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LAWFLASH

AVIATION SANCTIONS UPDATE—IRAN AND CUBA

April 20, 2016

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Since the beginning of 2016, there have been a number of changes in US and European sanctions imposed on Iran and US sanctions imposed on Cuba that may benefit the aviation industry.

With Implementation Day under the Joint Comprehensive Plan of Action (JCPOA) with Iran occurring on January 16, 2016, Iran publicly announced that it was in the market to acquire 100 new airplanes for its flagship carrier Iran Air from both Europe and the United States. The prediction is that many of these planes will be purchased from Airbus because European Export Credit Agencies (ECAs) are open for business with Iran.

Private lenders remain concerned about any long-term financing involving Iran because of the possibility of a “snap-back” of the sanctions if Iran defaults on the terms of the JCPOA. By contrast, notwithstanding the liberalization in US licensing policy for commercial airplanes, the Export-Import Bank of the United States (EXIM) is not open for business with Iran. Nonetheless, reports have appeared in the press in early April that Boeing was beginning negotiations with Iran to explore commercial opportunities there. Even without an opportunity for US financing, Iran may be willing to purchase commercial aircraft from Boeing with cash generated from unblocked funds or oil revenues to diversify risk and maintain commercial competition between Airbus and Boeing.

In the case of Cuba, the Cuban government’s economic resources are very limited by comparison with Iran; while the US embargo on Cuba has been relaxed within the limits of the statutory prohibitions and a new aviation licensing policy adopted along with permitted financing (EXIM has not reopened yet), it remains to be seen whether Cuba will be in the market for purchasing new aircraft anytime soon, from any source. The fleet of its flagship carrier, Cubana de Aviacion, consists principally of Russian aircraft, which do not fly to the United States to avoid being subject to attachment because of the hundreds of millions of dollars of outstanding US judgments against the Cuban government.

Most of the focus on Cuba and aviation has been centered on the new Memorandum of Understanding (MOU) signed on February 16 between the United States and Cuba, which will result in the re-establishment of regular commercial service between the two countries. A total of 110 daily roundtrip flights between the United States and Cuba will be allowed (20 to Havana and 10 to nine other destinations in Cuba). The MOU has produced a contentious scramble among US airlines for the most lucrative routes,

and the decision by the Department of Transportation will not be announced until this summer. Current air charter service to Cuba remains unchanged. In the meantime, Cuba is working on the expansion and modernization of the Jose Marti terminal in Havana so that it will be able to receive the increased air traffic.

This LawFlash provides an overview of the recent changes in aviation sanctions against Iran and Cuba.

IRAN-US

OFAC issued a Statement of Licensing Policy (SLP), effective as of January 16, 2016, which establishes a new “favorable” licensing review policy for specific license applications submitted to OFAC by US Persons[1] requesting OFAC authorization to

- export, re-export, sell, lease, or transfer to Iran commercial passenger aircraft for exclusively civil aviation end-use;
- export, re-export, sell, lease, or transfer to Iran spare parts and components for commercial passenger aircraft; and
- provide “associated services,” including warranty, maintenance, repair services, safety-related inspections and training related to the commercial passenger aircraft, spare parts, and components that are intended for export to Iran pursuant to a specific license issued by OFAC under the SLP.

Non-US Persons are also covered by OFAC’s SLP and will require a specific license from OFAC to export, re-export, sell, lease, or transfer to Iran US-origin commercial passenger aircraft/spare parts/components or commercial passenger aircraft/spare parts/components that contain 10% or more US-controlled content, as provided for in 31 CFR §§ 560.205 and 560.420 of the Iran Transactions and Sanctions Regulations (ITSR).

The types of aircraft and related parts and services that are eligible for licensing by OFAC under the new SLP include wide-body, narrow-body, regional, and commuter aircraft demonstrably used for commercial passenger aviation. Aircraft that are ineligible for licensing under SLP include cargo aircraft, state aircraft, unmanned aerial vehicles, military aircraft, and aircraft used for general aviation or aerial work. Helicopters also are not likely to be eligible for licensing by OFAC under SLP.

Applications for specific licenses requested pursuant to OFAC’s SLP must provide complete details regarding the transaction for which license authorization is sought, including

- the names of all parties involved;
- the type of aircraft/spare parts/components being exported, re-exported, or leased;
- the US Department of Commerce Export Control Classification Numbers (ECCNs) under the US Export Administration Regulations (EAR) for such aircraft/spare parts/components;
- the proposed end use in Iran for such aircraft/spare parts/components;
- all related dealings envisioned; and
- all associated services that will be provided.

Dealings and services to be included in a specific license application submitted to OFAC pursuant to OFAC’s SLP do not need to specifically encompass the following:

- **Contract negotiations or the execution of contingent contracts.** Such dealings were authorized by OFAC on March 24, 2016 when OFAC issued a new aviation-related Iran General License I (“Eye”). General License I authorizes US Persons to enter into and engage in all dealings that are ordinarily incident to the negotiation of and the entry into contingent contracts for activities eligible for

- specific license authorization under OFAC's SLP for the export or re-export to Iran of Commercial Passenger Aircraft and Related Parts and Services, provided that the performance of any such contract is made expressly contingent upon OFAC's issuance of a specific license authorizing the activities to be performed. General License I defines the term "contingent contracts" as including executory contracts, executory pro forma invoices, agreements in principle, executory offers capable of acceptance such as bids or proposals in response to public tenders, binding memoranda of understanding, or any other similar agreement.
- **Services that are ordinarily incident to a licensed transaction and necessary to give effect thereto.** Such services are already authorized under 31 CFR §§ 560.405. In the case of a licensed export, re-export, sale, lease, or transfer of a commercial passenger aircraft to Iran, or in the case of a licensed export, re-export, sale, lease, or transfer of related parts and services to Iran, services that are ordinarily incident and necessary to give effect to such licenses would appear to include transportation, legal, insurance, shipping, delivery, and financial payment services actually provided in connection with the licensed export.

To the extent that a specific dealing or service is not within the scope of a license application submitted to/issued by OFAC under SLP, or to the extent that a dealing or service is not authorized by OFAC under General License I or 31 CFR §§ 560.405 as detailed above, separate authorization from OFAC must be requested. Please note that Non-US Persons are not prohibited under the ITSR from entering into contracts—contingent or otherwise—or performing services involving Iran or the Government of Iran, and generally only require OFAC authorization under the SLP to export, re-export, sell, lease, or transfer to Iran US-origin commercial passenger aircraft/spare parts/components or commercial passenger aircraft/spare parts/components that contain 10% or more US-controlled content, as provided for in 31 CFR §§ 560.205 and 560.420 of the ITSR.

Specific licenses issued by OFAC pursuant to the SLP will include conditions and provisos to ensure that no licensed aircraft, goods, or services are re-sold or re-transferred to any person on OFAC's Specially Designated Nationals (SDN) List. Further, transactions authorized by OFAC pursuant to the new SLP do not need separate authorization from the US Department of Commerce unless a transaction involves a person on the Department of Commerce's Denied Persons List or the Entity List.

Applicants seeking to engage in transactions that would require separate authorization from the Department of Commerce should submit an application to it when submitting an application to OFAC pursuant to OFAC's SLP. The application to OFAC should also identify any individuals or entities that may give rise to a requirement for a separate authorization from the Department of Commerce.

IRAN-EU

With regard to the EU sanctions against Iran, on Implementation Day, the European Union generally ceased the application of various nuclear-related economic and financial sanctions against Iran pursuant to the JCPOA entered into by the United States, China, France, Germany, Russia, the United Kingdom, the European Union, and Iran. However, the sanctions on certain individuals and entities under the JCPOA remain in place so that transactions involving a person on the European SDN list require individual licenses from the relevant national authorities. The restrictions for "dual-use" goods and technology may also trigger a license requirement. The lists of dual-use goods that can be exported to Iran—subject to prior authorization—are to be found in Annexes I (Nuclear Suppliers Group (NSG) list, Parts I and II) and II (EU autonomous list) of Council Regulation 267/2012, as modified by Council Regulation No 2015/1861. This means that various civil aviation parts that could be used for military purposes, such as turbojet and

turbofan engines, still fall under the applicable license regime on the national level. Also problematic could be software specially designed or modified for the use of “production facilities” for dual-use goods in Iran, such as certain encryption or radar software. The export of dual-use goods is also covered in Part I, Section B of the Export Control List (in Germany, for instance, the so-called “900”- Goods). These restrictions would cover, for instance, certain (trunked) radio and radar systems as part of an aviation deal.

The UK Treasury’s Department for Business Innovation & Skills’ (UK BIS) “Iran List” mentions Iranian companies with specific concerns in the areas of military and weapons of mass destruction (WMD) end-use controls. Inclusion of an entity on the UK BIS Iran List does not necessarily indicate that an export license would be refused. Also, any non-inclusion of an entity on the list does not necessarily mean that the relevant authority would have no end-use concerns with exports to that entity. Entities on the list may give cause or concern, whatever their involvement in an export transaction may be.

CUBA

Effective January 27, 2016, the US Commerce Department, Bureau of Industry and Security (US BIS) amended the Export Administration Regulations (EAR) for exports and re-exports to Cuba by identifying additional types of exports and re-exports that are now subject to a general policy of approval for items related to safety of civil aviation and safe operation of commercial aircraft engaged in international air transportation.

Specifically, EAR Section 746.2 (15 CFR § 746.2) was amended by revising paragraphs (b)(2) and (b)(2)(v) to read as follows:

(b)(2) Exports and re-exports that generally will be approved. Applications for licenses to export or re-export the following generally will be approved:

(b)(2)(v) Items necessary to ensure the safety of civil aviation and the safe operation of commercial aircraft engaged in international air transportation, including the export or re-export of such aircraft leased to state-owned enterprises.

Given the substantial increase in US air travel to and from Cuba, US BIS also indicated that it made the change to emphasize the importance of civil aviation safety and to recognize that access to aircraft used in international air transportation that meet US Federal Aviation Administration and European Aviation Safety Agency operating standards by Cuban state-owned enterprises would contribute to that safety.

This new US BIS licensing policy will govern both exports from the United States and items exported from outside the United States that are “subject to the EAR” (meaning that such items contain 25% or more of US-origin controlled content).

US-based companies and persons, as well as foreign subsidiaries of US parent companies, must also comply with the OFAC prohibitions regarding Cuba (see 31 CFR §§ 515.201 and 515.559).

OFAC states that all transactions ordinarily incident to the exportation of items to any person within Cuba are authorized, provided that the exportation or re-exportation is licensed or otherwise authorized by the Department of Commerce under the EAR.

Further, US Persons are authorized to engage in all transactions ordinarily incident to negotiation of and

entry into executory contracts for the sale of items that may be exported from the United States to Cuba or 100% US-origin items that may be re-exported from a third country to Cuba consistent with the export licensing policy of the Department of Commerce, provided that actual performance of such executory contracts is expressly made contingent on the prior authorization by the Department of Commerce.

Finally, travel-related transactions directly incident to the conduct of market research, commercial marketing, sales or contract negotiation, accompanied delivery, installation, leasing, or servicing in Cuba of aviation items consistent with the export or re-export licensing policy of the Department of Commerce are also authorized, provided that the traveler's schedule of activities does not include free time or recreation in excess of that consistent with a full-time schedule (*see* 31 CFR § 515.533).

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[1] US Person means: (a) any individual, wherever located, who is a citizen or resident of the United States; (b) any person within the United States; (c) any corporation, partnership, association, or other organization organized under the laws of the United States or of any State, territory, possession, or district of the United States.; and (d) any corporation, partnership, association, or other organization, wherever organized or doing business, that is owned or controlled by persons specified in paragraphs (a) or (c).

