

OFAC Licensing: Exceptions to Economic Sanctions Prohibitions

A Presentation by
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SIFMA's OFAC Compliance Symposium
AXA Conference Center
New York, NY

November 6, 2008

OFAC Licensing: Exceptions to Economic Sanctions Prohibitions

OFAC licenses:

- authorize transactions and activities that are otherwise prohibited
- make exceptions to sweeping and comprehensive sanctions prohibitions and requirements
- are a necessary part of the effective administration of sanctions in accordance with US government (foreign) policy
- send signals to sanctions targets (carrot and stick)
- serve as mechanism for gradual relaxation and lifting of sanctions

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Presidential Executive Orders imposing sanctions and relevant underlying statutory authorities contemplate, foresee, and authorize exceptions – in appropriate cases

“ ...except to the extent provided in ...licenses issued pursuant to this order ... the following are prohibited:”

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The licensing function/process provides OFAC with necessary flexibility:

- maintains bright line, sweeping prohibitions (strength, integrity, clarity of sanctions)
- addresses unforeseeable, unintended consequences of the application of prohibitions (sanctions are sometimes a double-edged sword)
- provides for constant calibration and refinement of sanctions
- implements changes in underlying US government foreign policy
- affirmative support of US government policy; affords due process

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Organization of OFAC regulations, 31 CFR Chapter V:

100s – technical provisions

200s – prohibitions

300s – definitions

400s – interpretations

500s – licensing

600s – records and reports

700s – penalties

800s – procedures

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Types of OFAC licenses:

Specific:

- case-by-case determinations -- in response to written applications/petitions, specific to discreet transactions for specific persons
- non-precedential basis

General:

- authorizations applicable to certain categories of transactions and to all those similarly situated
- set forth in published OFAC regulations

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Specific licenses fall into two categories:

- statements of licensing policy
 - setting forth in regulations (mostly) objective criteria/conditions for issuance of licenses, *e.g.*, commodities (futures) trading (Iran), agricultural exports
- other applications (catch-all)
 - pursuant to OFAC's plenary licensing authority
 - highly discretionary

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Some examples of specific OFAC license applications/licenses:

- unblocking of certain funds (wire transfers) and other assets
- overcoming conflicts of law situations, *e.g.*, foreign branches of US banks, foreign subsidiaries of US companies
- challenge to OFAC’s basis for determinations, overcoming OFAC presumptions, *e.g.*, persons on the SDN list (post-designation due process), Cuban nationals residing outside of Cuba and the United States – eligibility for unblocking
- acquiring (M&A) or inheriting (successor liability) transactions involving sanctions targets

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Some examples of specific OFAC license applications/licenses (cont.):

- circumstances/transactions where sanctions target involvement is *de minimis* in comparison to others and/or nexus to sanctions targets is extremely remote (hyper-technical application, outer-periphery of the law)
- settlement and payment of certain global insurance claims
- inability to exclude sanctions target coverage from the scope of global insurance and reinsurance policies

OFAC statement: “In cases where such an exclusion is not commercially feasible, the insurer should apply for a specific OFAC license for the global insurance policy.”

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Some examples of general licenses:

- Iranian accounts at US banks and US broker-dealers
- protection of intellectual property (Iran, Sudan)
- provision of certain legal services
- payment of interest and deduction of service charges – blocked accounts

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Some examples of general licenses (cont.)

- carve-out for Southern Sudan
- certain payments involving Burma
- dollar-clearing (Iran)
- telecommunications
- trading of debt obligations (past Yugoslav sanctions)

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Note:

General licenses differ from one sanctions program to another. For example, a general license under the Iran program may not be available under the Cuba embargo

Judgments on whether and how a general or specific license applies are sometimes difficult

OFAC presumption usually against grant of licenses. Must overcome presumptions and offer cogent reasons for licensing to succeed on applications

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Helpful tips:

- must demonstrate to OFAC that issuance of specific license meets criteria or that issuance of license would be consistent with US government policy
- should first determine whether a license is even required
- in close-calls or for comfort, plead in the alternative to OFAC
- OFAC's licensing division deals with license applications as well as requests for interpretations
- do not abuse process or detract from your credibility by asking for licenses where license would not be granted

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The Eren Law Firm is an economic sanctions, anti-money laundering, bank regulation, and international trade regulation boutique serving U.S. and non-U.S. financial institutions/financial services companies, U.S. and non-U.S. companies, and sovereign governments.

Mr. Eren and Mr. Pinter of the Firm served in senior positions at the U.S. Treasury's Office of Foreign Assets Control (OFAC) for a combined 25 years prior to entering private law practice, respectively 6 and 8 years ago. Mr. Pinter was OFAC's Chief of Licensing between 1987 and 2002. At OFAC, among other things, Mr. Eren was a principal contributor to OFAC's promulgation of the Iran Transactions Regulations and his portfolio at OFAC consisted primarily of matters involving complex financial and trade transactions.

More information about The Eren Law Firm and its practice can be found at: www.erenlaw.com