

U.S. RESTRICTIONS ON OVERFLIGHTS AND AIR TRANSPORTATION SERVICES

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Over the years, the United States has restricted travel, travel services, and transportation services. These restrictions often vary in scope, depending upon the political circumstances, the legal basis for the restrictions, and the U.S. governmental agency administering and enforcing the restrictions. The Federal agencies that may prohibit or restrict (in part or in whole) travel or transportation and related transactions include: (1) the U.S. Department of the Treasury; (2) the U.S. Department of Transportation; (3) the Federal Aviation Administration; and (4) the U.S. Department of Commerce.

The Office of Foreign Assets Control (“OFAC”) is the office within the U.S. Department of the Treasury that administers and enforces economic and trade sanctions (including travel and transportation restrictions) against targeted countries and persons. In some cases, OFAC may be the only Federal agency imposing sanctions against a particular country. In other cases, the U.S. Department of Transportation (“DOT”) and/or the Federal Aviation Administration (“FAA”) may prohibit transportation services with respect to the same or another country. The U.S. Department of Commerce (“DOC”), moreover, has responsibility for regulating exports and reexports of U.S. manufactured items and foreign manufactured items with a de minimis level of U.S. content. DOC’s rules extend to the operation of aircraft and the transportation of baggage and cargo to foreign countries, including sanctioned countries. These other agencies do not necessarily coordinate with OFAC.

If any Federal agency prohibits travel, travel services, and/or transportation services, air carriers and other companies¹ cannot engage in any related transactions – even if another government agency may not impose similar restrictions. Therefore, before carriers provide any services to a sanctioned country, they must review carefully the applicable U.S. regulations and orders. The scope of these regulations and orders are summarized below.

OFAC Regulations

OFAC acts under presidential wartime and national emergency powers to impose sanctions that may restrict transactions and freeze assets under U.S. jurisdiction. The primary authorities are the Trading With the Enemy Act of 1917 (“TWEA”) and the International Emergency Economic Powers Act, as amended (“IEEPA”). Some OFAC

¹ Throughout this summary, and unless otherwise specified, the term “carrier” or “carriers” shall refer to all transportation companies, including travel agencies, freight forwarders, logistics companies, and ground handlers.

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OFAC publishes separate regulations governing each of its sanctions programs. The various regulations apply to all persons, who are subject to U.S. jurisdiction (“U.S. persons”). The term “persons” refers to individuals, partnerships, associations, corporations, or other organizations or entities. A “person subject to U.S. jurisdiction” generally includes (a) any citizen or permanent resident of the United States; (b) any corporation organized under the laws of the United States or any state, territory, possession, or district thereof; and (c) any person within the United States. Some OFAC regulations (i.e., those involving Cuba and Iran) also extend to any corporation, company, partnership, or association that is owned or controlled by U.S. persons. Thus, the OFAC regulations extend to all U.S. citizens and residents, wherever they are located. Foreign nationals, who are physically located in the United States, are subject to and must comply with the OFAC regulations. In addition, the regulations apply to all entities that are established or incorporated in the United States or that are located in the United States. This includes U.S. branch offices of foreign companies.

OFAC sanctions (as set forth in the particular set of OFAC regulations) can have two different components. OFAC may require that U.S. persons block accounts and other property of persons identified on the Specially Designated National List (the “SDN List”). OFAC also may prohibit U.S. persons from engaging in any trade or financial transactions with or involving the sanctioned country and/or SDNs.

When the OFAC regulations prohibit activities, U.S. persons cannot proceed with – and must reject or stop – all transactions relating thereto, unless OFAC otherwise authorizes the transactions. OFAC may authorize prohibited transactions in one of two manners. It may establish a general license in the applicable regulations. Alternatively, it may issue a written specific license. To invoke a general license, a U.S. person must satisfy all of the stated conditions. A qualifying U.S. person (one who meets all conditions) does not need to ask for OFAC’s permission before proceeding with a generally licensed transaction. As for a specific license, the U.S. person must submit a written application and wait for OFAC to issue a written license before proceeding with any transaction.

Depending upon the authority under which OFAC has implemented the sanctions, the published regulations may restrict travel, travel services, transportation services, transportation related transactions (such as uplifting fuel and arranging ground handling services), and/or financial transactions relating thereto. OFAC currently has

comprehensive country-based sanctions that restrict (in whole or in part) travel and/or transportation to **Cuba, Iran, North Korea, Sudan, and Syria**. OFAC also has imposed non-comprehensive (or limited) sanctions against **Burma (Myanmar) and Ukraine/Russia**. In addition, it administers list-based sanctions against certain regimes and/or officials of those regimes (such as **Lebanon, Libya, Iraq, and Somalia**) and against certain activities (such as terrorist, narcotics, and proliferation activities).² Differences, in some cases substantial differences, exist between the OFAC regulations governing each of these countries.

FAA Special Rules

In addition to reviewing the OFAC regulations, carriers must consider special FAA rules that restrict their flight operations. The special rules, called the Special Federal Aviation Regulations (the “SFARs”), apply to U.S. air carriers, U.S. commercial operators, FAA-certificated airmen, and persons operating U.S. registered aircraft. The SFARs may prohibit carriers from operating within the territory and airspace of a particular country. Alternatively, the SFARs may prohibit carriers from landing in, taking off from, or overflying the United States, if they stopped in a sanctioned country or if they are owned and/or controlled by a sanctioned country.

The FAA has published SFARs prohibiting flight operations with respect to **Iraq, Libya, North Korea, Somalia, Syria, Ukraine and Yemen**. These SFARs will remain effective until the FAA terminates them.

DOT Orders

Carriers also must review DOT orders that apply to certificated U.S. air carriers and permitted foreign air carriers. These orders may restrict air carriers’ authority to operate between the United States and certain countries. Specifically, DOT may prohibit U.S. carriers from selling any air transportation that involves a stop in a sanctioned country or from engaging in any transactions related to air transportation to that sanctioned country. DOT also may prohibit foreign carriers from selling air transportation in the United States that involves a stop in the particular sanctioned country. A DOT order, moreover, may prohibit carriers from engaging in foreign air

² Historically, OFAC has applied sanctions against countries. OFAC refers to these as “country-based sanctions programs.” In the last decade, however, OFAC has targeted governments or other persons for acting in a manner inconsistent with U.S. foreign policy. OFAC has restricted commercial transactions of terrorists, international narcotics traffickers, proliferators of weapons of mass destruction, and diamond traders. It also has sanctioned entities and/or individuals who have contributed to conflicts in, undermined democratic process in, or threatened the peace and stability of the Balkans, Belarus, Burundi, Central African Republic, Congo, Cote d’Ivoire, Iraq, Lebanon, Liberia, Libya, Somalia, South Sudan, Venezuela, Yemen, and Zimbabwe. OFAC may refer to these as “list-based sanctions programs.”

transportation to or from the United States using aircraft of a particular country's registry.

In addition to restricting air service and sales to targeted countries, DOT has applied the FAA restrictions to U.S. carriers' codeshare operations. In 1995, DOT notified the airline industry that the FAA's overflight prohibitions will extend to flights operated by foreign carriers, on which the codes of U.S. carriers are displayed. Under DOT's policy, foreign carriers cannot permit the codes of their U.S. codeshare partners to be displayed on flights that enter or depart the airspace or territory of an FAA-sanctioned country. DOT holds both the U.S. and foreign carriers responsible for complying with any effective FAA overflight prohibition.

DOT currently restricts, in whole or in part, the provision of air transportation to and from **Cuba, Lebanon, North Korea, and Sudan**. DOT also restricts transportation services to the United States by **Syrian** air carriers and **Lebanese** air carriers. In addition, DOT applies the FAA restrictions on **Iraq, Libya, North Korea, Somalia, Ukraine, and Yemen** to foreign carriers' codeshare operations to those destinations.

DOC Regulations

A fourth regulatory area concerns exports and reexports. In some cases, OFAC shares with DOC the responsibility for regulating the exportation and reexportation of U.S. items to sanctioned countries. DOC, in other cases, may have sole responsibility for regulating exports and reexports. When considering whether to commence operations to sanctioned countries or to transport cargo to sanctioned countries, air carriers must comply with DOC's regulations – called the Export Administration Regulations (the "EAR") – as well as with any applicable OFAC regulation and any applicable DOT/FAA rule.

Briefly, the EAR controls or restricts the exportation of virtually all goods, software, and technology (collectively called "items") from the United States to foreign countries. DOC also regulates the reexportation of U.S. items from one foreign country to another. The EAR extends to foreign-manufactured items containing a certain level of U.S. origin components or based upon U.S. technology. DOC also controls the transfer of U.S. technology (including technical data and technical assistance) to foreign persons within and outside the United States.

DOC broadly defines "export" and "reexport" in the EAR. "Export" means "an actual shipment or transmission of items subject to the EAR out of the United States." This does not require the transfer of an item to a foreign person; rather, it covers all shipments or transmissions out of the United States. "Reexport" means (a) the actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country and (b) the release of technology or software to a foreign person, wherever located.

DOC also interprets “shipment or transmission” very broadly. In the aviation context, the operation of an aircraft from the United States to a foreign country constitutes an export even though the aircraft has not been sold or transferred to a foreign person. Similarly, the operation of an aircraft (subject to the EAR) from one foreign country to another constitutes a reexport, regardless of whether the aircraft has been sold or transferred to a third person. Even the simple act of leasing an aircraft can result in a shipment or transmission of an aircraft outside of the United States or from one foreign country to another. These operations meet the definition of “export” or “reexport” even if there is no sale or transfer to a foreign entity.

In addition to identifying items that are subject to export controls, the EAR specifies licensing requirements based upon these controls. Controlled items generally cannot be exported or reexported to any country, unless DOC otherwise authorizes these transactions. DOC may grant this authorization by permitting a license exception in the EAR or by issuing a written license. A “license exception” covers certain risk-reducing circumstances. It allows exporters to export or reexport goods or technology to certain countries under certain conditions. The availability of a license exception depends, in part, upon the destination country.

One important license exception in the EAR is called “License Exception AVS.” This exception allows U.S.-registered commercial aircraft to operate “on temporary sojourn” from the United States to foreign countries, so long as the aircraft will not be sold and operational control will not be transferred to those countries. Foreign-registered commercial aircraft may depart the United States for any other country under License Exception AVS, provided the aircraft will not be sold and “operational control” of the aircraft will not be transferred to Iran, North Korea, Sudan, and Syria. DOC has identified nine criteria in License Exception AVS, which will determine whether there has been a transfer of operational control. If any one of these nine criteria is not satisfied, License Exception AVS does not apply. In this case, the carrier would need to obtain a DOC license before operating to the particular country.

Because the EAR reaches and regulates flight operations, air carriers must be cognizant of the controls. Before commencing air transportation services, carriers should evaluate the EAR and determine whether a license is required to operate an aircraft from the United States to a sanctioned destination (an export) or to operate a controlled aircraft from a third country to the sanctioned destination (a reexport). Carriers also must have procedures to verify that shippers present documentation demonstrating compliance with the EAR.

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Before carriers consider services to any country, they should consider whether OFAC or any other Federal agency has imposed restrictions on services to that country. Carriers also should periodically re-check sources for current information in this rapidly changing area of the law. The attached chart identifies the sources of these restrictions.



For more details about a particular sanctions program, please contact Lonnie A. Pera at ***Zuckert, Scoutt & Rasenberger, L.L.P.***

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RESTRICTIONS ON TRAVEL AND AIR TRANSPORTATION SERVICES

Country	FAA Airspace/ Overflight Restriction	DOT Transportation Service Restriction	OFAC Travel/ Transportation Services Restriction	DOC License Exception AVS
Burma			31 C.F.R. Part 537	YES
Cuba		DOT Order T-1 (cargo)	31 C.F.R. Part 515	YES
Iran			31 C.F.R. Parts 560, 561, 562	NOT AVAILABLE
Iraq	SFAR 77	DOT Order 95-2-34	31 C.F.R. Part 576 *	YES
Lebanon		DOT Order 98-6-25, P.D. 2007-22, and P.D. 98-32	31 C.F.R. Part 549 *	YES
Libya	SFAR 112	DOT Order 95-2-34	31 C.F.R. Part 570 *	YES
North Korea	SFAR 79	DOT Order 95-2-34, DOT Order T-1	31 C.F.R. Part 510	YES
Somalia	SFAR 107	DOT Order 95-2-34	31 C.F.R. Part 551 *	YES
Sudan		DOT Order 98-2-5 (cargo)	31 C.F.R. Part 538	YES
Syria	SFAR 104 and 114	DOT Order 86-12-48	31 C.F.R. Parts 542 and 596	NOT AVAILABLE US-Syria
Ukraine	SFAR 113	DOT Order 86-12-48	31 C.F.R. Part 589 & Executive Orders	NOT AVAILABLE US-Crimea
Yemen	SFAR 115	DOT Order 86-12-48		YES

* These are list-based programs. List-based sanctions programs do not specifically restrict air transportation services to, from, or over the named country.