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U.S. Announces Revocation of Sudanese Sanctions Regulations: New Opportunities and Familiar Risks

On October 6, 2017, the United States government announced that, effective October 12th, the Sudanese Sanctions Regulations (“SSR”) would be officially revoked. The October 6th announcement marked the culmination of a nine-month process initiated during the waning days of the Obama administration. Revocation of the SSR will create additional opportunities for U.S. companies to do business in—and with—Sudan. The step also is in line with a broader trend across U.S. sanctions policy in favor of narrower sanctions that target specific actors and categories of transactions over broader sanctions that target entire countries or regions.

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I. Overview of the SSR

The United States imposed sanctions against Sudan in 1997 in response to alleged human rights abuses and the country’s support of terrorism.¹ The SSR prohibited persons subject to U.S. jurisdiction from engaging in a broad range of transactions with Sudan, including:

- Exportation or reexportation to Sudan of goods, technology, or services from the United States or by a U.S. person;
- Importation into the United States of goods or services of Sudanese origin;
- Facilitation by a U.S. person of the export or reexport of goods, technology, or services from Sudan to any destination or to Sudan from any location;
- Performance by a U.S. person of any contract in support of an industrial, commercial, public utility, or governmental project in Sudan; and
- Any transactions by U.S. persons relating to the petroleum or petrochemical industries in Sudan, including, but not limited to, oilfield services and oil or gas pipelines.

Despite the SSR’s broad scope, enforcement was relatively limited. From 2012 through October 5, 2017, the U.S. Treasury Department’s Office of Foreign Assets Control (“OFAC”) announced 26 civil penalties or settlements that involved apparent violations of the SSR. Of these 26 enforcement actions, only five matters related exclusively to alleged violations of the SSR, while the remaining matters involved violations of multiple sanctions programs.

II. Recent Developments

As noted above, President Barack Obama initiated the revocation of the SSR. On January 13, 2017, President Obama issued Executive Order (“EO”) 13761, which provided for the revocation of the SSR on July 12, 2017 if the Government of Sudan sustained certain “positive actions over the past 6 months,” including “a marked reduction in

¹ The Republic of South Sudan gained independence from Sudan (also known as North Sudan) in July 2011. Following its secession from Sudan, South Sudan was no longer subject to comprehensive sanctions (although certain activities in South Sudan were—and remain—prohibited).

offensive military activity . . . steps toward the improvement of humanitarian access throughout Sudan . . . [and] cooperation with the United States on addressing regional conflicts and the threat of terrorism.” Exec. Order No. 13,761, 82 FED. REG. 5,331 (Jan. 18, 2017). On January 17, OFAC issued a general license authorizing all transactions prohibited under the SSR. Sudanese Sanctions Regulations, 82 FED. REG. 4,793 (Jan. 17, 2017).

Shortly after EO 13761 was issued, Reuters reported that President Obama’s action “came with the full approval of the incoming Trump administration.” [Move to lift Sudan sanctions came after Trump approval, months of talks](#), REUTERS (Jan. 14, 2017). Less than two weeks later, however, President Trump issued EO 13769, which temporarily suspended entry of Sudanese citizens, along with the citizens of six other countries, into the United States, subject to limited exceptions. Exec. Order No. 13,769, 82 FED. REG. 8,977 (Feb. 1, 2017). EO 13769 was superseded by EO 13780, issued on March 6, 2017, which included the same restriction on Sudanese citizens and cited Sudan’s “support for international terrorist groups, including Hizballah and Hamas . . . [and] al-Qa’ida.” Exec. Order No. 13,780, 82 FED. REG. 13,209 (Mar. 9, 2017). The inclusion of Sudan in President Trump’s “travel ban” suggested that the Trump administration was skeptical of the Government of Sudan’s commitment to combatting international terrorism.

On July 11, 2017, President Trump issued EO 13804, which extended the SSR review period established by EO 13761 from July 12 until October 12, 2017. Exec. Order No. 13,804, 82 FED. REG. 32,611 (July 14, 2017). On September 24, foreshadowing the October 6th announcement, President Trump issued a proclamation that imposed new restrictions on entry into the United States by citizens of eight countries—*not* including Sudan. Press Release, The White House, Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats (Sept. 24, 2017).

III. Life After the SSR

A. New Business Opportunities in Sudan

The revocation of the SSR will create new business opportunities in Sudan for U.S. companies. For the past twenty years, U.S. companies have been prohibited from engaging in virtually any business or dealings involving Sudan. In addition, while foreign-organized subsidiaries of U.S. companies were permitted to conduct business with Sudan, subject to restrictions,² many U.S. companies adopted blanket policies that prohibited all transactions involving Sudan, whether carried out by U.S. or non-U.S. personnel. Even though the SSR were suspended in January 2017, relatively few U.S. companies pursued opportunities in Sudan in the following months. Hesitancy by U.S. companies was undoubtedly attributable, at least in part, to lingering uncertainty regarding whether President Trump would reverse (or, at minimum, roll back) the Obama administration’s policy regarding Sudan, as President Trump has done with respect to Cuba (and has threatened to do with respect to Iran).

The 2011 secession of South Sudan inflicted a significant toll on the Sudanese economy. According to the U.S. Central Intelligence Agency, South Sudan accounted for approximately 75% of Sudan’s oil production, which had been the troubled country’s largest driver of GDP growth over the past decade. *The World Factbook*, Central Intelligence Agency (last visited Oct. 6, 2017). Still, oil production constitutes a significant percentage of the Sudanese economy and, in recent years, oil and gas investment in Sudan has been dominated by Chinese companies. See [Sudan: China’s Original Foothold in Africa](#), THE DIPLOMAT (June 14, 2017). With the revocation of the SSR, U.S. oil and gas companies, as well as extractive and consumer goods companies, potentially stand to benefit.

B. Significant Risks Remain

Despite the revocation of the SSR, conducting business in Sudan will continue to present a wide range of sanctions- and non-sanctions-related risks. As an initial matter, although the SSR will be revoked, certain Sudanese individuals and entities remain on OFAC’s List of Specially Designated Nationals (“SDNs”) and Blocked Persons pursuant to

² For example, 31 C.F.R. § 538.205 could be interpreted as prohibiting the exportation to Sudan by a non-U.S. company of U.S.-origin goods, technology, or services.

other sanctions programs. U.S. companies will remain prohibited from engaging in transactions involving SDNs, including SDNs based in Sudan, absent a license from OFAC. In addition, multinational organizations may be subject to European Union sanctions targeting Sudan, which include an arms embargo, prohibition against the provision of assistance for military activities, asset freezes, and travel restrictions. Relatedly, some companies may be subject to contractual restrictions against conducting business in Sudan that will not automatically dissipate as a result of the October 6th announcement. For example, certain loan agreements prohibit or restrict borrowers and their subsidiaries from conducting business with Sudan (as well as other countries targeted by comprehensive U.S. sanctions). Depending upon the specific wording of the underlying contractual provisions, such prohibitions or restrictions may survive revocation of the SSR.

Second, the revocation of the SSR will only apply prospectively. U.S. companies that engaged in impermissible business or dealings with Sudan prior to OFAC's issuance of a general license in January 2017 could still face potential sanctions liability stemming from their historical conduct. OFAC, *Frequently Asked Questions on Revocation of Certain Sanctions With Respect to Sudan and the Government of Sudan* on October 12, 2017. Notably, on October 5—the day before the announcement that the SSR will be revoked—OFAC announced a \$372,465 settlement with BD White Birch Investment LLC (“White Birch USA”), a U.S.-based manufacturer of paper and paperboard products, to resolve three apparent violations of the SSR. OFAC alleged that White Birch USA violated the SSR by facilitating the sale and shipment of over 500 metric tons of Canadian-origin paper from Canada to Sudan in 2013. Press Release, Treasury Dep't., *BD White Birch Investment LLC Settles Potential Civil Liability for Apparent Violations of the Sudanese Sanctions Regulations* (Oct. 5, 2017). Notably, OFAC's Enforcement Information stated that the general license issued in January 2017 “does not affect past, present, or future OFAC enforcement investigations or actions related to any apparent violations of the SSR relating to activities that occurred prior to the effective date of the general license.” In addition, in recent enforcement actions, OFAC has regularly asked companies to enter into statute of limitations tolling agreements, which can significantly extend the life of active investigations. As such, it is possible that OFAC will continue to pursue and resolve suspected historical violations of the SSR for several years, notwithstanding the October 6th announcement.

Third, significant non-sanctions-related obstacles to conducting business in Sudan will remain. For example, Sudan has an extremely high incidence of public sector corruption. In Transparency International's latest *Corruption Perceptions Index* (“CPI”), Transparency Int'l (last visited Oct. 6, 2017), Sudan ranked 170th out of 176 countries surveyed, earning the same score as Libya and Yemen. The only countries to score worse than Sudan in the 2016 CPI were Syria, North Korea, South Sudan, and Somalia. Beyond corruption risk, conducting business in Sudan may present significant—bordering insurmountable—personal security concerns. The U.S. State Department has issued a travel warning advising U.S. citizens not to travel to Sudan. *Sudan Travel Warning*, U.S. State Dep't (last updated Mar. 30, 2017). The State Department warning notes, *inter alia*, that terrorist groups are active and that violent crimes targeting Westerners occur everywhere in Sudan. Further, conducting business in Sudan presents significant reputational risk. Notwithstanding the October 6th announcement, Sudan remains one of only three countries designated on the State Department's State Sponsors of Terrorism list (along with Iran and Syria). *State Sponsors of Terrorism*, U.S. Dep't of State (last visited Oct. 6, 2017).³ In addition, in its 2017 World Report, Human Rights Watch described Sudan's human rights record as “abysmal,” citing “continuing attacks on civilians by government forces in Darfur, Southern Kordofan, and Blue Nile states” and “widespread arbitrary detentions of activists, students, and protesters.” *Sudan: Events of 2016*, Human Rights Watch (last visited Oct. 6, 2017). In sum, while the revocation of the SSR will present opportunities for U.S. companies evaluating potential business opportunities in Sudan, it is not a panacea.

C. Following U.S. Sanctions Developments

The pending revocation of the SSR serves as a useful reminder that U.S. sanctions policy can—and occasionally does—change quickly, at least in comparison to other areas of law. By way of illustration, the announcement that the

³ OFAC will issue a general license on October 12, 2017 authorizing the exportation of agricultural commodities, medicines, or medical devices that would otherwise be prohibited due to Sudan's continued presence on the State Sponsors of Terrorism list.

SSR will be revoked came on the same day that multiple news outlets reported that the Trump administration plans to take the potentially significant, though unpredictable, step of decertifying Iran's compliance with the Joint Comprehensive Plan of Action. The prospect of short-notice policy changes underscores the importance of remaining abreast of changes to U.S. sanctions regulations, and of communicating those changes to relevant personnel. Relatedly, the revocation of the SSR will necessitate re-review of internal policies and procedures, as well as template contract provisions, to ensure that those documents reflect the current status of U.S. economic sanctions.

D. Continuing Evolution of Sanctions as a Foreign Policy Tool

The pending revocation of the SSR is reflective of a broader trend across U.S. sanctions policy. In today's geopolitical climate—in which military options appear, at least at times, to present an undesirable or wholly unacceptable level of risk—the use of sanctions as a foreign policy tool is increasingly attractive. At the same time, the U.S. government is continually rethinking and refining how its sanctions programs affect targeted parties and U.S. commercial interests. Currently, there appears to be an emerging consensus in favor of targeted sanctions, which restrict certain categories of transactions and/or transactions with designated parties, as opposed to broad country-based sanctions.

While the trend in favor of more targeted sanctions undoubtedly presents increased opportunities for U.S. companies, those opportunities also carry compliance costs. From a compliance perspective, it generally is less costly to implement and enforce a broad prohibition against conducting business in a particular country or region than to analyze, on a case-by-case basis, whether a prospective transaction is prohibited by more targeted—and, increasingly technical—U.S. sanctions.

It is too early to assess whether the revocation of the SSR will mark a significant turning point away from broad country-based sanctions. At the very least, however, OFAC is unlikely to reverse course soon with respect to Sudan, as OFAC must demonstrate that sanctions relief can be real in order to preserve the bite of existing (and future) sanctions as a tool for influencing desired policy outcomes.

IV. Conclusion

While the revocation of the SSR will present new business opportunities for some U.S. companies, such opportunities still present numerous potential pitfalls. More generally, the decision to revoke the SSR marks another step in an emerging—but, at times, circuitous—trend away from broad, country-based sanctions. While this trend implicitly suggests increased commercial opportunities for U.S. companies, companies would be wise to evaluate those potential opportunities in light of the costs of complying with U.S. sanctions regulations that are increasingly complex and evolving with remarkable frequency.