



OFAC Sanctions: Overview and Update

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OFFICE OF FOREIGN ASSETS CONTROL (OFAC)



- Part of U.S. Department of Treasury
- Administers and enforces U.S. economic and trade sanctions
- Sanctions directed at targeted countries, terrorists, narcotics traffickers, and proliferators of weapons of mass destruction
- Broad subpoena powers
- Imposes civil fines for violations; criminal penalties imposed by U.S. Department of Justice



U.S. PERSON

- OFAC regulations define a U.S. Person as:
 - any U.S. citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person (i.e., individual or entity) in the United States. Iran Sanctions (31 C.F.R. 560.314,305).
- Sudan and Burma definitions are similar. 31 C.F.R. 538.315, 306; 31 C.F.R. 537.321,313



EXTENDED JURISDICTION FOR CUBA SANCTIONS



Broader Jurisdiction Under Cuba Sanctions

- Applies to U.S. Persons **and** foreign companies owned/controlled by U.S. Persons or companies subject to restrictions (31 C.F.R. 515.329)
- Dealing in property of Cuban nationals, even outside of Cuba, is prohibited (31 C.F.R. 515.305; 515.201)
- Travel to Cuba by U.S. Persons and foreign subs is prohibited in the absence of a specific or general license



JURISDICTION OVER FOREIGN ENTITIES

- Entities or portions of their operations in the United States, even temporarily, are U.S. Persons under all sanctions regulations
- Foreign persons that “cause” a U.S. Person to violate U.S. law are subject to U.S. jurisdiction under Section 206(a) of IEEPA Enhancement Act of 2007 and other legal theories. See e.g., 18 U.S.C. § 2
- Foreign persons that reexport controlled goods, including software with encryption and laptops to Cuba, Iran, North Korea, Sudan, or Syria
- **Numerous enforcement actions against foreign entities**



COMPREHENSIVE SANCTIONS

CUBA



IRAN



SUDAN



- Most “transactions” by U.S. Persons in these countries or with their governments are prohibited
- U.S. Persons cannot “facilitate” transactions by foreign persons
- No “exports” or “transshipments” of U.S. goods or from the U.S.
- Reexports of “controlled” U.S. goods by foreign persons prohibited
- Foreign persons can be fined or prosecuted for causing violations by U.S. Persons or reexporting controlled goods



SPECIFIC TO CUBA



- **TWEA-based**
 - Foreign companies owned/controlled by U.S. person subject to restrictions
 - Maximum civil penalty \$65,000; no escalation provision
 - Compare IEEPA: \$250,000 or twice transactional value
- **Blocking:** Property of Cuban nationals, even outside Cuba
- **Reexports by foreign persons:** not subject to policy of denial if < 20 percent U.S. content
- **Third-country issues:** Licenses available for financial institutions to service Cuban nationals with proof of residence in third country



MAJOR CHANGES FOR CUBA IN 2009



- **Restrictions on Family Visits to Cuba Lifted**

- May visit person related by blood, marriage, or adoption if no more than 3 generations removed from person or common ancestor
- Transactions ordinarily incident to family travel authorized up to the State Department *per diem* rate for Havana

- **Restrictions on Family Remittances Removed**

- No limit on the frequency or amount
- Same definition of "close relative"



MAJOR CHANGES FOR CUBA IN 2009



- **Telecommunications Service to Individuals in Cuba**
 - May contract with non-Cuban telecommunications service providers to provide services to "particular individuals" in Cuba
- **Telecommunications Payments to Cuba Permitted**
 - Licensing requirements for payments incident to the provision of telecommunications service between U.S. and Cuba eliminated
 - Payments incident to the provision of satellite radio or satellite television services to Cuba (not individuals) and roaming services agreements with telecom services providers in Cuba authorized
 - Transactions incident to the establishment of facilities to provide telecommunication services linking the U.S. and Cuba
 - Two new travel authorizations for telecom services providers



SPECIFIC TO IRAN



- Rejection instead of blocking of government assets (except SDNs)
- Some knowing exports via third countries allowed. US persons may export with knowledge intended specifically for Iran if ascertain all four conditions are present:
 - NLR (EAR 99)
 - Incorporated into foreign good and <10%, or substantially transformed
 - No prohibited end-use under EAR
 - Foreign items not intended or uniquely suited for use in petroleum or petrochemical industry
- Imports of carpets and foodstuffs authorized



SDN BANKS & ENTITIES



- Many Iranian banks and a number of entities have been designated and “blocked”
- Although “rejection” used for Iran, U.S. banks must “block” for SDN banks and entities
- Applies to branches outside Iran (e.g., Bank Melli in London)



NEW PENDING LEGISLATION FOR IRAN



H.R.2194-Iran Refined Petroleum Sanctions Act

Lower amount for sanctions against foreign parties to \$200K or \$500K (in 12-months)

- Iran's production of refined petroleum products
- Sales of refined petroleum products and associated activities

Certifications in USG contracts and other transactions

S.2799-Comprehensive Iran Sanctions, Accountability, and Divestment Act

Parent liability for activities of foreign subs

- Intended to circumvent U.S. sanctions
- Investment in Iran's energy sector or providing Iran with refined petroleum resources

Prohibits most direct or indirect exports; could be construed to prohibit EAR 99 reexports

Authorizes states/local governments to divest from firms investing in Iran's energy sector



SPECIFIC TO SUDAN



- Specified areas excluded from sanctions:
 - Southern Sudan, Southern Kordofan/Nuba Mountains State, Blue Nile State, Abyei, Darfur
 - Marginalized areas in and around Khartoum (official camps for internally displaced persons: Mayo, El Salaam, Wad El Bashir, and Soba)
- Exemptions for U.N. and U.S. contractors
- Exports require BIS and OFAC license
- Must block government assets



LIMITED SANCTIONS BURMA (MYANMAR)



- No “financial services” or “new investment” in Burma
- Burma sanctions virtually comprehensive for financial services sector
- No imports of Burmese goods (limited exceptions)
- Exports and transactions unrelated to financial services allowed
- Noncommercial personal remittances authorized
(General License No. 15)



LIMITED SANCTIONS BURMA (MYANMAR)



- U.S. Persons prohibited from providing:
 - Financial services: insurance services, investment or brokerage services (including but not limited to brokering or trading services regarding securities, debt, commodities, options or foreign exchange), banking services, money remittance services; loans, guarantees, letters of credit or other extensions of credit; or the service of selling or redeeming traveler's checks, money orders and stored value
 - New investment in the economic development of resources in Burma, including natural, agricultural, commercial, financial, industrial and human resources
- Transfer of funds from U.S. or by U.S. Persons to Burma or persons ordinarily resident in Burma restricted
- U.S. Persons are prohibited from facilitating the above
- Exports and reexports of goods to Burma are not prohibited



LIMITED SANCTIONS EXPORT EMBARGO

SYRIA



NORTH
KOREA



- No exports or reexports of U.S.-origin goods (even EAR 99) by any person
- Syria (policy of denials except for limited goods)
- North Korea (Policy of denial for luxury goods and certain CCL items; imports restricted)
- Enforced by Bureau of Industry and Security under Export Administration Regulations - Not OFAC
- Most non-export transactions and services allowed; no “facilitation” issues



OTHER SANCTIONS

- Balkans-related
- Belarus
- Côte d'Ivoire (Ivory Coast)
- Congo-related
- Diamond Trade
- Iraq-related
- Lebanon-related
- Former Liberian Regime
- Narcotics Trafficking
- WMD Nonproliferation
- Terrorism
- Zimbabwe
- Palestine (Hamas/Gaza)

LARGELY ENFORCED THROUGH SDN LIST



SPECIALLY DESIGNATED NATIONALS (SDNs)

- Designated under various OFAC sanctions programs
- Over 3,000 persons/entities designated all over the world
- Transactions between U.S. Persons and SDNs are prohibited
- U.S. Persons are prohibited from facilitating transactions with SDNs
- U.S. Persons must generally block (seize) any property in which an SDN has any interest, even indirect, which comes into their ownership or control



WHAT IS FACILITATION?

- Iran Regulations: May not “approve, finance, facilitate, or guarantee any transaction by a foreign person where the transaction by that foreign person would be prohibited . . . if performed by a [U.S.] person or within the United States.” 31 C.F.R. 560.208 (see also 560.417)
- Sudan Regulations: Facilitation is any unlicensed action by a U.S. Person that “assists or supports” transactions by or with a sanctioned party. See 31 C.F.R. 538.407 (see also 538.206)
- “Activity of a purely clerical or reporting nature that does not further trade or financial transactions with [sanctioned parties] is not considered prohibited facilitation.” “For example, reporting on the results of a subsidiary's trade with Sudan is not prohibited, while financing or insuring that trade or warranting the quality of goods sold by a subsidiary to the Government of Sudan constitutes prohibited facilitation.”



WHAT IS FACILITATION?

- Cuban Regulations do not have a “facilitation” clause, but it is generally understood that the evasion prohibition contained in 31 C.F.R. 515.201(c) has the same effect
- In addition to Iran and Sudan (addressed above), 31 C.F.R. 537.205 sets forth facilitation restriction for Burma
- Concept of facilitation generally understood to be the same for all programs even though worded differently



WHAT IS FACILITATION?

Prohibited facilitation or approval also occurs when a U.S. Person:

“Alters its operating policies or procedures, or those of a foreign affiliate, to permit a foreign affiliate to accept or perform a specific contract, engagement or transaction involving [Iran] without the approval of the [U.S.] person, where such transaction previously required approval by the [U.S.] person and such transaction by the foreign affiliate would be prohibited . . . if performed directly by a [U.S.] person or from the [U.S.]”

“Changes the operating policies and procedures of a particular affiliate with the specific purpose of facilitating transactions that would be prohibited . . . if performed by a [U.S.] person or from the [U.S.]”

“Refer[s] to a foreign person purchase orders, requests for bids, or similar business opportunities involving [sanctioned entities] to which the United States person could not directly respond”

[Iran Regulations, 31 C.F.R. 560.417; Sudan Regulations have similar prohibitions, 31 C.F.R. 538.407]



REEXPORTS RESTRICTION ON FOREIGN PERSONS - OFAC

OFAC regulations specifically prohibit certain reexports of export-controlled U.S.-origin goods by Foreign Persons to Iran and Sudan. Other reexports are controlled under the EAR by BIS.

- Iran (31 C.F.R. 560.205): “[T]he reexportation from a third country, directly or indirectly, by a person other than a United States person, of any goods, technology or services that have been exported from the United States is prohibited if [the goods are export controlled]”
- Sudan (31 C.F.R. 538.507): “The reexportation to Sudan or the Government of Sudan by a non-U.S. person of any goods or technology exported from the United States, the exportation of which to Sudan is subject to export or reexport license application requirements, is authorized under this section provided that the goods or technology [are not export-controlled]”
- Cuba, North Korea, and Syria: Reexports of U.S. origin goods to proscribed under the EAR absent BIS license or de minimis content



AUTHORIZED TRANSACTIONS

- Depending on specific provisions of each sanctions program, the following may be authorized:
 - Noncommercial personal remittances (some limits)
 - Information and informational materials
 - Telecommunications and personal communications
 - Payment for the shipment of a donation of articles to relieve human suffering
 - Transactions authorized by OFAC through specific or general licenses (e.g. telecommunications).



INFORMATION & INFORMATIONAL MATERIALS EXEMPTION

- **Berman Amendment**

- Includes but not limited to publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD-ROMs, artworks, news wire feeds in any format or medium of transmission even if commercial products

IEEPA § 1702(b)(3); TWEA § 5(b)(4)

- **No CCL Items** (e.g., no controlled technology or software)

- **Traps for the unwary:** OFAC interpretations may prohibit many related activities such as development of materials, marketing, distribution, and other activities without a license; stricter restrictions may apply to actions with government entities and/or products that are not “written”



TRANSSHIPMENT GUIDANCE

(aka General Inventory “Exception”)

U.S. exporter aware of reexports to Iran from general inventory of distributor; concerned may happen again

- OFAC’s response in July 2002 did not say lawful or unlawful
- Must not export goods to a third party if have reason to know intended specifically for Iran

Numerous ways to have reason to know

- Purchased specifically to fill Iranian order
- Buyer deals exclusively or predominantly with Iran
- Course of dealings, general knowledge, etc.

CAUTION: THIS IS NOT AN OFAC “EXCEPTION”



IEEPA Enhancement Act

- IEEPA did not originally include clear language imposing liability for causing violations of OFAC sanctions
- In Oct 2007, IEEPA was amended to state that any person who “**causes**” a violation of OFAC sanctions can be held liable for both civil and criminal penalties



IEEPA PENALTIES INCREASED

IEEPA Penalties (Iran, Sudan, Burma, EAR, SDN)

Civil penalty: **\$250,000** per violation or twice transactional value*

Criminal penalty: **\$1 million** per violation and **20 years**

* \$50,000 max applies to violations where enforcement action was not pending or commenced on or after Oct 16, 2007

TWEA Penalties (Cuba and North Korea)

Unchanged

Civil penalty: **\$65,000** per violation

Criminal penalty: **\$1 million** per violation and **10 years**





NOV 2009 – FINAL OFAC GUIDELINES

- New \$50,000 penalty for failure to maintain records required by OFAC
- Will consider disclosure to other agency to be voluntary self-disclosure; on a case-by-case basis
- Mitigation provided if disclosure filed and third party is required to report, but doesn't
- Credit given if SAR filed with FinCEN before voluntary disclosure *unless* OFAC discovers violation before disclosure is filed
- Refusal to sign tolling agreement not an “aggravating” factor, but agreement treated as cooperation



FOREIGN SUBS DOING BUSINESS IN SANCTIONED COUNTRIES

Facilitation Risks

- Approval/facilitation of acts prohibited to U.S. persons
- U.S. persons working at foreign subsidiary; recusal?
- Change in procedures may be facilitation

Blocking Statutes

- Resistance against extension of Cuba sanctions
- Legislation frequently proposed to extend Iran sanctions to entities owned or controlled by U.S. persons

Reexports

- Possible presumption of knowledge of specific destination
- Involvement of U.S. logistics support



FOREIGN PARENTS DOING BUSINESS IN SANCTIONED COUNTRIES

Reexport Risks

- Unlawful reexports
- Parent liability for procuring transshipment (innocent dupe)
- “General inventory” versus transshipment
- Knowing violations - U.S. subsidiary liability and/or conspiracy
- No EAR 99 reexports to Syria or North Korea

Facilitation Risks

- U.S. subsidiary cannot advise foreign parent on structuring of transactions with Cuba, Iran, Sudan, or Burma
- Must only advise on what is lawful or unlawful



RECENT ENFORCEMENT ACTION

Credit Suisse (Dec 2009)

Violation. Removed or revised (“stripped”) information from more than \$700 million in USD payment instructions processed through unaffiliated US banks and branches that would have revealed sanctioned country origin

DOJ (Deferred Prosecution Agreement), NYC (DPA), Federal Reserve (Cease and Desist Order), OFAC (Settlement)

Penalty: \$536 million in criminal forfeitures to DOJ and NY; Federal Reserve compliance supervision with reporting

- Lloyd’s TSB paid \$350 for similar violations in Jan 2009
- Lloyds and Credit Suisse arose out of NYC investigation into Alavi Foundation’s activities
- Other investigations pending



RECENT ENFORCEMENT ACTION

Australia New Zealand Banking Group (Aug 2009)

Violation. Deception involving 16 export letters of credit and reimbursement claims relating to trade with Sudan (value \$28m) and 15 financial transactions involving Cuba (value \$78m) with U.S. financial inst.

New guidelines = \$57.04m (\$56m + 1.04m)

Old guidelines = \$1.84m (\$0.8m + 1.04m)

Fined \$5.75m (almost 90% mitigation)

- Cooperation; extensive review; partial voluntary disclosure; prompt and thorough remediation
- Post-ABN AMRO conduct



RECENT ENFORCEMENT ACTION

DHL (Aug 2009)

Violation: Unauthorized shipments to Iran, Syria, and Sudan;
failure to maintain ~ 32,000 records

Joint Settlement: BIS and OFAC

Old guidelines: \$323.1 million

Penalty: **\$9,444,744** (97% mitigation)

- OFAC mitigated by \$300 million because many record violations related to informational materials
- No voluntary disclosure, but cooperated, remediated, and agreed to waiver of statute of limitations



RECENT ENFORCEMENT ACTION

Stena Bulk LLC (Jan 2009)

Violation: U.S. Sub of Swedish company facilitated trade-related transactions by foreign entities with Sudan by providing transportation-related services to transport oil to Sudan

- U.S. subsidiary reportedly managed foreign parent company's fleet

Penalty: \$426,486

- Voluntarily disclosed



RECENT ENFORCEMENT ACTION

Gold & Silver Reserve, Inc (Oct. 2009)

Violation: Exported financial services without authorization by activating 56,808 “e-currency” accounts through its website for persons in Iran and Cuba; 183,367 accounts opened

Prior guidelines used: \$11,000 (Iran) + \$65,000 (Cuba) = \$62.9 million

Penalty: \$2,950,000

- Did not voluntarily disclose
- Reduced from \$5 million because of \$2.05 million criminal penalty in another case



DECISION TO MAKE VOLUNTARY SELF-DISCLOSURE

- **Mitigation credit:** 50% can be \$ millions in some cases
 - New transactional cap makes disclosure more costly
 - Can get 25 – 40% mitigation for cooperation without it
- **Need to continue conduct?**
 - Material omission in license application
 - Knowing violations if no license obtained
- **Mergers & acquisitions exposure?**
 - May poison the company by failing to disclose
 - Successor liability
- **Knowledge by others?**
 - Will someone report you?
 - SEC Office of Global Security Risk/SOX



OFAC SUBPOENA POWER

31 C.F.R. § 501.602

- **Broad subpoena power.** “Every person is required to furnish under oath . . . at any time as may be required . . . complete information relative to any transaction . . . subject to the provisions of this chapter or relative to any property in which any foreign country or any national thereof has any interest of any nature whatsoever, direct or indirect.”
 - Can require production of records and hold hearings
- **Actual example:** “Provide detailed information regarding any U.S. Person’s involvement in transactions involving Iran, including but not limited to”
- **Civil penalties** for noncompliance
- **Criminal penalties** under 18 U.S.C. 1001



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