

Lifting of U.S. Sanctions Against Sudan

Below is an assessment of the impact of the Trump Administration's lifting of most U.S. sanctions against Sudan, effective October 12, 2017, on the ability of U.S. Persons to engage in business with Sudan, as well as any restrictions that remain in place.

In brief, the lifting of most U.S. sanctions has the following impact:

- U.S. Persons are no longer prohibited from engaging in business with almost all persons and entities in Sudan, including the Government of Sudan;
- U.S. financial institutions, including foreign branches of U.S. financial institutions, are no longer prohibited from holding accounts or processing payments for almost all persons and entities in Sudan, including the Government of Sudan (including payments denominated in U.S. Dollars);
- Most U.S.-origin goods may be sold into Sudan provided those goods are classified as EAR99 (*i.e.*, goods subject to the lowest levels of control under U.S. export controls) – this includes most ordinary consumer goods.

Certain limited restrictions do remain in place:

- Prohibitions on activities involving certain persons designated for their activities in Darfur (currently seven individuals and one company) and South Sudan, as well as a small number of persons and entities designated for other reasons;
- Sudan remains designated as a State Sponsor of Terrorism ("SSOT"), meaning licensing requirements remain in place under U.S. law and regulation for transfers of controlled dual-use U.S.-origin goods, software or technology, as well as certain other restrictions noted below.

These changes and their impact are discussed in greater detail below.

I. BACKGROUND – U.S. SANCTIONS AGAINST SUDAN

The U.S. first imposed sanctions against Sudan in November 1997, when President Clinton issued Executive Order 13067. In August 1993, the U.S. also designated Sudan as a State Sponsor of Terrorism ("SSOT").¹ Restrictions on most dealings with Sudan that had a U.S. nexus (that is, the involvement of U.S. Persons, U.S.-origin goods, software, or technology, or transactions denominated in U.S. Dollars that cleared through the U.S. financial system) were codified in the Sudanese Sanctions Regulations ("SSR," 31 C.F.R. Part 538), promulgated by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC"). These sanctions were expanded over time, with the issuance of Executive Order 13400 in April 2006, targeting certain persons involved in the Darfur conflict, and Executive Order 13412 in October 2006, targeting the Government of Sudan. The sanctions implemented by OFAC were also accompanied by a number of export control restrictions resulting from Sudan's designation as an SSOT. These restrictions are implemented by the U.S. Commerce Department's Bureau of Industry and Security ("BIS") and the State Department's Directorate of Defense Trade Controls ("DDTC").

As a result of negotiations between the United States and the Government of Sudan ("GOS") and positive actions taken by the GOS, the Obama Administration conditionally eased most U.S. sanctions against Sudan in January 2017 through the issuance of a broad general license, issuing Executive Order 13761 and establishing a timeframe for the permanent revocation of the SSR,

¹ See 58 Fed. Reg. 52523 (Oct. 8, 1993).

provided that the Sudanese Government continued making progress in a number of specified areas. This timeframe was extended by the Trump Administration in Executive Order 13804, issued in July 2017. Finally, on October 6, 2017, the Trump Administration announced that effective October 12, 2017, it would lift sanctions on a permanent basis and revoke the SSR. The Trump Administration based this action on Secretary of State Rex Tillerson's assessment that the Government of Sudan had sustained the positive actions that led to the provision of temporary sanctions relief under the Obama Administration, while also noting that the U.S. government continues to have a range of concerns about GOS activities, including its human rights record.²

The impact of this lifting and the limited restrictions that remain in place are discussed below.

II. IMPACT OF LIFTING SANCTIONS

Until the issuance of Executive Order 13761 and the related general license in January 2017, which authorized on a conditional basis all activities prohibited by the SSR,³ most activities that had a U.S. nexus were prohibited if they involved Sudan, directly or indirectly.

Broadly speaking, these prohibitions included dealings in blocked property, including property of the Government of Sudan,⁴ the importation or exportations of goods, services, or technology to or from Sudan,⁵ including financial services, and the approval or facilitation of activities involving Sudan by U.S. Persons, wherever located.⁶ In practical terms, these restrictions meant that transactions could not involve:

- Directly or indirectly, U.S. Persons, defined as U.S. citizens or permanent residents, any entity organized under the laws of the U.S. or any jurisdiction within the U.S. (including foreign branches), or any person physically present in the United States;⁷
- U.S.-origin goods, software, or technology;
- U.S. Dollar-denominated transfers that cleared through the U.S. financial system (as this would involve the export or re-export of financial services from the U.S.).

The involvement of one or more such U.S. nexus resulted in a transaction being prohibited under the SSR unless an OFAC general license were available or a company or other party applied for and received a specific license from OFAC authorizing the transaction. **Since January 17, 2017, all such transactions prohibited by the SSR have been authorized by a general license. As of October 12, 2017, this authorization became permanent.**

In addition, Section 908 of the Trade Sanctions Reform and Export Enhancement Act of 2000 ("TSRA") (codified at 22 U.S.C. § 7207(a)(1)) prohibited the provision of any U.S. Government assistance, including export assistance, credit, or guarantees, for exports to Sudan. This prohibition was expressly waived by the President in Section 2 of Executive Order 13761. Therefore, these restrictions on export assistance, credit, and guarantees no longer apply to Sudan.

² See <https://www.state.gov/p/af/rls/2017/274667.htm>

³ See 31 C.F.R. § 538.540.

⁴ See 31 C.F.R. § 538.201.

⁵ See 31 C.F.R. §§ 538.204, 538.205.

⁶ See 31 C.F.R. § 538.206.

⁷ See 31 C.F.R. § 538.315.

III. REMAINING RESTRICTIONS

A. State Sponsor of Terrorism Designation

i. General

Sudan remains designated as a State Sponsor of Terrorism, which entails significant consequences under U.S. law, including an arms embargo and restrictions on foreign assistance from the United States.⁸ The designation will remain in place unless and until the President rescinds the designation in a manner consistent with certain statutory requirements. Secretary Tillerson's report noted that "the Sudanese government's actions against terrorists have been notable, significant, and have contributed to advancing U.S. counterterrorism objectives and the global fight against terrorism."⁹

ii. Export Controls

From an export compliance perspective, the main impact of the SSOT designation is that certain licensing requirements remain under U.S. export control rules, mostly affecting items that have potential "dual-use" applications (*i.e.*, potential military as well as civilian applications).

The Export Administration Regulations ("EAR"), administered by BIS, govern exports and re-exports of commercial and "dual-use" goods, software, and technology (collectively "Items"), that is, Items that have both civilian and military applications.¹⁰ Most ordinary consumer goods, as well as most food, medicine, and medical devices are classified as EAR99 under the EAR and do not require an export license for Sudan under the EAR (see below discussion for an OFAC license that authorizes sale of food, medicine and medical devices to Sudan).¹¹

The export or re-export to Sudan of U.S.-origin items (or foreign-origin items containing more than 10% U.S.-origin controlled content by value) designated on the Commerce Control List ("CCL") will continue to require a license from BIS, unless one or more license exceptions apply. For example, most mass market computers, phones, and software are eligible for export or re-export to Sudan under License Exception Consumer Communications Devices ("CCD").¹² Therefore, companies will need to continue to assess whether any items they intend to export or re-export to Sudan are on the CCL, and if so, whether a license exception might be available.

iii. Additional SSOT-related Restrictions

As a result of Sudan's continuing SSOT designation, certain sanctions restrictions remain in place that, as a practical matter, are largely technicalities. Under TSRA, an OFAC license is still required

⁸ See <https://www.state.gov/j/ct/list/c14151.htm>.

⁹ See <https://www.state.gov/p/af/rls/2017/274667.htm>.

¹⁰ The U.S. arms embargo against Sudan also remains in effect, which generally prohibits the export or re-export to Sudan of defense articles or defense services. Such transactions are governed by the U.S. State Department's International Traffic in Arms Regulations ("ITAR").

¹¹ See 15 C.F.R. § 742.10(a).

¹² See 15 C.F.R. § 740.19.

for sales of medicine, medical devices, and agricultural commodities to Sudan. Such exports had previously been authorized pursuant to a general license, and on October 6, 2017, OFAC issued General License A, which continues the authorization for this activity with Sudan. Items shipped under General License A must be exported or re-exported within the 12-month period beginning on the date of the signing of the contract for export or re-export. Significantly, no OFAC license is required for financing of such exports and reexports, nor is an OFAC license required for import of food or other products from Sudan.

Further, as a consequence of the SSOT designation, the Terrorism List Governments Sanctions Regulations, administered by OFAC, are applicable to Sudan. Those regulations prohibit U.S. persons from engaging in financial transactions with SSOT governments. However, there is a broad general license in place that authorizes all such transactions, including with the Government of Sudan except for transactions that (1) constitute a donation to a U.S. Person, or (2) with respect to which a U.S. Person knows or has reasonable cause to believe, would pose a risk of furthering terrorist acts in the United States.¹³

B. Restricted Parties

A small number of Specially Designated Nationals (“SDNs”) remain in Sudan, even though on October 12, 2017, OFAC delisted all SDNs designated under only the SSR. Virtually all transactions involving an SDN are prohibited if they have a U.S. nexus.

These remaining SDNs in Sudan are primarily certain persons and entities designated under OFAC’s Darfur sanctions (31 C.F.R. Part 546) and South Sudan sanctions (31 C.F.R. Part 558).¹⁴ Companies should continue to undertake due diligence and transaction screening for SDNs and other restricted parties as part of their broader compliance obligations under OFAC sanctions.

IV. CONCLUSION

The lifting of sanctions has removed most barriers for U.S. companies seeking to do business with Sudan when the activities do not involve Items on the CCL. In particular, U.S. banks are now able to provide financial services to most persons and institutions in Sudan, including the Government of Sudan. The restrictions that remain in effect require companies to take due diligence steps, such as screening potential customers and business partners and identifying controlled dual-use items that may require an export license. In this respect, companies need to do their homework to ensure they are complying with any remaining restrictions, but Sudan is no longer off-limits for business as a result of the actions this year by the Obama and Trump Administrations.

¹³ See 31 C.F.R. Part 596 generally and 31 C.F.R. 596.504 for the general license.

¹⁴ As of the date of this memorandum, there are also five persons and entities designated under the Central African Republic sanctions program (31 C.F.R. Part 553) and as Specially Designated Global Terrorists (“SDGT”).