

ALERT

BIS and OFAC Publish Amendments to Promote the Free Flow of Information in Sudan

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Consistent with the U.S. government's commitment to advancing the free flow of information to, from, and within Sudan, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) published amendments to the Export Administration Regulations (EAR) easing its licensing policy and creating exceptions to license requirements for certain communications items to Sudan. These changes were made in conjunction with a general license published by the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC), which administers sanctions against Sudan, permitting the export or reexport of certain services, software, and hardware incident to personal communications to or in Sudan. Both amendments took effect on February 18, 2015.

BIS Amendments

A license is required to export and reexport to Sudan most items on the EAR's Commerce Control List, including many consumer communications devices and telecommunications infrastructure items. BIS's amendments revise its general policy of denial for license applications involving Sudan to permit case-by-case review for licenses involving telecommunications equipment and associated computers, software, and technology for civil end-use. This change is designed to promote the development of civil telecommunications network infrastructure in Sudan.

BIS's amendments also revise License Exception Consumer Communications Devices (CCD) such that it now authorizes exports and reexports without a license of specified consumer

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Practice Areas

Export Controls and Economic Sanctions
International Trade

communications devices (e.g., mobile phones, computers, modems, etc.) that are widely available for retail purchase and commonly used to exchange information and facilitate personal communications to eligible individuals and independent non-governmental organizations in Sudan. Formerly, this exception only applied to Cuba. BIS's revision to License Exception CCD also updates the list of eligible items under the exception, including adding GPS and similar satellite receivers as eligible items for export and reexport to Sudan. Further, while the Sudanese government generally is not an eligible end-user under this exception, BIS has included a carve-out that permits the provision of certain consumer software distributed free of charge to the government.

As part of the Sudan amendments, BIS revised another exception in the EAR (License Exception TMP), which previously outlined the criteria and restrictions for exporting certain tools of trade to Sudan. BIS noted that License Exception CCD now authorizes all of the exports previously authorized by this exception. This is notable given that License Exception CCD, on its face, does not reference tools of trade or indicate with any certainty that it would apply to exports of tools of trade.

In addition, the new rule removes a license requirement for reexports to Sudan of certain software classified under Export Control Classification Numbers (ECCN) 5D992.b and 5D992.c. ECCN 5D992.b generally includes encryption software that has the characteristics of, or performs the functions of, certain telecommunications and information security equipment, while ECCN 5D992.c includes mass market encryption software such as mobile apps. Keep in mind that while reexports of these items are generally permitted, exporting such items from the United States to any destination with knowledge that they will be reexported to Sudan still is prohibited without a license.

OFAC Amendments

Previously, OFAC's Sudanese Sanctions Regulations (SSR), 31 C.F.R. Part 538, provided a general license for the exportation of certain services and software incident to the exchange of personal communications (e.g., instant messaging, chat and email, social networking, sharing of photos and movies, web browsing, and blogging), provided that such services and software were publicly available at no cost to the user, from the United States or by U.S. persons. Such software qualified for this authorization only if it was designated as EAR99, not subject to the EAR, or classified by BIS as mass market software under ECCN 5D992.

As a result of its recent amendments, OFAC has lifted its no-cost restriction, as the SSA now authorize the exportation of certain fee-based software and incidental services. OFAC has also expanded its general license to permit the exportation, reexportation, or provision, directly or indirectly, to Sudan of certain additional personal communications software, hardware, and related services subject to the EAR. In addition, OFAC has added a new general license authorizing the exportation, reexportation, or provision, directly or indirectly, by a U.S. person located outside the United States to Sudan of certain software and hardware not subject to the EAR. For example, OFAC now authorizes a foreign branch of a U.S. company to export certain hardware or software that is not subject to the EAR from a foreign country to Sudan. OFAC has also added a new general license permitting the importation by an individual into the United States of certain hardware and software previously exported by the individual to Sudan pursuant to other provisions in the SSR. Finally, in

order to ensure that the Sudanese sanctions do not deter companies from making available certain no-cost personal communications tools to persons in Sudan, the SSR now includes a new general license covering the exportation, reexportation, or provision to the government of Sudan of certain no-cost services and software that are widely publicly available.