

International Trade Alert

June 18, 2013

OFAC Issues General License Authorizing Exports and Re-Exports to Iran of Personal Communications Products and Related Internet, Satellite and Telecommunications Services

On May 30, 2013, the Office of Foreign Assets Control (OFAC) issued General License D¹ to the Iranian Transactions and Sanctions Regulations (ITSR), authorizing the export and re-export to Iran from the United States, or by U.S. persons, of certain commercial personal communications products and services, including smart phones, laptops and tablets containing U.S.-origin hardware and software that were previously prohibited. This General License, however, only covers a limited number of specified items, as discussed below. Moreover, the plain language of the General License currently does not extend to certain personal communications products and services that are subject to U.S. export controls that are re-exported from a non-U.S. country to Iran by a non-U.S. company.

The General License applies most directly to companies that deal in communications hardware, software or services (e.g., telecom, satellite, computing). This alert provides additional detail on the scope of the authorization, including certain items and activities specifically excluded.

Permitted Exports, Re-exports and Related Transactions

Officials at agencies that participated in the development of the new General License have informally indicated that the General License is generally intended to allow exports and re-exports to Iran of personal communications equipment and services (e.g., smart phones, laptops and tablets) that are commercially available for retail purchase in the United States and other markets. The General License authorizes the export and re-export of certain items subject to the Export Administration Regulations (EAR), such as those classified on the Commerce Control List (CCL) under Export Control Classification Numbers (ECCNs) 5A992.c and 5D992.c—which are therefore eligible for mass market treatment—and certain items designated as EAR99. The General License specifies hardware and related software and services used for the exchange of personal communications over the Internet that are authorized for export and re-export to Iran, including specified ECCN categories of:

- fee-based services incident to personal, Internet-based communications
- fee-based software subject to the EAR that is necessary to enable such services

¹ General License D follows the Iran General License Related to Personal Communication, 31 C.F.R. § 560.540, issued on March 10, 2010, which allows the export or re-export from the United States or by a U.S. person, wherever located, of no-cost services and software incident to the exchange of personal communications over the Internet.

- certain other software and hardware specified in the Annex to the General License, including mobile phones, smart phones, SIM cards, modems, routers, satellite phones, laptops, tablets, keyboards, mice, anti-virus software and virtual private networks (VPNs)
- consumer-grade Internet connectivity services, including sale or lease of capacity on satellites and other telecommunications transmission facilities.

U.S. persons and companies, including non-U.S. subsidiaries and other owned or controlled affiliates of U.S. companies, are generally eligible to engage in exports and re-exports of items covered by the General License to Iran. The General License also authorizes U.S. depository institutions and U.S.-registered brokers or dealers to process transfers of funds in connection with such authorized transactions.

Restrictions on Use of the General License

Under express provisions, the General License does not authorize the export or re-export of:

- services, software or hardware to the government of Iran or any person who has been designated as a Specially Designated National
- commercial-grade internet connectivity services or telecommunications transmission facilities
- web-hosting services that are for purposes other than personal communications, such as for commercial endeavors
- domain name registration services.

The General License does not relieve an exporter or re-exporter from compliance with any other federal agency's licensing requirements. However, the EAR states that if OFAC authorizes an export or re-export subject to both the EAR and the ITSR, OFAC authorization is considered authorization for purposes of the EAR.

Limitation of the General License to “U.S. Persons”

As currently worded, the General License authorizes exports and re-exports to Iran of eligible EAR-controlled personal communications items by a U.S. person, including exports from the United States by U.S. subsidiaries or facilities of non-U.S. companies or by non-U.S. companies that export such items from the United States. However, the plain language of this General License at present does not provide a basis for supply of the same kinds of EAR-controlled items from outside the United States to Iran by a non-U.S. distributor, manufacturer or service provider.

Because of this limitation, personal communications items that are subject to the EAR and specified in the General License are not permitted to be re-exported from a non-U.S. country to Iran by a non-U.S. person under the General License—even though the same items could be exported to Iran from the United States or re-exported from a non-U.S. country to Iran by a U.S. company (including its owned or controlled non-U.S. company).

For example, in the case of a foreign-made commercial tablet that is subject to the EAR and specified in the General License but that incorporates U.S.-origin components not described in the License, under the General License:

- a U.S. company may export the tablet to Iran from the United States
- a U.S. company (including its owned or controlled non-U.S. company) may export the tablet to Iran from a country other than the United States
- a non-U.S. company may export the tablet to Iran from the United States
- a non-U.S. company *may not* export the tablet to Iran from a country other than the United States.

These limitations present a peculiar supply-chain challenge for the non-U.S. company that makes the tablet and for the U.S. companies that supply it with U.S.-origin components that cause the tablet to become subject to the EAR. On its face, the General License does not restrict U.S. companies from supplying components not specified in the General License to a U.S. manufacturer for incorporation into the tablet that is made in the United States and that is intended for export to Iran. However, the General License does not appear to permit U.S. suppliers to sell the same components to non-U.S. companies for integration into a tablet made outside the United States intended for direct supply to Iran. Also, it is unclear whether the General License permits U.S. suppliers to sell components not specified in the General License to U.S. companies (including their owned or controlled non-U.S. companies) that manufacture the same tablet abroad when the tablet is intended to be ultimately exported to Iran.

Disparate Impact on Non-U.S. Manufacturers, Distributors and Service Providers

At this time, it is unclear whether U.S. officials contemplated that the scope of the new General License should be limited in this way. However, unless and until the General License is subject to amendment or interpretive guidance to expand its reach beyond this limitation, the General License will have a disparate impact on U.S. manufacturers, distributors or other providers of personal communications products and services, compared to their non-U.S. counterparts.

It remains to be seen whether, and, if so, when, officials at OFAC and other agencies with a role in related policy may take action to address this issue. In the meantime, non-U.S. re-exporters of items specified in the General License would require specific licensing from OFAC. In this regard, these companies should take note that the General License provides that OFAC will consider licensing on a case-specific basis for the exportation and re-exportation of services, software and hardware incident to personal communications not specified in the license.

Contact Information

If you have any questions regarding this alert, please contact:

Wynn H. Segall

wsegall@akingump.com
202.887.4573
Washington, D.C.

Edward L. Rubinoff

erubinoff@akingump.com
202.887.4026
Washington, D.C.

Tamer A. Soliman

tsoliman@akingump.com
971.406.8531
Abu Dhabi
202.887.4430
Washington, D.C.

Thomas James McCarthy

tmccarthy@akingump.com
202.887.4047
Washington, D.C.

J. David Park

dpark@akingump.com
202.887.4585
Washington, D.C.

Soo-Mi Rhee

srhee@akingump.com
202.887.4382
Washington, D.C.

Marwa M. Hassoun

mhassoun@akingump.com
310.728.3324
Los Angeles—Century City

Mahmoud Baki Fadlallah

mfadlallah@akingump.com
971.406.8541
Abu Dhabi
202.887.4000
Washington, D.C.