

September 17, 2021

UNITED STATES CREATES NEW SANCTIONS REGIME OVER HUMANITARIAN CRISIS IN ETHIOPIA

To Our Clients and Friends:

On September 17, 2021, the U.S. Treasury Department’s Office of Foreign Assets Control (“OFAC”) imposed sanctions in response to the ongoing humanitarian and human rights crisis in Ethiopia, particularly in the Tigray region of the country.^[1] The new sanctions program provides authority to the Secretary of the Treasury, in consultation with the Secretary of State, to impose a wide range of sanctions for a variety of activities outlined in a new Executive Order (“E.O.”). No individuals or entities have yet been designated under the E.O. However, U.S. Secretary of State Antony Blinken has warned that “[a]bsent clear and concrete progress toward a negotiated ceasefire and an end to abuses – as well as unhindered humanitarian access to those Ethiopians who are suffering – the United States will designate imminently specific leaders, organizations, and entities under this new sanctions regime.”

This action comes on the heels of repeated calls by the United States for all parties to the conflict to commit to an immediate ceasefire as evidenced in the Department of State’s press statement on May 15, 2021, and Secretary of State Blinken’s phone call to Ethiopian Prime Minister Abiy Ahmed on July 6, 2021. Similarly, on August 3-4, 2021, U.S. Agency for International Development (“USAID”) Administrator Samantha Power traveled to Ethiopia to “draw attention to the urgent need for full and unhindered humanitarian access in Ethiopia’s Tigray region and to emphasize the United States’ commitment to support the Ethiopian people amidst a spreading internal conflict” according to a USAID press release at the time. And prior to the actions on September 17, on August 23, 2021, OFAC sanctioned General Filipos Woldeyohannes, Chief of Staff of the Eritrean Defense Forces, for engaging in serious human rights abuses under the Global Magnitsky sanctions program and condemned the violence and ongoing human rights abuses in the Tigray region of Ethiopia.

The nature and scope of this new sanctions regime suggests that the Biden administration is taking a measured, flexible, and cautious approach to the situation in Ethiopia. OFAC is able to impose sanctions measures of varying degrees of severity, without those sanctions necessarily flowing down to entities owned by sanctioned parties – which should limit ripple effects on the Ethiopian economy. Alongside the Chinese Military Companies sanctions program, this new sanctions program is one of the very few instances where OFAC’s “50 Percent Rule” does not apply, perhaps signaling a more patchwork approach to sanctions designations going forward. The decision to hold off on any initial designations is also telling, and makes clear the focus on deterrence – as opposed to punishment for past deeds. Moreover, at the outset, OFAC has issued general licenses and related guidance allowing for humanitarian activity in Ethiopia to continue. The approach here, although slightly different, is broadly consistent with the Biden administration’s handling of the situation in Myanmar, in which it has

gradually rolled out sanctions designations over a period of many months and prioritized humanitarian aid in its general licenses and guidance.[2]

Menu-Based Sanctions Permit Targeted Application of Restrictions

With respect to persons or entities engaged in certain targeted activities, the E.O. permits the Department of the Treasury to choose from a menu of blocking and non-blocking sanctions measures. In keeping with recent executive orders of its kind, the criteria for designation under the E.O. are exceedingly broad. The E.O. provides that the Secretary of the Treasury, in consultation with the Secretary of State, may designate any foreign person determined:

- to be responsible for or complicit in, or to have directly or indirectly engaged or attempted to engage in, any of the following:
 - actions or policies that threaten the peace, security, or stability of Ethiopia, or that have the purpose or effect of expanding or extending the crisis in northern Ethiopia or obstructing a ceasefire or a peace process;
 - corruption or serious human rights abuse in or with respect to northern Ethiopia;
 - the obstruction of the delivery or distribution of, or access to, humanitarian assistance in or with respect to northern Ethiopia, including attacks on humanitarian aid personnel or humanitarian projects;
 - the targeting of civilians through the commission of acts of violence in or with respect to northern Ethiopia, including involving abduction, forced displacement, or attacks on schools, hospitals, religious sites, or locations where civilians are seeking refuge, or any conduct that would constitute a violation of international humanitarian law;
 - planning, directing, or committing attacks in or with respect to northern Ethiopia against United Nations or associated personnel or African Union or associated personnel;
 - actions or policies that undermine democratic processes or institutions in Ethiopia; or
 - actions or policies that undermine the territorial integrity of Ethiopia;
- to be a military or security force that operates or has operated in northern Ethiopia on or after November 1, 2020;
- to be an entity, including any government entity or a political party, that has engaged in, or whose members have engaged in, activities that have contributed to the crisis in northern Ethiopia or have obstructed a ceasefire or peace process to resolve such crisis;
- to be a political subdivision, agency, or instrumentality of the Government of Ethiopia, the Government of Eritrea or its ruling People's Front for Democracy and Justice, the Tigray

People's Liberation Front, the Amhara regional government, or the Amhara regional or irregular forces;

- to be a spouse or adult child of any sanctioned person;
- to be or have been a leader, official, senior executive officer, or member of the board of directors of any of the following, where the leader, official, senior executive officer, or director is responsible for or complicit in, or who has directly or indirectly engaged or attempted to engage in, any activity contributing to the crisis in northern Ethiopia:
 - an entity, including a government entity or a military or security force, operating in northern Ethiopia during the tenure of the leader, official, senior executive officer, or director;
 - an entity that has, or whose members have, engaged in any activity contributing to the crisis in northern Ethiopia or obstructing a ceasefire or a peace process to resolve such crisis during the tenure of the leader, official, senior executive officer, or director; or
 - the Government of Ethiopia, the Government of Eritrea or its ruling People's Front for Democracy and Justice, the Tigray People's Liberation Front, the Amhara regional government, or the Amhara regional or irregular forces, on or after November 1, 2020;
- to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any sanctioned person; or
- to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any sanctioned person.

Upon designation of any such foreign person, the Secretary of the Treasury may select from a menu of sanctions options to implement as follows:

- the blocking of all property and interests in property of the sanctioned person that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, and provide that such property and interests in property may not be transferred, paid, exported, withdrawn, or otherwise dealt in;
- the prohibiting of any United States person from investing in or purchasing significant amounts of equity or debt instruments of the sanctioned person;
- the prohibiting of any United States financial institution from making loans or providing credit to the sanctioned person;
- the prohibiting of any transactions in foreign exchange that are subject to the jurisdiction of the United States and in which the sanctioned person has any interest; or

- the imposing on the leader, official, senior executive officer, or director of the sanctioned person, or on persons performing similar functions and with similar authorities as such leader, official, senior executive officer, or director, any of the sanctions described in (1)-(4) above.

The restrictions above not only prohibit the contribution or provision of any “funds, goods, or services to, or for the benefit of” any sanctioned person, but also the receipt of any such contribution or provision of funds, goods, or services from any sanctioned person. Those persons subject to blocking sanctions would be added to OFAC’s Specially Designated Nationals and Blocked Persons List (“SDN List”), while those subject to non-blocking sanctions would be added to the Non-SDN Menu-Based Sanctions List (“NS-MBS List”).[3]

In addition to the restrictions described above, the E.O. directs other heads of relevant executive departments and agencies to, as necessary and appropriate, to (1) “deny any specific license, grant, or any other specific permission or authority under any statute or regulation that requires the prior review and approval of the United States Government as a condition for the export or reexport of goods or technology to the sanctioned person” and (2) deny any visa to a leader, official, senior executive officer, director, or controlling shareholder of a sanctioned person.

OFAC’s “50 Percent Rule” Does Not Automatically Apply

Importantly, and unlike nearly all other sanctions programs administered by OFAC, this E.O. stipulates that OFAC’s “50 Percent Rule” does not automatically apply to any entity “owned in whole or in part, directly or indirectly, by one or more sanctioned persons, unless the entity is itself a sanctioned person” and the sanctions outlined within the E.O. are specifically applied. OFAC makes clear in Frequently Asked Questions (“FAQs”) 923 and 924 that such restrictions do not automatically “flow down” to entities owned in whole or in part by sanctioned persons regardless of whether such persons are listed on OFAC’s SDN List or NS-MBS List.

Parallel Issuance of New General Licenses and FAQs to Support Wide Range of Humanitarian Efforts

Recognizing the importance of humanitarian efforts to addressing the ongoing crisis in northern Ethiopia, OFAC concurrently issued three General Licenses and six related FAQs:

- General License 1, “Official Activities of Certain International Organizations and Other International Entities,” authorizes all transactions and activities for the conduct of the official business of certain enumerated international and non-governmental organizations by their employees, grantees, or contractors. FAQ 925 provides additional information on which United Nations organizations are included within this authorization.
- General License 2, “Certain Transactions in Support of Nongovernmental Organizations’ Activities,” authorizes transactions and activities that are ordinarily incident and necessary to certain enumerated activities by non-governmental organizations, including humanitarian projects, democracy-building initiatives, education programs, non-commercial development projects, and environmental or natural resource protection programs. FAQ 926 provides

additional examples of the types of transactions and activities involving non-governmental organizations included within this authorization.

- General License 3, “Transactions Related to the Exportation or Reexportation of Agricultural Commodities, Medicine, Medical Devices, Replacement Parts and Components, or Software Updates,” authorizes transactions and activities ordinarily incident and necessary to the exportation or reexportation of agricultural commodities, medicine, medical devices, replacement parts and components for medical devices, and software updates for medical devices to Ethiopia or Eritrea, or to persons in third countries purchasing specifically for resale to Ethiopia or Eritrea. The authorization is limited to those items within the definition of “covered items” as stipulated in the general license, and the general license includes a note that the compliance requirements of other federal agencies, including the licensing requirements of the U.S. Department of Commerce’s Bureau of Industry and Security (“BIS”), still apply. As of this writing, licenses from BIS for exports to Ethiopia are still required for any items controlled for reasons of chemical and biological weapons (CB1 and CB2), nuclear nonproliferation (NP1), national security (NS1, NS2), missile technology (MT1), regional security (RS1 and RS2), and crime control (CC1 and CC2) unless a license exception under the Export Administration Regulations (15 C.F.R. § 730 *et seq.*) applies.

Concluding Thoughts and Predictions

The implementation of this new sanctions program targeting “widespread violence, atrocities, and serious human rights abuse” in Ethiopia highlights the Biden administration’s efforts to apply pressure to Ethiopian and Eritrean forces to implement a ceasefire and permit the free flow of humanitarian aid into the Tigray region. We will continue to monitor further developments to see how the Biden administration chooses to deploy the flexible tools of economic pressure that it has created. As noted, we anticipate that, based on the administration’s recent past practice, its approach to designations under the new Ethiopia-related sanctions program will be gradual and measured as opposed to sweeping. Notably, the administration’s decision to create a new sanctions program as opposed to simply designating additional individuals and entities under an existing OFAC program (such as the Global Magnitsky sanctions program) may indicate the administration’s desire to put the Ethiopian and Eritrean governments on alert before additional actions are taken. The new Ethiopian sanctions program’s broad general licenses as well as the non-application of OFAC’s “50 Percent Rule” give further support to this assessment.

Moreover, the new sanctions program appears calibrated to minimize any collateral effects on international and non-governmental organizations operating within the humanitarian aid space, and may signal that the Biden administration will include broad humanitarian allowances in new sanctions actions moving forward.

Although the Department of the Treasury had not yet designated any foreign persons pursuant to this new sanctions regime, companies considering engaging with parties in the Horn of Africa should remain abreast of any new developments and designations, as unauthorized interactions with designated persons

can result in significant monetary penalties and reputational harm to individuals and entities in breach of OFAC's regulations.

[1] According to the accompanying press release from the Department of the Treasury, the imposition of new sanctions represents an escalation of the Biden administration's efforts to hold accountable those persons "responsible for or complicit in actions or policies that expand or extend the ongoing crisis or obstruct a ceasefire or peace process in northern Ethiopia or commit serious human rights abuse." In the same statement, the Treasury Department made clear the purpose of the E.O. was to target "actors contributing to the crisis in northern Ethiopia" and was not "directed at the people of Ethiopia, Eritrea, or the greater Horn of Africa region."

[2] For more on Myanmar sanctions developments, please see our prior client alerts on February 16, 2021, and April 2, 2021.

[3] For more background on the NS-MBS List, please see our December 2020 client alert which discussed the designation of Republic of Turkey's Presidency of Defense Industries ("SSB") to the then newly created NS-MBS List. To date, SSB remains the only designee on the NS-MBS List.



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