

November 16, 2015

## The State Department's Recent Federal Register Notice Marks Opening Steps Toward Access to Iranian Market for US Commercial Aircraft Industry

On November 2, 2015, the US State Department published a list of contingent waivers to a host of US sanctions on Iran that would apply to US and non-US persons.<sup>1</sup> Included in the publication is an announcement of waivers that would, if and when they are implemented, allow US entities to sell and export commercial passenger aircraft, spare parts and components to Iran.

The relief presented in the State Department's notice is contingent on Iran implementing numerous changes to its nuclear program and having those changes verified by the International Atomic Energy Association (IAEA). Such changes are months away at a minimum; as a result, it will be some time before the Iranian market opens up to US suppliers and equipment. Nonetheless, the publication marks a step toward the potential relaxing of sanctions stemming from Iran's nuclear deal reached earlier this year.

### History of Controls on Iran

As most are well aware, the United States has maintained some of its most stringent export controls and sanctions on dealings with Iran and Iranian nationals for more than a generation. These export laws can be complex and difficult to navigate, as the underlying authorities and details of prohibited actions originate from numerous different laws and executive orders and are administered by several different government agencies. Compounding the difficulty is that the penalties for violations of these export controls have become extremely high, and many have involved both monetary fines and mandatory jail time for those who are caught and convicted.

Actions by those in the commercial aircraft industry have not been ignored by the Justice Department. For example, in 2010, Balli Aviation Ltd. was fined \$15 million and placed on corporate probation for five years after having pled guilty to illegally exporting three Boeing 747 aircraft from the United States to Iran.<sup>2</sup> More recently, in 2014, the Dutch company Fokker Services B.V. agreed to forfeit \$10.5 million and paid another \$10.5 million in a parallel civil settlement for engaging in transactions involving the illegal export of US aircraft parts, technologies and services to customers in Iran, Sudan, and Burma, all of which are sanctioned countries.<sup>3</sup>

<sup>1</sup> See *Contingent Waiver of Certain Sanctions Related to the Joint Comprehensive Plan of Action*, 80 Fed. Reg. 67,470 (Dep't State, Nov. 2, 2015).

<sup>2</sup> [UK Firm Pleads Guilty to Illegally Exporting Boeing 747 Aircraft to Iran](#)

<sup>3</sup> [Fokker Services B.V. Agrees To Forfeit \\$10.5 Million For Illegal Transactions With Iranian, Sudanese, And Burmese Entities; Company Will Pay Additional \\$10.5 Million In Parallel Civil Settlement](#)

For more information, please contact your Katten attorney or any of the following members of the **Aviation** practice.

Jane M. Cavanaugh  
+1.202.625.3685  
[jane.cavanaugh@kattenlaw.com](mailto:jane.cavanaugh@kattenlaw.com)

Jonathan C. Goldstein  
+1.212.940.8640  
[jonathan.goldstein@kattenlaw.com](mailto:jonathan.goldstein@kattenlaw.com)

Thomas E. Healey  
+1.202.625.3631  
[thomas.healey@kattenlaw.com](mailto:thomas.healey@kattenlaw.com)

Stewart B. Herman  
+1.212.940.8527  
[stewart.herman@kattenlaw.com](mailto:stewart.herman@kattenlaw.com)

Timothy J. Lynes  
+1.202.625.3686  
[timothy.lynes@kattenlaw.com](mailto:timothy.lynes@kattenlaw.com)

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Fokker's violations were determined to be especially egregious because the company had no formal OFAC compliance protocols in place during most of the period in which the illegal transactions allegedly took place. Moreover, the penalty agreement itself continues to be tied up in litigation after a district court judge rejected a deferred-prosecution agreement between Fokker and the Justice Department containing the settlement terms, stating that such an agreement "would undermine the public's confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically" for its transgressions.<sup>4</sup>

Needless to say, regardless of the industry, US persons and entities who do business with foreign customers must remain vigilant in evaluating their transactions to make sure they do not fall afoul of US export laws or sanctions on Iran. Those who do business with customers and entities in the Middle East also should have established compliance programs that monitor that business and that can report suspicious transactions before they turn into violations.

## Joint Comprehensive Plan of Action

After extended and tenuous negotiations concerning the development of Iran's nuclear program for exclusively peaceful purposes, Iran, the European Union, and the "P5+1" countries<sup>5</sup> reached a Joint Comprehensive Plan of Action (JCPOA) on July 14, 2015.<sup>6</sup> Under the JCPOA, Iran agrees to transparency and oversight in the development of its nuclear fuel enrichment and processing capabilities, certain limitations in its fuel accumulation and stockpiling, and other measures related to its nuclear program. In exchange, the UN Security Council, European Union and United States will agree to phase out sanctions and other restrictions on transactions with Iran and Iranian nationals, and license certain activities by US and non-US persons.

Of interest to those reading this advisory, the JCPOA calls out that, among other sanctions relief, the United States "will . . . allow for the sale of commercial passenger aircraft and related parts and services to Iran." Specifically, the United States agrees to license: (a) the export, re-export, sale, lease or transfer to Iran of commercial passenger aircraft for exclusively civil aviation end-use; (b) the export, re-export, sale, lease or transfer to Iran of spare parts and components for commercial passenger aircraft; and (c) the provision of associated services for the foregoing, including warranty, maintenance, and repair services and safety-related inspections, provided that licensed items and services are used exclusively for commercial passenger aviation.

It is important to note that any licenses issued under this section will include conditions to ensure that licensed activities do not involve any person on the Specially Designated Nationals (SDN) list. Should the United States determine that licensed aircraft, goods, or services have been used for purposes other than exclusively civil aviation end-use, or have been re-sold or re-transferred to persons on the SDN List, the United States would view this as grounds to cease performing its commitments under the JCPOA. Therefore, it is highly expected that, if and when the waivers are implemented, those US entities doing business with Iran in the commercial aircraft industry will be expected to thoroughly document and answer questions concerning both the end-uses and end-users of their aircraft, parts and services.

## Implementation of the JCPOA and the Recent Federal Register Notice

The JCPOA is implemented throughout a series of stages. Two dates under the JCPOA that are critical to understand the implementation of the above licenses are the "Adoption Day" and the "Implementation Day." October 18, 2015 marked Adoption Day, the day the JCPOA went into effect. On that day, President Obama issued a memorandum directing the Secretaries of the Departments of State, Treasury, Commerce, and Energy to take all appropriate preparatory measures to ensure the prompt and effective implementation of the US commitments set forth in the JCPOA upon Iran's fulfillment of the requisite conditions.<sup>7</sup> The recent Federal Register notice marks the official publication date of the Secretary of State's commitment to implement the JCPOA in response to President Obama's memorandum.

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<sup>4</sup> [U.S. Aligns With Fokker Against Judge Who Called Penalty Light](#); see also *United States v. Fokker Services B.V.*, Case No. 14-cr-121 Memorandum Opinion (D.C. Cir. Feb. 5, 2015).

<sup>5</sup> The "P5+1" countries refers to the five UN Security Council countries—United States, China, France, United Kingdom and Russia—plus Germany.

<sup>6</sup> The full text of the JCPOA and Annexes is available [here](#).

<sup>7</sup> [Statement by the President on the Adoption of the Joint Comprehensive Plan of Action](#)

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Under the Federal Register Notice, the State Department conditionally finds that “it is vital to the national security of the United States” to waive a host of sanctions against Iran. These include waivers of sanctions on transactions by non-US persons generally, and “transactions by US persons for the sale of commercial passenger aircraft and spare parts and components for such aircraft, and associated services to Iran” in accordance with the terms of the JCPOA.

It is important to remember, though, that the sanctions relief presented in the November 5th notice are far from final. The measures spelled out represent only **conditional** commitments to act. The President’s memorandum directed the agencies to take steps to implement US commitments with respect to sanctions described in the JCPOA beginning on Implementation Day. This is the day when the International Atomic Energy Association (IAEA) has verified that Iran has implemented a number of its commitments described in the JCPOA. These measures are comprehensive, and include making substantial infrastructure changes at several of its nuclear reactors and uranium enrichment facilities. At a minimum, it is expected to take several months for Iran to be able to undertake such operations, and that does not factor in any internal political obstacles or challenges that may arise.

In addition, the commitments presented in the November 5th notice are conditional on the Office of Foreign Assets Control (OFAC) issuing any required licenses for the covered transactions. Of course, it is expected that OFAC and the State Department will coordinate their actions on Implementation Day so as not to create a scenario where transactions tolerated by one agency are prohibited by another. Still, it is a continuing reminder that undoing the tangled web of sanctions against Iran requires a synchronized effort by multiple agencies.

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