

Aviation Advisory

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US Sanctions Against Burma Lifted on October 7 With President's Executive Order

On Friday, October 7, 2016, President Obama delivered on a promise that he had made in September by signing an executive order terminating the economic and financial sanctions program on the country of Burma (Myanmar). The administration had signaled that sanctions would be lifted during the President's meeting with state counselor Aung San Suu Kyi last month, in response to the democratic reforms that have been implemented in the country in recent years.

These actions serve to loosen most of the remaining restrictions on doing business with individuals or entities in Burma, and will further boost trade relations with a country that has been transitioning from decades of military rule. Still, those seeking business opportunities in Burma, including within the aviation industry, should continue to be mindful of their obligations to comply with other US export control laws and sanction programs that may continue to apply to Burmese entities.

The United States had gradually been loosening restrictions on doing business with individuals and entities in Burma since the middle of 2012. When it was first established in 1997, the Burma Sanctions Program had a relatively broad "country-wide" application. The sanctions generally prohibited any new investment by US persons or entities in the country, and included a country-wide importation ban. Burma also was found in 2003 to be a country of "primary money laundering concern" by the Financial Crimes Enforcement Network (FinCEN), which led to restrictions on US financial institutions maintaining correspondent accounts for Burmese banks.

As the country gradually shifted from military rule to democratic rule, the United States eased restrictions on a piecemeal basis, so that much of what remained of the sanctions program restricted dealings with certain targeted individuals and entities, primarily those with ties to the military or banking sectors. Similarly, the Office of Foreign Assets Control (OFAC) issued general licenses in 2012 and 2013 that allowed some correspondent account activity with Burmese banks notwithstanding FinCEN's 2003 finding, although many US banks remain cautious when it comes to providing correspondent services for Burma transactions.

Sanctions Lifted by Executive Order

This latest action should remove most of the remaining uncertainty when it comes to doing business with Burma. Executive Order 13742 issued on October 7 is entitled "Termination of Emergency With Respect to the Actions and Policies of the Government of Burma," and was accompanied by a fact sheet issued by OFAC. The key points taken from the Executive Order are below:

- All individuals and entities that were blocked pursuant to the Burmese Sanctions Regulations (BSR) (31 C.F.R. Part 537) have been removed from OFAC's Specially Designated Nationals and Blocked Persons List.

Should you have any questions concerning the lifting of US sanctions against Burma and how they impact your business, please contact the Katten Muchin Rosenman LLP and Rock Trade Law LLC attorneys listed below.

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- All property and interests in property blocked pursuant to the Burmese Sanctions Regulations are now unblocked.
- The ban on the US importation of Burmese-origin jadeite and rubies, and jewelry containing the same, is revoked.
- All OFAC-administered restrictions under the Burma sanctions program concerning banking or financial transactions with Burma are no longer in effect.
- OFAC will remove the BSR from the Code of Federal Regulations.
- The Responsible Investment Reporting Requirements administered by the State Department associated with certain new investments in Burma are no longer required but remains voluntary.

Although the lifting of sanctions does not change FinCEN's 2003 finding concerning money laundering concerns, FinCEN issued an administrative exception on October 7 to suspend the prohibition on US banks maintaining correspondent accounts for Burmese banks. Assuming the country continues to make progress in addressing corruption, money laundering and narcotics-related activities, FinCEN is prepared to rescind this action altogether.

These actions taken together should go a long way in breaking down trade barriers with Burma. Even as sanctions against Burma had been moving from a blanket approach to a targeted approach since 2012, the lifting of sanctions removes many of the obstacles and concerns over potential OFAC violations that US companies had been facing.

It does not, however, remove them all. Those looking to open up business with Burma should still be mindful of the many other sanctions and embargoes still in place. Roughly 30 Burmese entities were listed under other sanctions programs in addition to the BSR. These parties continue to be blocked even after the lifting of the Burmese sanctions program. Of note in the aviation industry, Yangon Airways and at least some of its principals are still blocked under the Foreign Narcotics Kingpin Sanctions program still in place. It is still a violation for a US entity to do business with a blocked party without a license. Accordingly, while US companies looking for business opportunities in Burma now have little reason not to move forward, they should continue to proceed with caution and not neglect their due diligence obligations.

Maintaining Due Diligence Over Export Transactions to Burma

For those entities looking to sell or lease aircraft to Burma or a Burmese national, what constitutes adequate "due diligence" will depend on what is being sold or leased, and to whom. At a minimum, any US exporter should take the following steps when considering an export-based transaction to a foreign country that is not subject to a comprehensive embargo or sanctions program:

- Review what articles are to be sold or exported against the Commerce Control List (CCL). The CCL contains broad categories of articles whose exports are controlled for various reasons. For example, many commercial (non-military) aircraft are classified in the CCL under Export Control Classification Number (ECCN) 9A991. However, one should consider using care when classifying articles in the CCL, and consult counsel as appropriate. The articles described in the CCL often reference very specific product characteristics or capabilities, and often require a technical understanding of what is being exported.
- If the product is listed in the CCL, a license from the Department of Commerce's Bureau of Industry and Security (BIS) may be required before the article can be exported. The exporter should identify the basis for control (e.g., anti-terrorism, national security, etc.) and determine if that basis applies to the country of export. In Burma's case, any article controlled for reasons other than anti-terrorism or firearms convention purposes would require a license from BIS.
- If the product is not listed under the CCL but still falls under the jurisdiction of the US Department of Commerce (e.g., the article is of US origin or contains significant US-origin content), it is designated as "EAR99." EAR99 articles generally do not require a license from BIS; however, there may be other controls in place that condition or restrict exports of such articles.
- Identify the end-use of the article. The United States continues to enforce an arms embargo against Burma, and exports of defense articles or services are still restricted under the International Traffic in Arms Regulations to that country. If an aircraft being sold or leased may have capabilities for being used in military applications, even if it is not intended or marketed as such, sales or leases of that aircraft to Burma may be restricted.
- Identify all parties to the proposed transaction, including the buyer(s), agents, carriers, third-party service providers and end-user(s), for screening against restricted party lists maintained by OFAC and BIS. This includes identifying the ownership interests of entities involved in the transaction. Under OFAC's "50 percent" rule, an entity that is owned (directly

or indirectly) 50 percent or more by one or more blocked parties is also blocked, even if the entity is not itself listed as a blocked party.

- If screening turns up a potential hit, the exporter should further investigate whether the transaction may be restricted or require a license before it can proceed. This may include consulting in-house or outside counsel for guidance on further steps.

Finally, understand that compliance with export controls does not necessarily end once the initial transaction is complete. If the proposed transaction includes an agreement to provide ongoing warranty or repair services, for example, the service provider should continue to monitor restricted party lists and other publications by OFAC and the Department of Commerce to ensure that their foreign partner or customer does not become blocked in the future, or that the activity does not become restricted.

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