactly has been authorized to date and what is still potentially out there as options for U.S. organizations. Really, in the end, just expressing, you know, the fact that what those options are and what, you know, kind of some ongoing advocacy efforts are trying to see as a change in U.S. government policy in this particular area, which would serve to balance the needs of the relief efforts there against the policy considerations of the government. So, with that, I'll move on. And, of course, you know, what I'm doing is really giving you some observations and reflections based on what I know. It's not specific legal advice to use, so to the extent your organization, you know, certainly, this information will be of value to you, but you need your own, your own legal support in order to analyze this fully.

I have been a part of a group of about eight or so lawyers working through Interaction kind of analyzing this issue over the last couple weeks, and it's been a very active group looking at the issues and engaging, in particular, OFAC, last week, and I'll get into more of that lately. And, so, and, so, really, as I speak, I really speak on behalf of Interaction and their engagement on this, as well as the insights of those participating on that group.

Really, the issue here is one of access. And I think all of us know that the issue is a very complex one. You know, aid groups in almost all respects were expelled from certain parts of Somalia back in 2009, so, you know, one of the fundamental questions is, you know, "Will we be welcome back?" and, "What are the security dimensions of our return?" And I cannot underscore enough the importance of how sensitive this issue is on the ground, and Care and other organizations are very, are, you know, very carefully, you know, considering their options based on the very real security dimensions of our staff and partners. So, that's also an issue that makes, you know, response in Somalia very different than a, than say a Haiti or other more recent elements because of those dimensions locally and which we're very, very well-aware of. It's also very political, of course. So, we're really in the midst of some significant, you know, policy determinations within the U.S. government. There's been some movement on it of late that I'll share, but I think some of that is very much ongoing as well.

So, one thing that you have perhaps seen in following the news on this particular area is that there is no, you know, the OFAC restrictions, the legal restrictions relating to working in Somalia are party-based, not territory-based. And, so, you'll see, at least in the media, you know, last week more than others, a real, you know, focus on Administration officials, et cetera saying, you know, that, "We're not stopping you from working in Somalia," essentially. That is, there are no legal restrictions for working in Somalia, and that's technically true from a geographic standpoint, but as Kay highlighted and as we all know, there are very real concerns for, you know, for al-Shabaab, the most critical group that's designated that operates and controls in that area. But it is true that the broad legal restriction doesn't apply to the geographic area. And, so, where that comes into play is that many NGOs, including Care, are operational in other parts of

Somalia, and, so, you know, in the context of fundraising and of provision of relief we know that the famine extends beyond Somalia's borders and certainly within Somalia in areas that are not al-Shabaab controlled and, therefore, you know, the ability to program in those regions does not, do not face the same, you know, kinds of legal hurdles that are faced in, you know, southern and western Somalia, in particular. So, that's an important, that's the important way to look at this.

So, the other kind of context here that we're really considering is that, you know, Care and many other NGOs are not currently operational within al-Shabaab controlled areas and because of the expulsions that happened in 2009. And, so, you know, to some extent, you know, certainly there are groups that are operational there. You know, the information and understanding that we have in terms of being operational there, you know, has led us, you know, from an entity standpoint as U.S. organizations to be concerned about the level of al-Shabaab control, interaction, influence, et cetera, over our work. And there are, you know, there are programmatic concerns on that, neutrality concerns – I've already talked about the security concerns – but on the legal front, Kay talked about the material support laws generally, the, you know, the legal restrictions that face us. It is without question that we face, you know, real concerns of al-Shabaab involvement in implementation of relief activities in areas that it controls. And there's a spectrum of potential involvement that raise varying degrees of concern under the law, and those range from a fairly sophisticated and systematic tax program that provides for, you know, the payment of taxes for certain activities that are conducted there. There are, that's an issue that OFAC itself has said that it's aware of and knows about, and in the context of a, of the material support laws, et cetera, you know, are a major concern and for which, really, the relief that I'll get into is going to be sought. Those are what I would label "direct support," or "direct payment," "direct material support," et cetera. There would be other areas in those, it's comparable to that in terms of, you know, kind of transport fees, checkpoint fees, those types of things that, which would be, you know, you know, we believe potentially could be, you know, assessed with regularity in, within the context and so that's worthy of consideration.

You know, there are other areas of possible involvements, you know. We would, you know, consultations with local militia, et cetera, relating to, on the delivery of aid, the security of it, in order to have it be transferred effectively, you know, would likely be something that we would need to do in order to get our work accomplished in those areas. You know, there are, you know, some incidental benefits that may result in terms of, you know, water facilities, whatever, being used by various warring parties, et cetera. Those are issues of, that are concerning. And, really, of course, you know, underlying all of it is the, you know, potential of theft and, you know, coercive influence in some way, shape or form of diversion, you know, those types of things. And I think, you know, that generally, no one wants that to happen. And that said, you know, the circumstances there are very fluid, very much of a, you know, kind of anarchy situation, as is, you know, kind of well documented. And so, the realities are that it is very, very likely, based on the fact that, again, we're looking at this a bit from afar, that these types of interactions will occur and, therefore, you know, this group of NGOs, you know, through Interaction has

engaged in a, I think, a meaningful way, directly with OFAC in order to get these things addressed.

I'd like to briefly summarize what I see as five kind of options and in the context of those five options, what, I'll elaborate a bit more on what each of them are. And this is as of, depending on where you are, twelve-thirty Eastern Time on Wednesday, August 10th. You know, I think it could very well be that changes occur on this, but these are some of the options for, you know, operational NGOs going forward.

You know one of the things... The first option, really, is the option of, you know, will we be able to operate in al-Shabaab controlled areas without a license? And I think, you know, to some extent, you know, as I've articulated, and I think we know, that that might be very difficult to do, you know, but, you know, there may be ways that organizations, et cetera, might explore those options. It would be, you know, a real...you know, some, some strong internal controls and considerations of how the programs are implemented, et cetera, but that, of course, as I said before, this is not a geographic restriction; it's an entity-based, it's a party-based restriction, and, so, you know, we can't start the conversation without, at least, highlighting the fact that, you know, is this an option? I'm not saying it is. I'm just saying that it's something worth considering.

The second option, I'll elaborate more deeply on Kay's comments. OFAC has issued and, therefore, there have been some serious policy determinations made within the U.S. government with respect to the issuance late, I guess it was Friday, a week and a half ago Friday, but really known to us about a week ago, of a license to USAID and to the State Department for activities relating to famine relief. Now, this is similar to many other, if you're familiar with other countries for which restrictions reign in the OFAC and material support area, this type of license is similar to those that you see in West Bank Gaza, in Sudan, in Zimbabwe, in Myanmar, in other places where USAID, because it, itself, and its employees are subject to the laws in place, approaches and receives a specific license itself in order to conduct certain activities. And those activities that have been authorized are often, you know, made not known to us, either through, you know, it being classified, or they're not, you know, being willing to share, but the idea behind that specific license in the current case, with respect to operations in Somalia, is that like in these other license programs, the authorizations contained in that license apply to grantees and contractors of USAID and State. So, the license then, as in these other programs, applies, allows for certain transactions, certain dealings to occur, so long as they are subject to the license and so long as they are part of a USAID or State funded project. So, the important kind of distinction here that I think people need to understand – and if you don't, it's important – is that what has happened here is that a distinct carve-out has occurred with respect to USAID and State funded programs and related authorizations. So, if that applies to you and your organization, then I think the general feeling, subject to, you know, further understanding of what the actual, conditions actually are, are that, that, as Kay suggested, a significant step has been taken with respect to those funds to allow for certain activities that otherwise would not be authorized. And, for that, OFAC and the U.S. government can be commended to allow for that to happen.

There's been some discussion on the side, which I'll get into, about what other funding might be applied to that license authorization, and that include programs as part of the USAID or State program, programs from other donors, you know, European, you know, British, foundations, et cetera, that, that are used as match to complement the programs that are primarily being managed by USAID and State. That is an evolving situation. That, how they... You know, how that will happen, I mean, it could be that current programs have those built in, in which case they, it seems they would apply. There also seems to be indications from AID that they are willing to explore how those funding opportunities might be brought under the USAID and State license, from now going forward. So, in other words, a modification of existing awards. That's, it's a bit unclear how that's going to happen, but you should know that if you get USAID or State funding that that option is being talked about at high levels and could be available to organizations. So, that's really the third point – this tie-in of other programs into U.S. government and State programs. That's, that is the third option. I can say that when asked, you know, senior USAID and OFAC officials, you know, responded to a question on this point. And the question was, you know, "Let's say we have a program in the north of Somalia that is USAID funded, and we have an ECHO funded program that we envision being able to implement in the south. Are you saying that that might be able to be covered under the State and USAID license?" that is, brought under the umbrella of the State and AID license. And the response was, "Yes," that that, that there's potential for that. Again, I don't know how mechanically or efficiently this will work and, of course, all of this discussion is subject to some, just extreme needs that are needed immediately and, so, really, the issues are how this would happen. And I fear from my own experience that this would be something that would take too much time, given the urgent need on the ground, but those issues are being discussed. That's the third, that's the third option that I see, however, however it ends up evolving.

The fourth option that was generally addressed by Kay is to have OFAC issue a general license to U.S. NGOs and U.S. persons for, to authorize certain activities, transactions, et cetera, that would apply immediately and systemically, to some extent, to U.S. persons and organizations in connection with the relief. And it's in this area where just about a little less than a week ago – last Thursday – Interaction submitted a, I think, a very effective request for the issuance of a general license to provide relief to U.S. organizations and persons that are, that are outside of the USAID and State license umbrella, the main issue being, is the gap. And that gap is, okay, we've got and are thankful for the ability to program USAID and State money and perhaps match funds relating to those particular programs, and maybe the tie-in of other programs related to Section Three, but the reality is that if an organization that was required to comply with these laws raised money from a European donor, a European foundation, you know, an American non-US government donor or foundation or corporation, et cetera, that they would not, now, technically have the same degree of coverage as the USAID and State funded programs. And, so, that, obviously is, are, you know, from a policy standpoint, of course, in our view, is a, you know, an inherent and unfortunate contradiction and one that we are insisting be looked at meaningfully, so that organizations who take advantage of the world's, you know, interest in Somalia and the desire to fund operations there, that

organizations are able to take advantage of all those opportunities that are out there. And it's for that which, you know, this document, this application or request was submitted. You know, we've had, you know, preliminary conversation with OFAC on them. The response was not "no;" the response was not "yes." It is very much an ongoing discussion. Another conversation is planned where we will get into more detail as to what it is that they may or may not do. There are many policy considerations at play here with respect to the general license, as Kay suggested.

The fifth option is a specific, specific licensing process. And that entails simply a submission to OFAC of specific information regarding program intentions, of internal controls, of other, other, you know, factual areas of importance with respect to intended programmatic activities, in this case, Somalia. But, historically – there have been exceptions – but, historically, specific licenses being the fifth option here take weeks if not months, if not many months to process in an effective way. You know, they receive thousands of, tens, tens of thousands of applications in a given year, we're told, and they have indicated that, of course, because of this, of the humanitarian imperative here that specific license requests would be very quickly processed and if, for those of you who know the industry and have been around for awhile, the earthquake in Bam, Iran, back in, I believe, 2004, had specific licenses being granted to conduct activities in Iran very quickly, even in a matter of days. And so there will, there is a responsibl...there is an option of doing that, however, we are still insisting that option four, the general license is, is id...is most ideal for us, as a general community, because it does not require this significant level of detail and the time-consuming process of compiling information and submitting it to OFAC for review and, really, negotiation along the way. Along the lines... Whether it's a general or specific license, you know, I think it would, it's safe to say, that there are number of other policy considerations which are still at play within the U.S. government. They've made some decisions with respect to USAID and State funds. They have authorized payments in certain circumstances in those scenarios. They've clearly not yet done that for programs that are from other donors and, so, the hope is that advocacy efforts, awareness, media, the various Hill letters that Kay cited will have an effect on that.

The Q&A:

QUESTION: This is sort of a nuance question. If an NGO has funding from USAID in one district to do, let's say, health, which is covered, and also has private funding, or let's say foundation funding, to do another type of sector in another district, in both cases touching al-Shabaab, do we have any sense of what the, of what OPAC is saying about those circumstances?

EJ: Well, I think, I think, I would respond in two ways, Steve. You know, I've highlighted the disparity between USAID's source funding and other source funding. You know, the first question I would ask is are there any... I think... Well, to answer your question bluntly, you know, I think OFAC is saying that something under a funding

from other than USAID and State is not part of that, of the USAID and State license. So you would have, on one hand, you know, activities authorized by that license and, on the other hand, they would not have, you would not have the same comfort for those other activities. You know, so really, you know, the issues at play here and still in many cases resolving is, you know, the active discussions that I know Care and other organizations are having with OFDA, presuming – I don't know if you have OFDA funding or not – that would entertain these other funding streams to be part of the USAID award that you have so that you could get cover for it, to the extent that you felt that you needed it. You know, absent those discussions and absent the ability, you know, to feel comfortable, you know, your options there are either to await the issuance of this general license to the extent that we're able to get it issued and in hopes that we get it issued in favorable terms that would benefit you, or go in with a specific request to OFAC for those activities.

KG: In my conversation with an OFAC official asking about a situation with private funds, they indicated that inadvertent, unintentional diversion of resources to al-Shabaab would, is not something they're interested, but if it's something that is repeated and regular, like a periodic tax payment or something like that, then they, that would violate the terms of the material support statute.

EJ: Okay, I'm wondering if, if I, if there's anything I might add. I guess maybe I'd add, Kay, to your comment about, you know, what OFAC is saying and what you may be hearing some in the media about, about these intentional, you know, incidental... If, you know, referring to the FAQ that that was put into place, you know, that is an important document and this was published on August 4th. It is on the OFAC website. There is guidance there. The particular item there is Section No. Four where it says, "What if in delivering humanitarian assistance, my organization unintentionally provides cash to members of al-Shabaab?" and it goes on, you know, to say that extreme caution for cash payments in those areas of Somalia is necessary, but, you know, it does go on to say that unintentional payments that have been made where we didn't have a reason to know that it was dealing with al-Shabaab is not the focus of OFAC's sanctions enforcement, which, I think, Kay, you referred to earlier. You know, real specifically, to me, you know, "To the extent that an organization is facing demands for large or repeated payments in al-Shabaab controlled areas, it should consult with OFAC." You know, OFAC has a hotline that they'll quickly say to call. You know, it's always an option. You know, what I'm saying is that the real issue is, is that, again, if these repeated payments, large, whatever wording they or us might put on it, you know, the specific or general license is the way to provide the legal comfort for you. And I think, you know, as information and policy decisions are made known, you know, that word will get out quickly as we've seen. And if the political pressure builds, I think that will also ensure that there, that that is known.

QUESTION: Thank you. I just have a quick question. Eric, I was wondering if you could comment on whether or not, and to the extent to which, what's going on with regards to the interpretation of the sanctions and the barriers in Somalia are sort of a one-off problem or if it's just one instance of a broader problem when it comes to the provision of humanitarian aid and the obstacles faced due to these material support restrictions.

EJ: Yeah, that's a great question. And I think the fact that we face, you know, these types of hurdles in such a dire emergency is a just a tragedy for the people on the ground who need our assistance. And I, you know, I think if you were to review the testimony that was given before the subcommittee on Africa, under the Senate Foreign Relations Committee, Jeremy Konyndyk, from Mercy Corps, talked about, about how the, you know, material support laws, broadly defined, you know, OFAC, et cetera, these restrictions, how, you know, there are a couple of area where there is room for providing a much more immediate ability for us to work in areas like this in certain emergency situations. And, you know, that would be – I mean Kay referred generally to the religious materials and, I believe, food provisions with, that have exemptions. This idea of having, so for humanitarian affairs and activities in times of crisis is a way, a definite way to change policy on the longer front outside of Somalia. You know, in some ways, I think this crisis highlights that need and creates, potentially, some fantastic energy around the idea of, regardless of how this is resolved, and we hope favorably, and we hope very quickly, but it does highlight not only the potential legal ability to allow for this activity if it happens in the future, number one, but it also may serve to expose, you know, bureaucratic inefficiencies within the U.S. government as to policy determinations, as to licensing processing, et cetera, that might serve to change the way, at least in humanitarian response situations, the U.S. government and how its laws are applied or would relate to those types of responses, so, you know, we'll see how, what that, what that looks like in future. I think, you know, now's a good time to certainly press for those.

[pause]

Operator: And your next question comes from the line of Dustin Lewis from HPCR. Your line is open.

DL: Great. Thanks so much, both Kay and Eric for hosting this discussion today. I had two questions. The first one, just to be absolutely crystal clear on, there's been nothing public from the State Department regarding potential exemptions under 2339B(j) for provision of certain forms of material support. And the second question is if there's been any discussion with OFAC, in the discussions with OFAC if there's been any mention of the correspondent Security Council regime under which, you know, resolutions 1916, 1972, that are, require certain form of humanitarian carve-out. That doesn't seem to be reflected in the current policies and which are the only resolutions that I see not on the OFAC website.

EJ: Yeah, both good questions. On your first one, I am not aware of any statements along those lines, on your first question. With respect to the U.N. humanitarian carve-out

that was, in fact, as part of Interaction's submission, that was expressly referenced as a possible solution to this potential, you know, general licensing request. Now, again, it very much is subject to, you know, policymaking review within the U.S. government, but what you're referring to is correct. You know, the U.N. in those Security Council resolutions did authorize and did carve out humanitarian activities for certain parties. You know, you know U.N. agencies, you know, those who are – I'm forgetting the, the term – those who have observer status and those who are implementing partners of the U.N. are given, you know, certain defined relief from U.N. restrictions. I, you know, you know, many of us are, quote, "implementing partners" of the U.N. in Somalia and elsewhere and, you know, it seems very reasonable in my view and certainly an important policy data point to assert that that type of authorization should have attached to a licensing regime, whether it be general or specific. It's unclear, at this point, whether that's going to be, that that broad level of authorization is going to be possible. I think it's not likely, and that it still remains subject to discussion, but it was expressly cited in the Interaction submission to OFAC and we'll see where that goes.

KG: This is Kay. A comment in reference to 2339B(j), which is the criminal material support statute, with the exemption for religious materials and medicine, that, the Secretary of State is allowed to exempt nontangible items, technical advice and assistance, training, personnel and things like that if, if she finds that the activities don't present a threat and the Attorney General under the statute has to concur with that finding. So, the Secretary of State could, at least, provide an exemption for the dialogue or humanitarian negotiations that may be necessary to talk to al-Shabaab and work out logistics in order to get access to the people in the territory they control, but I have not heard anything about movement in that direction.

Operator: And your next question comes from the line of – oops, I apologize, Joanne Mariner from Hunter College. Your line is open.

JM: Hi, Kay. I wanted to ask, you had mentioned that DOJ's been quiet, that there's no similar reassurance provided by DOJ that people wouldn't be prosecuted under the material support statute. Why do you think that is and what could they be doing, what could they be doing to reassure aid agencies?

EJ: Well, that's a, that a good question. They have been quiet, to my knowledge, since 2009, and in 2009, they, you know, we do have copies of, essentially, you know... Actually, let me take that back. This is a, an OFAC letter that talks about a no, you know, a no-enforcement letter, essentially, that is relating to the historic USAID State license that goes back to 2009. I should go back a bit. In 2009, State and OFAC – sorry, State and USAID received a license for work in Somalia, and we are aware at that point – and this was a couple years ago – of a dialogue between State and OFAC about, with real intimate details about what it is that was being expected as activities in al-Shabaab controlled areas and, in essence, what was going to be authorized by OFAC. It, you know, that, you know, that letter, you know, still exists. It's still out there. I think circumstances on the ground have very much changed. I would question whether or not

it applies. It also was only relating to, of course, USAID and State issued, contractors and grantees, et cetera. But, as far as I'm concerned, Justice has been silent. I have not heard anything on it and so no form of, you know, no prosecute memo or otherwise is apparent, though I had heard that there was potentially some discussion of that, but I have not heard of anything bearing fruit in that regard.

KJ: Yeah, this is Kay. I think it would only be speculation to guess why Justice has not been represented in the statements that have been made publicly so far as USAID, State and Treasury. The... Prosecutors, generally, like to keep the widest discretion possible, but their silence is becoming a major hurdle to the success of what the State, Treasury and USAID, new policy that they have announced, because unless Justice can provide some kind of understanding that they're backing this policy, groups are going to wonder if criminal prosecution is still a possibility.

EJ: I suspect a lot of this is tied up in the, you know, in the ongoing policy determinations that are being considered. And I know, you know, for example, that, you know, the Director of OFAC is, has had a number of meetings in the last few days on this very point, and so [pause] with, you know, at the White House and other places, and so it's being discussed. I would imagine, certainly at the Justice level, obviously as well, and certainly at the table. You know, again, what results from it, we're unclear on at this point.

Operator: And you have a follow-up question from Steve Hansch from Relief International. Your line is open.

SH: Seguing from the things you have just said over the last ten minutes, the flip side of the OFAC issue is, which, let's say that it's all cleared up, the flip side is going to be now getting access from al-Shabaab. Has the working group of lawyers from Interaction raised with USAID, has there been any discussion around branding of NGOs? 'Cause one of the things that al-Shabaab specifically looked for when they asked NGOs to leave over the last three years was the material support that NGOs got from the U.S. government. Thank you.

EJ: Honestly, that issue has not come up. I'm not intimately familiar with the, with what AID policy in this area is at current time, but I would be very surprised if there wasn't already some form of waiver in place. I may be wrong. It's certainly within the power of AID under its own regulations to consider and provide waivers in security situations and others that, certainly in this case, are justified. So if one is not now available, then it really needs to be available. So, and that can be requested and sought. And if it's not available, I think that's a relatively simple ask given all the other complications that organizations are facing to be operational there.

Operator: And, again, if you would like to ask a question, please press star-one on your telephone keypad.

Operator: And there are no further questions in queue, I'll turn the call back over to the presenters.

KG: Okay, well, this is Kay. In conclusion, I'd like to thank everyone for their time and for their questions. And I agree with Eric that this is both an opportunity for the nonprofit sector to be heard in a way that allows more aid to get into areas affected by the famine where it is very badly needed, but it's also a case study in how the current law and current policies don't work, and don't help meet the humanitarian imperative. Our presumption is against aid, and you have to get some kind of waiver or special action to provide it, and I think we need to make the point the presumption should be in favor of access to civilians in need of aid, and we need to push to have that happen. So, if you have further questions, either now or in the coming weeks, please let us know. You can send an email to info@charityandsecurity.org. We will be compiling these questions and forwarding them to U.S. government agencies to see what answers we can get, and we will share that information. And, again, this session will be posted on our website at www.charityandsecurity.org. And thank you all.

Operator: And this concludes today's conference call. You may now disconnect.

[end of recording]