Rebooting US Policy On Iran Tech Sales

*Law360, New York (July 01, 2013, 6:02 PM ET)* -- On May 30, 2013, the Office of Foreign Assets Control of the United States Department of the Treasury issued a general license authorizing the sale and export to persons in Iran of certain personal communications and Internet connectivity services, consumer electronics (including laptops and smartphones) and software designed to facilitate personal communications. Effective immediately, U.S. companies — and foreign companies that are owned/controlled by U.S. companies and thus subject to the U.S. sanctions against Iran — may sell specified products and services to Iranian consumers without OFAC’s prior review or approval.

This marked relaxation of the U.S. economic sanctions on Iran aims to “facilitate the free flow of information in Iran” and “empower the Iranian people as their government intensifies its efforts to stifle their access to information.” And it reopens a potentially significant (albeit crippled) market, where nearly half of Iran’s approximately 75 million consumers access the Internet weekly, and 90 percent of households have a mobile phone. The new general license is also causing some to question the recent, vigorous prosecutions of persons charged with exporting to Iran the same types of consumer products (e.g., laptop computers) whose export is now suddenly lawful, or even encouraged as a means of advancing U.S. foreign policy interests, under this new general license.

Under the new general license, persons subject to the U.S. sanctions against Iran may now sell and export, subject to certain exceptions, the following hardware and software (together with any services necessary for their operation) to Iran:

- Mobile phones, smartphones, personal digital assistants and satellite phones;
- Laptops, tablets, personal computers and accessories (disk drives, keyboards, mice, etc.);
- Modems, radio equipment, routers and WiFi access points designated for 50 or fewer concurrent users;
- Residential satellite terminals and receivers;
- Antivirus and anti-malware software; and
- Communications and connectivity software including virtual private networks, proxy tools, and fee-based tools for voice, text and video communications.

The new general license also authorizes the sale to persons in Iran of consumer-grade Internet connectivity services, fee-based services to facilitate personal Internet communications (e.g., instant messaging, Web browsing, blogging and media-sharing), and similar services. Previously, the export to Iran of certain services incident to the exchange of personal communications over the Internet was authorized, but only if provided at no cost to the user.
The new general license is qualified in several ways. For instance, it only applies to hardware and software classified under specified Export Control Classification Numbers on the Export Administration Regulations’ Commerce Control List. It remains unlawful to transact directly or indirectly with the government of Iran (including its agencies and instrumentalities) and with certain persons or entities subject to a blocking order (“specially designated nationals”). Perhaps most importantly, the new general license is limited to services and associated software that facilitate “personal” communications — e.g., it does not authorize the provision of commercial-grade Internet connectivity services, domain name registration services, or Web-hosting services for commercial endeavors.

Companies that are subject to the U.S. sanctions against Iran and that market the kinds of hardware, software or services covered by the new general license should update their export compliance policies to reflect this change, and may wish to pursue new opportunities in Iran. For the practitioners who advise these companies, the new general license may raise some difficult questions, particularly relating to how it applies to software products and software-as-a-service.

One question companies already face is how expansively the authorization can be interpreted consistent with its limitation to personal rather than commercial or other types of communications. In connection with an earlier general license authorizing distribution in Iran of free personal communications tools, OFAC issued guidance that is useful here by analogy, as it identifies specific, exemplary products and services that OFAC deemed “personal” and eligible for the license (e.g., Dropbox, Flashplayer, Acrobat Readers).

The new general license may allow companies to monetize products and services identified in the earlier guidance by offering advanced features or functionalities in exchange for a fee (the so-called “freemium” model). Some companies will need to consider whether they can reliably determine if a customer in Iran would use the company’s product or service for personal or commercial purposes — a hard question, for instance, for a Web-hosting service provider that has limited visibility into the nature of its customers and does not monitor the content they place on the hosted website.

Companies that take advantage of the new general license may also consider whether general licenses can be combined to authorize a broader scope of transactions. Under the Iran sanctions, “[a]ny transaction ordinarily incident to a licensed transaction and necessary to give effect thereto” is itself authorized under a longstanding general license. Thus, for instance, this “ordinarily incident” general license may authorize U.S. companies to provide help-desk services and support to Iran-based users of laptop computers and smartphones that were sold in Iran under the cover of the new general license. Ultimately, some affected companies may need to seek clarification from OFAC regarding whether the new general license authorizes a specific product or service.

Another set of questions for some companies wanting to rely on the new general license is how to navigate the thicket of restrictions on banking transactions relating to Iran and the reluctance of financial institutions to participate in even authorized transactions involving Iran. These obstacles to collecting payment for newly authorized products and services may diminish the practical impact of this general license.

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