

# International Trade Alert

October 13, 2017

## Key Points

- Based on certain State Department findings, effective October 12, 2017, long-standing U.S. sanctions on the Republic of Sudan administered by OFAC under the Sudan Sanctions Regulations will be terminated, and U.S. persons will no longer be generally prohibited from engaging in transactions involving Sudan or the government of Sudan. This action reverses nearly 20 years of comprehensive U.S. sanctions on Sudan.
- Despite this point, important U.S. trade restrictions affecting Sudan remain, including restrictions on activities prohibited under related sanctions programs, including Darfur-related, human-rights-based sanctions. Sudan also remains on the U.S. list of State Sponsors of Terrorism, so that heightened U.S. export control and other trade restrictions remain in place for the country. Moreover, OFAC retains authority to designate persons and entities associated with Sudan on the SDN List pursuant to other sanctions authorities as it deems appropriate.
- Finally, even legally permissible activities involving Sudan may still pose challenges for U.S. and non-U.S. companies in connection with loan facilities and other contracts containing restrictive covenants applicable to business with Sudan, as well as U.S. state-level sanctions in more than 30 U.S. states that target companies engaging in Sudan-related business for divestment, exclusion from government contracts eligibility and other punitive actions.



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## Trump Administration Lifts U.S. Sanctions on Sudan; Important Limitations Remain

### Introduction

On October 6, 2017, the U.S. Department of the Treasury Office of Foreign Assets Control (OFAC) announced that it will revoke the core U.S. sanctions regime against Sudan. Under Executive Order 13761 (as amended by Executive Order 13804) issued by former President Obama on January 13, 2017, this action follows published confirmation by the State Department that Sudan has “sustained the positive actions” that gave rise to Executive Order 13761, including “carrying out its pledge to maintain a

cessation of hostilities in conflict areas in Sudan; continuing improvement of humanitarian access through Sudan; and maintaining its coordination with the United States on addressing regional conflicts and the threat of terrorism.”

Based on this action, effective October 12, 2017, U.S. persons are no longer generally prohibited from engaging in transactions involving Sudan or the government of Sudan under the SSR. Furthermore, consistent with the revocation of sanctions, OFAC will remove the SSR from the U.S. Code of Federal Regulations.

Despite this action, important U.S. trade restrictions affecting Sudan remain in place. These include U.S. export control restrictions in connection with Sudan’s continuing U.S. designation as a State Sponsor of Terrorism, additional restrictions imposed by provisions of the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA), and continuation of Darfur-related U.S. sanctions. Additionally, OFAC retains legal authority to make additional Specially Designated Nationals and Blocked Persons (SDN) designations of persons associated with Sudan, and more than 30 U.S. states have sanctions measures in place that provide for potential divestment, government contracts disqualification and other punitive measures against companies that engage in business activities involving Sudan. Accordingly, U.S. and non-U.S. companies considering commercial opportunities involving Sudan should include careful evaluation and assessment of these issues in business planning and management of related activities.

## **Background**

For nearly two decades, the U.S. government has maintained comprehensive economic sanctions on Sudan pursuant to Executive Order 13067 (November 3, 1997) and Executive Order 13412 (October 13, 2006). These executive orders blocked the property of the government of Sudan and generally prohibited U.S. persons from engaging in Sudan-related transactions. Sudan was targeted with these sanctions based on stated U.S. concerns regarding human rights abuses and support for international terrorism.

On January 13, 2017, after months of intensive bilateral discussions and negotiation, the Obama administration issued Executive Order 13761 (see [previous alert](#)). This executive order authorized the termination of U.S. sanctions on Sudan on condition that the Secretary of State in the incoming new U.S. administration issue a report finding that Sudan had sustained positive action in the following five key areas of engagement: (1) maintaining a cessation of hostilities in conflict areas; (2) improving humanitarian access throughout Sudan; (3) assisting to resolve the conflict in South Sudan; (4) countering the Lord’s Resistance Army; and (5) cooperating with the United States in addressing the threat of terrorism. In conjunction with this executive order, OFAC issued a general license at 31 C.F.R. § 538.540 authorizing all transactions otherwise prohibited by the SSR.

On July 11, 2017, the Trump administration issued Executive Order 13804, extending the deadline for the State Department to issue its report by an additional three months (see [previous alert](#)). On October 6, 2017, the State Department issued a [statement](#) and [report](#) finding that Sudan has sustained positive action in the aforementioned areas of engagement, authorizing the lifting of sanctions pursuant to Executive Order 13761. The report also stated that the U.S. government secured cooperation from the

government of Sudan in additional policy areas, including the implementation and enforcement of U.N. Security Council obligations related to North Korea.

## Summary of Changes

Effective October 12, 2017, OFAC revoked Sections 1 and 2 of Executive Orders 13067 and 13412, which blocked the property of the government of Sudan and prohibited U.S. persons from engaging in transactions with Sudan or the government of Sudan. Consequently, U.S. persons may engage in transactions previously prohibited under the SSR, and the Sudan General License issued in January (31 C.F.R. § 538.540) is superseded and no longer in effect.

OFAC has also issued **General License A** authorizing exports and re-exports to Sudan of agricultural commodities, medicine and medical devices otherwise barred due to Sudan's continued U.S. listing as a State Sponsor of Terrorism. General License A authorizes exports and re-exports of such items to Sudan, provided that the conditions of this general license are met, including adherence to a 12-month shipment restriction under TSRA.

In addition, OFAC has issued a new set of **FAQs** that provide further explanation regarding implications of the changes to the Sudan sanctions programs and ongoing restrictions applicable to Sudan-related transactions, discussed below.

## Continuing Trade Restrictions

Notwithstanding these substantial changes, important U.S. trade restrictions on business with Sudan and the government of Sudan remain.

- **List-Based Sanctions:** OFAC's revocation of sanctions unblocks property of individuals and entities designated on the SDN List under the SSR. However, this action does not affect other U.S. sanctions programs that intersect with activities involving Sudan or Sudanese nationals, including the South Sudan and Darfur-related sanctions programs. OFAC also retains other sanctions authorities to designate Sudanese persons on the SDN List. Companies should therefore continue to screen parties (whether associated with Sudan-related transactions or otherwise) against the SDN List notwithstanding the recent changes.
- **State Sponsor of Terrorism:** Sudan remains on the U.S. list of State Sponsors of Terrorism. This designation imposes restrictions on exports of defense articles, dual-use items and other commodities. It also includes imposition of miscellaneous restrictions, such as limitations on economic assistance and a ban on U.S. Department of Defense contracts above \$100,000 with companies controlled by the government of Sudan.
- **Exports of Agricultural Commodities, Medicine and Medical Devices:** Sudan's continued designation as a State Sponsor of Terrorism means that trade restrictions under TSRA related to exports of agricultural commodities (including foods), medicine and medical devices remain in place. Pursuant to 22 U.S.C. § 7205, exports of these items to the government of Sudan or any entity in Sudan require a license from OFAC, which OFAC has provided under new General License A.

Moreover, OFAC does not require a license for financing transactions related to these exports or re-exports. The key limitation to General License A is that the items must be shipped within the 12-month period following the date of the signing of the contract for export or re-export. This is a statutory requirement under TSRA, and, as such, Congressional action is necessary to lift this requirement.

- **Export Controls:** Items subject to U.S. export controls continue to be subject to restrictions for transfer to Sudan. Both U.S. and non-U.S. persons require authorization from the Department of Commerce's Bureau of Industry and Security (BIS) to export or reexport items that are listed on the Commerce Control List (CCL) (i.e., items subject to U.S. export controls, except for low-level items designated as EAR991). 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 CCL to Sudan.
- **Financial Institutions:** Financial institutions are no longer prohibited from processing transactions involving Sudan that are denominated in U.S. dollars, as either a correspondent institution or on behalf of their own customers. However, despite the changes in U.S. law, it is important to anticipate that some financial institutions may still be unwilling to process such transactions or take on related business based on pure business risk, anticorruption and money laundering risk considerations.
- **Financing and 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, particularly loan facility agreements issued by financial institutions. Companies seeking to take advantage of new opportunities in Sudan should review existing agreements to ensure that legally permissible, Sudan-related business does not result in a breach of covenants under commercial agreements.
- **State Divestment Policies:** Many U.S. states (more than 30) continue to maintain Sudan-related sanctions laws that prohibit investments and require divestment of 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, despite the lifting of sanctions under the SSR. Moreover, public and private investors that apply Socially Responsible Investment principles and policies may continue to restrict investments in companies that engage in business in Sudan.
- **European Union Restrictive Measures:** The European Union continues to maintain limited sanctions on Sudan, including an arms embargo, a ban on the provision of related assistance and services, and a restriction on the admission of designated individuals into the European Union. In addition, there is an asset freeze, as well as a prohibition to provide funds and economic resources to designated individuals.
- **OFAC Enforcement:** The OFAC FAQs expressly state that the revocation of sanctions on Sudan and the government of Sudan do not impact "past, present, or future OFAC enforcement investigations or actions" against individuals or entities for apparent violations of the SSR that

occurred prior to October 12, 2017. Accordingly, companies should be mindful of the long-standing OFAC policy to review a transaction in light of the laws in existence at the time, and consider voluntary self-disclosures where appropriate.

**Conclusion**

The decision to revoke sanctions on Sudan and the government of Sudan relieves much of the uncertainty that followed the issuance of Executive Order 13761 in the final days of the Obama administration. This decision will result in expanded commercial opportunities for U.S. and non-U.S. companies seeking to explore a market that has been subject to severe economic restrictions for nearly two decades. Consideration of such opportunities should include careful evaluation of remaining limitations and associated sanctions and export control risks.

**Contact Information**

If you have any questions concerning this alert, please contact the lawyers listed below or any of Akin Gump's [Export Controls and Economic Sanctions partners](#).

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