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De-Implementation Day: Preparing for Changes to U.S. Sanctions Targeting Iran

Throughout the 2016 presidential campaign, candidate Donald Trump sharply criticized the Iran nuclear deal—the Joint Comprehensive Plan of Action (“JCPOA”)—and threatened to withdraw the United States from the agreement if its terms were not renegotiated. During the initial months of his presidency, President Trump continued his criticism of the JCPOA, while reluctantly certifying Iran’s compliance with the agreement’s terms. Finally, in October 2017, President Trump declined to certify Iran’s compliance with the JCPOA, triggering a 60-day window during which Congress could elect to impose new sanctions against Iran. Congress did not act and, on January 12, 2018, President Trump announced that he would waive sanctions against Iran for a final time, ostensibly extending the life of the JCPOA until May 12.

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Since January 12, there have been no public reports of significant progress toward amending the JCPOA, and Iranian government representatives have stated that the country is unwilling to renegotiate the agreement’s terms. Against this backdrop, changes to current U.S. sanctions policy with respect to Iran could be imminent, with potentially significant consequences for U.S. and non-U.S. companies alike. As such, this article examines several potential changes to the current sanctions regime, as well as practical considerations for companies with international operations involving Iran.

Overview of Current Iran Sanctions

The United States maintains wide-ranging, comprehensive sanctions targeting Iran. The Iranian Transactions and Sanctions Regulations (“ITSR”) prohibit U.S. persons from engaging in virtually any business or dealing with individuals or entities located or organized in Iran.¹ Unlike other country-based sanctions programs, the ITSR apply not only to U.S. persons, but also to foreign entities “owned or controlled” by U.S. persons. For purposes of the ITSR, a foreign entity is “owned or controlled” by a U.S. person if a U.S. person (1) holds a 50% or greater equity interest by vote or value in the foreign entity; (2) holds a majority of the seats on the foreign entity’s board; or (3) otherwise controls the actions, policies, or personnel decisions of the foreign entity.²

Certain prohibitions of the ITSR apply to foreign entities that are neither owned nor controlled by a U.S. person. For example, foreign entities are prohibited from exporting U.S.-origin products or services to Iran. Similarly, foreign entities may violate the ITSR by causing any other entity to violate the Iranian sanctions. This could occur, for example, if a foreign entity were to initiate an Iran-related payment that were processed through a correspondent account in the United States or at the foreign branch of a U.S. financial institution. In addition, the United States administers “secondary sanctions” that specifically target foreign entities that engage in transactions with certain Iranian counterparties.

On January 16, 2016 (“Implementation Day”), the United States and the European Union relaxed their Iranian sanctions programs pursuant to the JCPOA. However, the United States did not lift non-nuclear secondary sanctions against Iran. As a result, secondary sanctions continue to attach to non-U.S. persons’ activities with (1) more than

¹ Under the ITSR, U.S. persons include (1) U.S. companies and their foreign branches; (2) U.S. citizens, wherever located; and (3) any person physically located in the United States. 31 C.F.R. § 560.314.

² *Id.* § 560.215(b)(1)(i)-(iii).

200 Iranian or Iran-related individuals and entities that remain on the SDN List; (2) the Islamic Revolutionary Guard Corps (“IRGC”) and its designated agents or affiliates; and (3) any other person on the SDN List in connection with Iran’s proliferation of weapons of mass destruction or their means of delivery or Iran’s support for international terrorism.

Following Implementation Day, OFAC also issued a general license, General License H, which allows foreign entities owned or controlled by U.S. persons to conduct certain business with Iran, subject to restrictions. Such transactions generally must not support Iran’s nuclear program or involve U.S. persons, U.S. territory, controlled U.S.-origin goods, the U.S. financial system, or parties included on the SDN List or OFAC’s List of Foreign Sanctions Evaders (“FSE List”).³

Despite the sanctions relief introduced on Implementation Day under General License H, U.S. persons continue to be generally prohibited from engaging in most dealings with Iran.

Possible Actions

Under existing authorities, President Trump has authority to act unilaterally to (1) revoke or narrow the scope of sanctions relief accorded to Iran pursuant to the JCPOA; or (2) impose new sanctions targeting Iran. Importantly, these potential actions are not mutually exclusive, meaning that U.S. and non-U.S. companies must be prepared to address a combination of new sanctions and restrictions that do not necessarily reflect the *status quo ante* on January 16, 2016.

Revocation of General License H

President Trump could instruct OFAC to revoke General License H. General License H was arguably the most significant aspect of sanctions relief accorded to U.S. companies, as the general license has enabled a wide range of entities to conduct commercial transactions with Iran that otherwise would have been prohibited due to the breadth of the ITSR.

Revoking General License H would have the most obvious and immediate impact upon foreign entities owned or controlled by U.S. persons that are (1) currently conducting business with Iran; or (2) contemplating new activities in Iran. OFAC has advised that, “in the event of a JCPOA sanctions snapback, the U.S. government would provide non-U.S., non-Iranian persons a 180-day period to wind down operations in or business involving Iran that was consistent with the U.S. sanctions lifting under the JCPOA and undertaken pursuant to a written contract or written agreement entered into prior to snapback.”⁴ Foreign entities owned or controlled by U.S. persons would need to wind down their operations in, or business involving, Iran within the 180-day grace period. Doing so may present practical challenges for even the best-prepared companies—among other issues, agreements may need to be amended or terminated altogether, business operations may need to be shuttered, and supply chains may need to be recalibrated to avoid Iran-related transactions.

In addition, there are certain foreign entities currently conducting business with Iran in “partial reliance” on General License H. These foreign entities fall—or may fall—within the third, “catch-all” prong of the ITSR’s “ownership or control” test (*i.e.*, entities that are not majority-owned by U.S. persons, but whose “actions, policies, or personnel decisions” may, in OFAC’s view, be controlled by U.S. persons).⁵ This third prong of the ITSR’s “ownership or control” test is subjective. Since General License H was introduced in January 2016, some foreign entities with minority U.S. investors have begun conducting business with Iran without determining, as a formal matter, whether they are required to comply with the ITSR. In other words, these foreign entities have reasoned (1) they are generally

³ Since 2012, OFAC has maintained “foreign sanctions evader” sanctions targeting foreign individuals and entities whom OFAC determines have (1) violated, or caused violations of, U.S. sanctions against Iran or Syria; or (2) facilitated deceptive transactions on behalf of parties subject to U.S. sanctions. U.S. persons are prohibited from conducting virtually any business with individuals or entities on the FSE List.

⁴ OFAC, JCPOA FAQs #M.5, available [here](#) [hereinafter “JCPOA FAQs”].

⁵ 31 C.F.R. § 560.215(b)(1)(iii).

outside the scope of OFAC's jurisdiction; or (2) even if within the scope of OFAC's jurisdiction, their Iran-related activities are permissible under General License H. If General License H were to be revoked, each foreign entity that "partially relies" on General License H as a fallback position may be forced to make a risk-based determination regarding whether it in fact qualifies as "owned or controlled" by a U.S. person, and therefore is required to comply with the ITSR.

Partial Revocation of General License H

Alternatively, President Trump could narrow the scope of General License H, without revoking the general license in its entirety. While tightening of General License H could take many different forms (*e.g.*, restrictions on payment terms, product-related restrictions, etc.), one foreseeable scenario is that the Administration may instruct OFAC to further restrict the categories of Iranian end users that may be involved in transactions executed pursuant to General License H.

Currently, General License H explicitly excludes transactions involving (1) entities or individuals on the SDN List or FSE List; and (2) military, paramilitary, intelligence, or law enforcement entities of the Government of Iran (including the IRGC), or any official, agent, or affiliate thereof. OFAC could expand the scope of prohibited end users to include, for example, entities and individuals on the List of Persons Identified as Blocked Solely Pursuant to Executive Order 13599 (the "E.O. 13599 List").⁶ This, or other steps to narrow the scope of permissible activities under General License H, may have significant commercial implications for foreign entities that have pursued business opportunities in Iran in reliance on the current terms of General License H.

Additional Sanctions Designations

President Trump also could instruct OFAC to designate additional Iranian parties on the SDN List. While this step would have minimal impact upon U.S. persons, who already are prohibited from engaging in most dealings with Iran, the implications could be potentially significant for foreign parties that are neither owned nor controlled by U.S. persons. As described above, on Implementation Day, OFAC lifted *nuclear-related* secondary sanctions that targeted non-U.S. persons for engaging in certain transactions with Iran. OFAC explicitly did *not* lift secondary sanctions that target non-U.S. persons for conducting transactions with Iran-related individuals and entities who remain—or are subsequently placed—on the SDN List. As a result, the designation of additional Iranian SDNs may deter foreign entities from conducting business with Iran, as such business dealings may present an increased risk of being targeted by secondary sanctions.

New Secondary Sanctions

Finally, President Trump could instruct OFAC to impose new sanctions targeting sensitive Iranian industries, such as Iran's energy industry. Prior to 2012, the United States maintained secondary sanctions that prohibited non-U.S. persons from, *inter alia*, (1) investing in Iran's oil, gas, or petrochemical sectors; (2) providing goods, services (including financial services), or technology in connection with Iran's energy sector; (3) purchasing, acquiring, selling, transporting, or marketing petrochemical products from Iran; (4) exporting, selling, or providing refined petroleum products and petrochemical products to Iran; and (5) dealing with entities affiliated with Iran's energy sector, including the National Iranian Oil Company, the Naftiran Intertrade Company, and the National Iranian Tanker Company.⁷

Were President Trump to instruct OFAC to instate (or reinstate) certain secondary sanctions targeting key Iranian industries, foreign entities (not otherwise subject to OFAC's jurisdiction) would effectively be forced to decide

⁶ The E.O. 13599 List identifies entities and individuals that meet the definition of the term "Government of Iran" under the ITSR but are not included on the SDN List, and include a large number of Iranian financial institutions, energy firms, shipping companies, and others. The E.O. 13599 List was created on Implementation Day in order to clarify a subset of entities and individuals that were no longer targeted by secondary sanctions pursuant to the JCPOA but that remained off limits to U.S. persons. JCPOA FAQs #I.2.

⁷ *Id.* at #B.1-B.7.

whether to (1) continue their dealings with targeted Iranian industries, at the risk of being sanctioned by the United States; or (2) discontinue their dealings with targeted Iranian industries, abandoning the investment made in, and potential profits realized from, pursuing such opportunities.

Proactive Steps

While it is impossible to predict with certainty what may happen on, or around, May 12, the prevailing uncertainty need not equate to sanctions compliance paralysis. This section outlines several practical steps that U.S. and non-U.S. companies should start to take to prepare themselves for whatever Iran-related actions may unfold over the coming weeks.

Identify Iran-Related Touchpoints

As an initial step, U.S. and non-U.S. companies should identify their Iran-related touchpoints, cognizant that those touchpoints may be indirect. For example, do any non-U.S. subsidiaries or portfolio companies conduct business with Iranian counterparties, including sourcing or direct or indirect sales (*e.g.*, via a distributor, reseller, or sales agent)? Are any non-U.S. subsidiaries or portfolio companies a party to joint ventures, consortia, or other arrangements whose scope of operations may include Iran or Iranian counterparties? Are any non-U.S. subsidiaries or portfolio companies contemplating new, Iran-related investments or business opportunities?

Develop a Communication Strategy

In parallel, U.S. and non-U.S. companies should consider how to communicate relevant changes to U.S. sanctions targeting Iran to affected employees, subsidiaries, portfolio companies, and other business partners. While development of an effective communication plan is necessarily organization-specific, factors to consider include:

- The predictably extensive media coverage, by U.S. and non-U.S. media outlets, of the announced changes, some of which may be legally inaccurate; and
- The need to respond to employee and business partner inquiries with a single, consistent policy in a timely manner, to minimize unnecessary business disruption.

The timely and accurate communication of changes in U.S. sanctions targeting Iran will be particularly important if, as is anticipated, the European Union does not follow the United States' lead in reversing sanctions relief accorded pursuant to the JCPOA, potentially leading to employee confusion regarding sanctions compliance obligations.

Review Existing Agreements

Companies also would be well served to review existing agreements with Iranian counterparties and agreements that otherwise touch Iran—including agreements involving foreign subsidiaries and portfolio companies—to assess what steps may be required to terminate the agreements. Many agreements contain termination provisions with minimum notice periods, and failure to provide timely notice could result in the seemingly untenable choice of (1) failing to terminate the agreement within the OFAC-allotted period, creating potential U.S. sanctions exposure; or (2) breaching the terms of the agreement, risking potential civil liability in a non-U.S. jurisdiction. Advance planning may assist companies to head off unintended, and potentially intractable, contractual consequences resulting from changes to U.S. sanctions.

Identify Relevant Policies, Procedures, & Controls

For companies whose subsidiaries, portfolio companies, or affiliates conduct business in or with Iran, any change to the Iranian sanctions almost inevitably will require amendments to existing policies, procedures, or controls. Advance identification of the policies and procedures—at the corporate, subsidiary, and portfolio company level—that may or will need to be updated will help facilitate a single, coordinated response to changes in U.S. policy, thereby reducing confusion and business disruption.

For any affiliates that may continue conducting business with Iran (*e.g.*, minority-owned portfolio companies organized outside of the United States), potential change in U.S. policy would be an opportune time to ensure that such affiliates have implemented sufficient restricted party screening procedures to detect and prevent transactions with prohibited Iranian counterparties that could result in the affiliates themselves becoming sanctions targets.

Conclusion

Although the scope of possible changes to U.S. sanctions targeting Iran is unclear, companies with international operations would benefit from advanced planning. Simple, proactive steps will go a long way towards avoiding unnecessary crises, whether commercial or legal, and ensure that companies are equipped to address the latest development in an ever more complicated—and frequently evolving—regulatory regime.