

ACI's 5th Annual Economic Sanctions Boot Camp

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Focus on Facilitation

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Tweeting about this conference?

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Facilitation / Exports of Services



- U.S. person cannot **facilitate / otherwise support** activity that would be prohibited if performed by U.S. person
- Providing service anywhere may be prohibited **if benefit of service is received by sanctioned party**

DON'T DO SOMETHING INDIRECTLY YOU CAN'T DO DIRECTLY

Jurisdiction / U.S. Persons

- All U.S. citizens and residents, wherever located
- All U.S.-organized, incorporated companies or entities
- **All persons in United States**, regardless of nationality
 - *Example:* British national attending a management retreat in Los Angeles
- In case of *Iran and Cuba*, a non-U.S. entity controlled or owned by a U.S. person also is subject to U.S. jurisdiction

Causing a Violation

There can be liability for any person, regardless of nationality, who causes a violation

See *large penalties against non-U.S. banks*



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Facilitation Prohibition: Iran

“...no United States person, wherever located, may approve, finance, facilitate, or guarantee any transaction by a foreign person where the transaction by that foreign person would be prohibited by this part if performed by a United States person or within the United States.” 31 C.F.R. § 560.208

Iran Example 1

- “[A] prohibited **facilitation** or approval of a transaction by a foreign person occurs . . . when a United States person:
 - . . . **Alters its operating policies or procedures**, or those of a foreign affiliate, to permit a foreign affiliate to accept or perform a specific contract, engagement or transaction involving Iran or the Government of Iran without the approval of a United States person, *where such transaction previously required approval* by the United States person . . .” 31 C.F.R. § 560.417(a)

Iran Examples 2 and 3

- “**Refers to a foreign person** purchase orders, requests for bids, or similar business opportunities involving Iran or the Government of Iran to which the United States person *could not directly respond* as a result of the prohibitions contained in this part.” 31 C.F.R. 560.417(b)
- “**Changes the operating policies and procedures** of a particular affiliate with the specific purpose of facilitating transactions that would be prohibited by this part if performed by a United States person or from the United States.” 31 C.F.R. § 560.417(c)

Facilitation Prohibition: Sudan

- “. . . the **facilitation** by a United States person, including but not limited to *brokering* activities, of the exportation or reexportation of goods, technology, or services from Sudan to any destination, or to Sudan from any location, is prohibited.” 31 C.F.R. § 538.206
- “the performance by any United States person of any contract, including a financing contract, **in support of** an industrial, commercial, public utility, or governmental project in Sudan is prohibited.” 31 C.F.R. § 538.207

Sudan Example 1

- “The prohibition contained in § 538.206. . . bars **any unlicensed action by a U.S. person that assists or supports trading activity with Sudan by any person.** Facilitation of a trade or financial transaction that could be engaged in directly by a U.S. person or from the United States consistent with the prohibitions, general licenses and exemptions contained in this part is not prohibited.” 31 C.F.R. § 538.407(a)

Sudan Example 2

- “To avoid potential liability for U.S. persons under this part, a U.S. parent corporation must ensure that its non-U.S. subsidiaries act independently of any U.S. Person with respect to all transactions and activities relating to the exportation or reexportation of goods, technology or services between Sudan and any other location including but not limited to **business and legal planning; decision making; designing, ordering or transporting goods; and financial, insurance and other risks.**” 31 C.F.R. § 538.407(b)

Sudan Example 3

- “No U.S. person may **change its policies or operating procedures, or those of a foreign affiliate or subsidiary**, in order to enable a foreign entity owned or controlled by U.S. persons to enter into a ***transaction that could not be entered into*** directly by a U.S. person or from the United States.” 31 C.F.R. § 538.407(c)

Sudan Example 4

- “No U.S. person may **refer to a foreign person** purchase orders, requests for bids or similar business opportunities involving Sudan or the Government of Sudan to which the U.S. person *could not directly respond* as a result of the prohibitions contained in this part.” 31 C.F.R. § 538.407(d)

Facilitation Prohibition: Syria

- “Except as otherwise authorized, United States persons, wherever located, are prohibited from **approving, financing, facilitating, or guaranteeing** a transaction by a foreign person where the transaction by that foreign person would be prohibited by ... this part **if performed by a United States person** or within the United States.” 31 C.F.R. § 542.210

Facilitation Prohibition: Burma

- Funds ... may not be held, invested, or reinvested in a manner that provides immediate financial or economic benefit or access to any person whose property or interests in property are blocked pursuant to § 537.201(a), nor may their holder **cooperate in or facilitate the pledging or other attempted use as collateral of blocked funds or other assets.** *31 C.F.R. § 537.208(f) – former U.S. sanctions on Burma*

Burma Example

- **Divestiture of shares in an entity to a foreign person** constitutes facilitation of that foreign person's investment in Burma. *31 C.F.R. § 537.412(b) – former U.S. sanctions on Burma*

Foreign Sanctions Evaders List

- Executive Order 13608 (May 1, 2012) authorizes the imposition of sanctions on “Foreign Sanctions Evaders” that **undermine U.S. sanctions on Iran and Syria**
 - Executive Order 13608, Section 1(a)(ii), targets those who **“facilitate deceptive transactions for or on behalf of any person subject to United States sanctions concerning Iran or Syria”**

Facilitation Summary

- The facilitation provisions in the Iran, Sudan, Syria, and Burma regulations are based on similar prohibitions in the underlying Executive Orders
- Executive Orders and regulations implementing blocking sanctions do not specifically target facilitation
 - A U.S. person providing services to assist a person subject to blocking sanctions would be providing services in which the sanctioned person has an interest.

NOT Facilitation: Sudan Sanctions

- “Activity of a **purely clerical or reporting nature** that does not further trade or financial transactions with Sudan or the Government of Sudan is not considered prohibited facilitation. For example, *reporting on the results of a subsidiary’s trade* with Sudan is not prohibited, **while financing or insuring that trade or warranting the quality of goods sold by a subsidiary to the Government of Sudan** constitutes prohibited facilitation.” 31 C.F.R. § 538.407(a)

NOT Facilitation (cont'd)

- Provision of legal advice and counseling on the requirements of and compliance with the laws of any jurisdiction within the United States, provided that such advice and counseling are not provided to facilitate transactions in violation of this part.
 - *This is standard language in the legal services general licenses included in regulations implementing OFAC sanctions programs*

Hypothetical Number 1

- Acme Co is a UK company.
- Beta Co is Acme's U.S. subsidiary.
- You are outside counsel for Beta.
- Beta asks you the following:
 - One of our senior officers has been named to the Acme Co board. The Board is about to vote on a major capital expenditure related to Iranian business.
 - How can we proceed?
 - What if Acme Co asks the question?
 - Does it affect the analysis if the senior officer is not a U.S. person?

Hypothetical Number 2

- A sales manager employee of Acme Co is a U.S. citizen who resides in the UK.
- The sales manager receives an email requesting them to handle an order for a shipment to **Sudan.**
 - How should the employee respond?
 - Should the employee have been walled off from receiving such inquiries?

OFAC Enforcement Example

Ameron International Corporation – 2013

- U.S. company based in California
- \$437,700 civil settlement with OFAC
- Explicit facilitation violations

Ameron (cont'd)

- According to OFAC, Ameron:
 - **approved**, on two occasions, *capital expenditure requests* made by Ameron B.V., a Dutch subsidiary of Ameron, and Ameron (Pte) Ltd. (“PTE”), a Singaporean subsidiary of Ameron, to purchase toolings and other equipment needed to fulfill orders for a South Pars project, located in Iran;
 - **referred to its foreign subsidiaries** three business opportunities involving the sale of goods to Iran that Ameron itself could not have directly performed as a result of the prohibitions set forth in the ITSR...

Thank You!

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