

International Trade Alert

January 17, 2017

Key Points

- Effective today, a new general license reverses two decades of U.S. policy by authorizing all transactions otherwise prohibited by the Sudanese Sanctions Regulations (SSR), including all transactions with Sudan or the Government of Sudan. In a parallel action, the Bureau of Industry and Security announced today that the agency has changed its review policy for applications for licenses to export or reexport certain items to Sudan from a policy of denial to a policy of approval.
- President Obama issued an executive order effective July 12, 2017, revoking prior executive orders underlying the SSR and effectively abolishing the Sudan sanctions program, provided that the **incoming** Secretary of State issues a finding regarding Sudan's cooperation.
- Important limitations remain. For example, these actions do **not** authorize activities prohibited under the Darfur or South Sudan sanctions programs, and U.S. export controls continue to restrict severely the export or reexport of dual-use items to Sudan. In addition, companies previously doing business in Sudan under authorizations for medical and agricultural items issued pursuant to the Trade Sanctions Reform and Export Enhancement Act of 2000 remain subject to a one-year contract requirement. Finally, state divestment policies discouraging business with Sudan will continue to apply.



Obama Administration To Terminate Sudan Sanctions Program

Introduction

On January 13, 2017, the Obama administration announced that it would lift sanctions imposed on Sudan issued under the Sudanese Sanctions Regulations (SSR), which are administered by the Treasury Department's Office of Foreign Assets Control (OFAC). The action reverses nearly 20 years of U.S. policy toward Sudan, a country that had been the target of a comprehensive trade embargo due to human rights abuses and support for international terrorism. The United States has stated that its decision comes after months of bilateral engagement with Sudan, which has revealed that country's support for key U.S.

foreign policy goals, such as ceasing hostilities in conflict areas, including Darfur, and enhancing counterterrorism cooperation.

Summary of Changes

Effective today, a new general license at 31 C.F.R. § 538.540 authorizes all transactions otherwise prohibited by the SSR. Under this general license, both U.S. and non-U.S. persons can engage in transactions with individuals and entities in Sudan, and with the government of Sudan, provided that the transactions in which they engage do not violate any other sanctions programs or any other relevant laws and regulations, the most pertinent of which are detailed in the next section.

In addition to the general license, the Obama administration issued an executive order that will revoke prior executive orders underlying the SSR. The executive order becomes effective on July 12, 2017, provided that the incoming Secretary of State publishes a notice in the Federal Register on or before that date stating that the Government of Sudan has sustained positive action toward cessation of hostilities in conflict areas in Sudan; continued improvement of humanitarian access throughout Sudan; and maintained its cooperation with the United States on addressing regional conflicts and the threat of terrorism.

Finally, the Department of Commerce's Bureau of Industry and Security (BIS) revised its denial policy for Sudan export and reexport license applications to an approval policy, provided that the transaction involves certain items that are intended to ensure the safety of civil aviation or the safe operation of fixed-wing commercial passenger aircraft, or items that will be used to inspect, design, construct, operate, improve, maintain, repair, overhaul or refurbish railroads in Sudan. As explained below, this new rule does not remove any existing license requirements for exports or reexports to Sudan.

Remaining Limitations and Key Considerations

Notwithstanding the general license, important limitations remain that should be considered by U.S. and non-U.S. persons seeking to conduct Sudan-related business. The following provides a brief overview of these remaining limitations and considerations:

- **U.S. List-Based Sanctions.** While the action taken by the U.S. government serves to unblock the property of parties designated solely pursuant to the SSR, it does not affect other U.S. sanctions programs, some of which may intersect with activities in Sudan, such as the programs relating to South Sudan and Darfur. As with many of the sanctions programs administered by OFAC, these programs are list-based and prohibit companies from doing business with individuals on OFAC's Specially Designated Nationals (SDN) list. Companies therefore should continue to screen parties for hits against the SDN list, regardless of the recent policy changes.
- **Export Controls.** Notwithstanding the OFAC changes and BIS's revised licensing policy, exports and reexports to Sudan of items subject to U.S. export controls continue to be severely restricted. This means that, even though U.S. persons can now engage in transactions with Sudan, these activities may not involve the export or reexport of items subject to U.S. export controls, other than very low-

level (i.e., EAR991) items, without prior U.S. government authorization. Notably, because Sudan is not subject to embargoes or other special controls under the Export Administration Regulations (EAR), certain EAR license exceptions may be available to authorize transactions of items listed on the U.S. Commerce Control List (CCL) to Sudan.

- **Agricultural Commodities, Medicine and Medical Devices.** Persons engaged in the trade of agricultural commodities (including food), medicine and medical devices continue to be subject to restrictions requiring that any exports or reexports of agricultural commodities, medicine or medical devices destined for Sudan be shipped within a 12-month period, which runs from the date of the signing of the contract for export or reexport. This restriction is mandated by the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) and will remain in place absent an act of Congress. Effectively, this restriction requires entities dealing in such items to enter into new contracts annually, rather than rely on long-term contractual arrangements.
- **Financial Institutions.** Financial institutions are now permitted to process transactions denominated in U.S. dollars involving Sudan, both as correspondent institutions and on behalf of their own customers. However, banks should be mindful of these remaining restrictions, particularly in the context of trade finance transactions where the export control restrictions described above can expose the institution to risk for financing a transaction in violation of U.S. export control laws.
- **Contractual Limitations.** Given that Sudan has long been a target of comprehensive sanctions by the U.S. government, it is not uncommon to find broad limitations on Sudan-related transactions in business contracts. Companies seeking to do business in Sudan under the new general license should review existing agreements to ensure that legally permissible Sudan-related business does not give rise to breaches of commercial agreements.
- **State Divestment Policies.** Various U.S. states continue to maintain Sudan-related divestment sanctions laws, prohibiting investments and requiring divestment by public funds from companies that engage in certain types of business activities involving Sudan. These laws will continue to pose business and reputational risks for companies that engage in business activities associated with Sudan under the new general license.

Concluding Remarks

The reversal of U.S. policy on Sudan is a significant change in the final days of the Obama administration and is likely to have major implications for U.S. and non-U.S. companies that conduct business in the region. Accordingly, we expect these changes to remain in place unless the incoming administration fails to issue a finding, before July 12, 2017, that Sudan has taken positive steps toward U.S. policy goals in the region, such as maintaining a cessation of hostilities in conflict areas in Sudan, improving humanitarian access throughout Sudan, and/or cooperating with the United States on counterterrorism and regional conflicts.

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