ZUCKERT SCOUTT RASENBERGER

U.S. RESTRICTIONS ON OVERFLIGHTS AND AIR TRANSPORTATION SERVICES

(September 2018)

By Lonnie Anne Pera

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 restricting (in part or in whole) travel, services, 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 the exportation of items from the United States and the reexportation 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 counties, including sanctioned countries. These other agencies do not necessarily coordinate with OFAC when they decide to act.

If any Federal agency prohibits travel, travel services, and/or transportation services, air carriers and other companies[1] 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 all applicable U.S. regulations and orders.

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" refers to air transportation companies, including freight forwarders, logistics companies, and ground handlers.

sanctions also are based upon United Nations and other international mandates, while other sanctions implement U.S. laws and/or address U.S. foreign policy concerns only.

OFAC publishes separate regulations governing each of its sanctions programs. The various regulations apply to 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 jurisdiction within the United States; and (c) any person within the United States. Some OFAC regulations (e.g., Cuba) also extend to companies or entities owned or controlled by U.S. persons. Thus, OFAC regulations extend to U.S. citizens and residents (wherever located) and companies organized in the United States. Foreign nationals, who are physically located in the United States, are subject to and must comply with the OFAC regulations. 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, a U.S. person cannot proceed with – and must reject or stop – these activities, unless OFAC otherwise licenses 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 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 the transaction.

Depending upon the relevant statutory authority, OFAC's 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, Syria, and the Crimean region of Ukraine**. OFAC also has imposed more limited sanctions against **Russia and Venezuela.** 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 various OFAC regulations.

FAA Special Rules

In addition to reviewing the OFAC regulations, carriers must consider FAA rules that restrict flight operations. These 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 generally remain effective for two years, unless FAA otherwise extends or revokes them.

DOT Orders

Carriers must review DOT orders that restrict an airline's authority to operate between the United States and certain countries. DOT may prohibit U.S. carriers from selling 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 transportation to or from the United States using aircraft of a particular country's registry.

In addition to restricting air service to targeted countries, DOT applies the FAA restrictions to U.S. carriers' codeshare operations. In 1995, DOT notified the airline industry of its policy to extend the FAA overflight prohibitions to foreign carrier flights on which U.S. carrier codes are displayed. Under this policy, foreign carriers cannot display the codes of their U.S. codeshare partners on flights that enter or depart the

[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 ("WMD"), and diamond traders. It also has sanctioned entities and/or individuals for contributing to conflicts, undermining the democratic process, or threatening peace and stability in such countries as the Balkans, Belarus, Burundi, Central African Republic, Congo, Iraq, Lebanon, Liberia, Libya, Somalia, Sudan (relating to Darfur), South Sudan, and Yemen. OFAC may refer to these as "list-based sanctions programs." More recently, OFAC has imposed secondary sanctions on non-U.S. persons for conducting business with targeted governments, persons, and organizations. For example, OFAC administers secondary sanctions against foreign persons for transacting with Iran and North Korea.

(continued…)

airspace or territory of an FAA-sanctioned country.[3] DOT holds both U.S. and foreign carriers responsible for complying with the FAA's prohibitions and DOT's policy.

DOT currently restricts, in whole or in part, the provision of air transportation to and from **Lebanon and North Korea.** DOT also restricts transportation services to the United States by **Syrian** air carriers. In addition, DOT applies FAA's restrictions on **Iraq, Libya, North Korea, Somalia, Syria, Ukraine, and Yemen** to foreign carriers' codeshare operations to or over 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 of items from the United States, and the reexportation of certain items from third countries, to sanctioned countries. DOC, in other cases, may have sole responsibility for regulating exports and reexports. When considering whether to provide services 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. With respect to goods, the term "export" means "an actual shipment or transmission out of the United States." This does not require the transfer of a good to a foreign person; rather, it covers the shipping, sending, or taking of the good out of the United States. A "reexport" means the actual shipment or transmission of goods subject to the EAR from one foreign country to another foreign country.

DOC also construes "shipment or transmission" as broadly as possible to mean the movement of controlled items to another country. 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 a controlled aircraft from one foreign country to another constitutes a reexport, regardless of whether the aircraft is sold or transferred to a third party. Even

[3] DOT provided this notice in Order 95-2-34. Although the order specifically prohibited overflying Afghanistan, DOT states its general policy on flight restrictions in the order. DOT reaffirmed on March 19, 2015 that it will approve codeshare arrangements only if foreign carriers do not display U.S. carrier codes on flights that enter, depart, or transit the airspace of any area subject to FAA flight restrictions.

the simple act of leasing an aircraft may involve the shipment or transmission of an aircraft outside of the United States. In all three instances, the aircraft operations represent exports or reexports that must comply with DOC licensing requirements.

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 qualifying items to certain countries under certain conditions – without the need for a written license. 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 aircraft to operate "on temporary sojourn" from the United States to foreign countries – without a license – 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 other countries 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 (conditions) for determining whether a transfer of operational control has occurred. If a condition is not met, this exception does not apply. In this case, the carrier must obtain a DOC license before operating to that country.

Because the EAR reaches and regulates aircraft operations, air carriers must be cognizant of the controls. Carriers should evaluate whether a DOC license is required to operate commercial aircraft to a sanctioned destination. Carriers also must have procedures to verify that shippers present documentation demonstrating that items in consolidated or single shipments comply with the EAR.

* * * *

Before carriers consider services to a 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.***

Lonnie Anne Pera
(202) 973-7913
lapera@zsrlaw.com

ZUCKERT SCOUTT RASENBERGER

September 2018

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
Cuba			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 & 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	31 C.F.R. Part 510	NOT AVAILABLE US-North Korea
Somalia	SFAR 107	DOT Order 95-2-34	31 C.F.R. Part 551 *	YES
Syria	SFAR 104 & 114	DOT Order 86-12-48	31 C.F.R. Parts 542 & 596	NOT AVAILABLE US-Syria
Ukraine/ Russia	SFAR 113	DOT Order 86-12-48	31 C.F.R. Part 589 & Executive Orders	NOT AVAILABLE US-Crimea
Venezuela			31 C.F.R. Part 591	YES
Yemen	SFAR 115	DOT Order 86-12-48	31 C.F.R. Part 552 *	YES

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

** OFAC general license authorizes non-U.S. persons to operate certain eligible aircraft on temporary sojourn from third countries to Iran.