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U.S. Government Revokes the Sudanese Sanctions Regulations, But Restrictions and Risks Remain

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On October 6, 2017, the U.S. Government announced its decision to revoke, effective October 12, 2017, the economic sanctions imposed upon Sudan since November 1997 through the Sudanese Sanctions Regulations (“SSR”). (82 Fed. Reg. 47287 (October 6, 2017)). Beginning a process begun by the Obama Administration in January 2017, the Trump Administration explained that the decision follows “sustained positive actions” by the government of Sudan over the last nine months to maintain a cessation of hostilities in Sudan, improve access to humanitarian aid throughout Sudan, and maintain cooperation with the United States on counter-terrorism efforts. Contemporaneous with the announcement, the U.S. Department of Treasury’s Office of Foreign Assets Control (“OFAC”) published new Sudan Frequently Asked Questions (“FAQs”) and issued new General License A to authorize certain exports and reexports pursuant to the Trade Sanctions Reform and Export Enhancement Act of 2000 (“TSRA”).

From 1997 until January 2017, the U.S. Government imposed and enforced an extensive trade embargo that essentially prohibited U.S. persons from doing business with Sudan. In January 2017, President Obama conditionally lifted sanctions on Sudan authorizing a wide array of activities previously prohibited under the SSR and Executive Orders (“E.O.s”) 13067 and 13412, with a path to a permanent revocation of sanctions in six months if certain conditions were met. In lifting the sanctions, OFAC issued a general license to allow most business between the United States and Sudan. The general license also unblocked Sudanese assets blocked under the SSR, including assets of the government of Sudan.

In July 2017, President Trump extended the suspension of the Sudanese embargo until October 12, 2017, at which time President Trump needed to renew the operative general license, terminate the SSR, or revoke the general license and reinstate the comprehensive sanctions program. Effective October 12, the U.S. Government revoked sections 1 and 2 of E.O. 13067 and E.O. 13412, which blocked the property of the government of Sudan and generally prohibited U.S. persons from engaging in transactions in Sudan or with the government of Sudan. In other words, as of October 12, 2017, U.S. persons are no longer prohibited from engaging in transactions previously prohibited under the SSR without an OFAC license. In addition, the prior general license issued in January 2017 is no

longer necessary for U.S. persons to engage in such transactions. Termination of the SSR was accompanied by the removal of numerous Sudanese individuals and entities from OFAC's list of specially designated nationals ("SDNs"), but certain Sudanese individuals and entities remain on the SDN list pursuant to other OFAC sanctions programs.

In spite of the revocation of sanctions, Sudan remains on the State Sponsors of Terrorism List ("SST List"). In an attempt to address the potential incongruence between revocation of the SSR and Sudan's continued presence on the SST List, OFAC has issued General License A to authorize exports and reexports of certain TSRA items (e.g., agricultural commodities, medicine and medicinal devices) to Sudan.

Remaining Restrictions and Potential Risks

Despite the removal last week of the OFAC economic sanctions against Sudan, U.S. and non-U.S. parties considering business transactions involving Sudan should remain cognizant of continuing potential restrictions on transactions with Sudan because of its inclusion on the SST List. These include:

- The Arms Export Control Act ("AECA")¹ imposes a prohibition upon the export, sale, lease, or other provision of defense articles to Sudan (22 U.S.C. § 2780(b)(1)(A-C)). The AECA further prohibits a U.S. person from taking any other action which would facilitate the acquisition, directly or indirectly, of a defense article by the government of Sudan (22 U.S.C. § 2780(b)(1)(D)). Finally, the AECA establishes that a U.S. person may be found in violation of those prohibitions if a corporation or other person "controlled in fact by that United States person" sells, leases, or otherwise provides a defense article to Sudan or otherwise facilitates the acquisition of a defense article by the government of Sudan (22 U.S.C. 2780(b)(2)).
- A U.S. person and non-U.S. persons may be required to obtain a license from the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") to export or reexport to Sudan items subject to the Export Administration Regulations ("EAR") according to generally applicable regulations under the EAR (15 C.F.R. §§ 730-774) as well as regulations under the EAR specifically aimed at Sudan (15 C.F.R. § 742.10) or at Country Group E foreign nations which includes nations designated as state sponsors of international terrorism (15 C.F.R. § 740 Supp. No. 1).
- Federal law prohibits any U.S. person from engaging in a financial transaction with the government of Sudan knowing or have reasonable cause to know that Sudan is designated as a country supporting international terrorism except as provided in OFAC regulations (18 U.S.C. § 2332d). Under OFAC's Terrorism List Governments Sanctions Regulations (31 C.F.R. § 596), OFAC has provided general authorization for financial transactions with nations on the SST List that are not otherwise subject to licensing or prohibition under another OFAC sanctions program, except for a transfer from a Terrorism List Government: (1) constituting a donation to a U.S. person; or (2) posing a risk, which is known or

should reasonably be known, of furthering terrorist acts in the United States (31 C.F.R. § 596.504).

- Prohibitions on doing business with certain Sudanese individuals and entities that remain on OFAC's SDN and Blocked Persons List pursuant to other sanctions programs.
- Multinational businesses may be subject to the European Union's sanctions targeting Sudan.
- Prohibitions on U.S. foreign assistance to Sudan.
- A requirement for the U.S. Government to oppose World Bank and International Monetary Fund loans to Sudan.

Parties should also consider the potential risks of doing business in/with Sudan, including, but not limited to:

- Corruption concerns because of Sudan's high rate of public sector corruption.
- Personal security risks and concerns because of the heightened threat of terrorist attacks in Sudan.
- Reputational risks because of Sudan's inclusion on the SST List and reported human rights' violations.

Moreover, to reduce the risk of inadvertent breaches of commercial agreements, parties seeking to do business in Sudan should review existing agreements to determine whether they need to be amended to allow Sudan-related business under the agreement.

Recordkeeping Requirements

U.S. persons who rely on the new General License A must still comply with OFAC's recordkeeping requirements by keeping a "full and accurate record" of its Sudan-related transactions for a minimum of 5 years. See 31 C.F.R. § 501.601.

Revocation of the SSR Has No Impact on Pending or Future OFAC Enforcement Investigations Based on Conduct that Occurred Prior to October 12, 2017

The U.S. Government analyzes an apparent sanctions violation under the laws and regulations existing at the time the apparent violation occurred. As a result, the revocation of Sudanese sanctions will have no impact on any current/future investigations regarding apparent violations of the SSR that occurred before October 12, 2017. In other words, OFAC enforcement actions based on pre-sanctions-revocation violations of the SSR could arise after the effective date of the revocation of sanctions. For instance, on October 5, 2017, OFAC announced a \$372,465 settlement with BD White Birch Investment LLC ("White Birch USA") to settle White Birch USA's potential civil liability for three apparent violations of the Sudanese Sanctions Regulations related to export transactions that occurred in April and December 2013.

Conclusion

Based on the U.S. Government's revocation of the SSR, it appears that Sudan is now significantly closer to being open for business than it has been at any point since 1997. Nevertheless, those seeking to do business with Sudan should still exercise caution as new business opportunities may still face certain restrictions and may also pose substantial risks.

The export controls/trade sanctions team at Holland & Hart is well equipped to answer questions about the revocation of the SSR and explain how the SSR's revocation may influence your consideration of future business opportunities with Sudan. We will provide updates as significant events occur.

¹The administrative agency tasked in part with implementation of the AECA, the State Department's Directorate of Defense Trade Controls, has issued inconsistent regulations with regard to the export of defense articles to designated state sponsors of international terrorism. See 22 C.F.R. §§ 126.1(d)(1) and 126.1(v). Regardless of the apparent contradictions of the ITAR provisions, the AECA's statutory prohibition upon the export or sale of defense articles to designated state sponsors of international terrorism controls. That statutory prohibition carries criminal penalties, including a maximum term of imprisonment of 20 years for a willful violation of the AECA (22 U.S.C. § 2780(j)). For our detailed analysis of the apparent conflict between ITAR Section 126.1(v) and the AECA, please [click here](#).