

November 9, 2018

IRAN SANCTIONS 2.0: THE TRUMP ADMINISTRATION COMPLETES ITS ABANDONMENT OF THE IRAN NUCLEAR AGREEMENT

To Our Clients and Friends:

Six months ago, President Donald Trump announced his decision to abandon the 2015 Iran nuclear deal—the Joint Comprehensive Plan of Action (the "JCPOA")—and re-impose U.S. nuclear-related sanctions on the Iranian regime.^[1] The second and final wind-down period for those sanctions expired on November 5, 2018, triggering the "snap back" of remaining U.S. secondary sanctions on Iran's oil, energy, and financial sectors, among other measures. As of this week, the primary and secondary U.S. sanctions that were in place prior to the JCPOA have been restored, U.S.-owned or -controlled foreign entities are once again prohibited from engaging with Iran, and over 700 parties have been added to the U.S. Department of the Treasury's Specially Designated Nationals and Blocked Persons ("SDN") List, increasing the total number of SDNs by 10 percent—the largest single-day set of designations in the history of the Office of Foreign Assets Control ("OFAC").^[2]

The Trump administration's May 2018 decision to re-impose sanctions on Iran went further than many had anticipated, leading many to believe that the sanctions imposed this week would result in an aggressive expansion of U.S. economic pressure on Iran. In fact, a number of waivers and exceptions should mitigate the impact of these new measures. The United States has agreed to temporarily waive prohibitions on oil imports for eight countries: China, India, South Korea, Japan, Italy, Greece, Taiwan, and Turkey.^[3] The U.S. administration stopped short of pressuring the Society for Worldwide Interbank Financial Telecommunication ("SWIFT") to disconnect each and every Iranian financial institution, which leaves some international payment channels open to Iran for the time being.^[4] Furthermore, OFAC has issued guidance expressly noting that non-U.S. persons will not be targeted by sanctions for engaging in transactions with or involving non-designated Iranian entities and non-sanctionable goods and services.^[5]

Nevertheless, the task of complying with these complex regulations will be a heavy burden for multinational companies in the coming months. Complicating matters, the Trump administration's decision to abandon the JCPOA sowed discord with European allies, and has given rise to competing compliance obligations for multinational companies. As we described [here](#), and discuss further below, in August 2018 the European Union implemented a blocking statute to prevent European firms from complying with U.S. sanctions on Iran.

Background

As we described [here](#), the JCPOA, signed between Iran and the five permanent members of the United Nations Security Council (the United States, the United Kingdom, France, Russia, and China) and Germany (the "P5+1") in 2015, committed both sides to certain obligations related to Iran's nuclear development.^[6] Iran committed to various limitations on its nuclear program, and in return the international community (the P5+1 alongside the European Union and the United Nations) committed to relieving substantial portions of the sanctions that had been placed on Iran to address that country's nuclear activities. This relief included the United States' agreement to ease certain secondary sanctions, thus opening up the Iranian economy for non-U.S. persons without risking their access to the U.S. market to pursue Iranian deals.

On May 8, 2018, President Donald Trump announced his decision to withdraw from the JCPOA and re-impose U.S. nuclear-related sanctions.^[7] Though this announcement was in accord with the President's long-stated opposition to the JCPOA, his decision went further than many observers had anticipated. In conjunction with the May announcement, the President issued a National Security Presidential Memorandum ("NSPM") directing the Secretary of State and the Secretary of the Treasury to prepare immediately for the re-imposition of all U.S. sanctions lifted or waived in connection with the JCPOA, to be accomplished as expeditiously as possible and in no case later than 180 days from the date of the NSPM—November 4, 2018. As described in an initial set of frequently asked questions ("FAQs") set forth by OFAC, the re-imposition of sanctions was subject to certain 90- and 180-day wind-down periods that expired on August 6 and November 4, respectively.^[8]

As we discussed [here](#), on August 6, 2018 the President issued a new executive order authorizing OFAC to re-impose sanctions that had been subject to the 90-day wind-down period.^[9] That executive order consolidated Iran-related sanctions authorities and re-imposed the first tranche of secondary sanctions on transactions involving Iranian rials, Iranian sovereign debt, certain metals, and the Iranian automotive sector, among other measures.^[10] The August executive order also set forth the tranche of sanctions authorizations that were subsequently imposed this week.

New Sanctions

With the expiration of the 180-day wind-down period on November 5, 2018, the United States has now re-imposed sanctions on the following:^[11]

- Iranian port operators, shipping and shipbuilding;
- Petroleum-related transactions;
- Transactions by foreign financial institutions with the Central Bank of Iran and designated Iranian financial institutions;
- Provision of specialized financial messaging services to the Central Bank of Iran and certain Iranian financial institutions;

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- Underwriting services, insurance and reinsurance; and
- Iran's energy sector.

Pursuant to the executive order issued on August 6, the following types of secondary sanctions may be imposed on non-U.S. persons:

- Blocking sanctions on non-U.S. persons who materially assist, sponsor, or provide support for or goods or services in support of:
 - the National Iranian Oil Company ("NIOC"), Naftiran Intertrade Company ("NICO"), or the Central Bank of Iran;[12]
 - Iranian SDNs;[13] or
 - any other person included on the SDN List pursuant to Section 1(a) of the New Iran E.O. or Executive Order 13599 (i.e., the Government of Iran and certain Iranian financial entities);[14]
- Blocking sanctions on non-U.S. persons who:
 - are part of the Iranian energy, shipping, or shipbuilding sectors;[15]
 - operate Iranian ports;[16] or
 - provide significant support to or goods or service in support of persons that are part of Iran's energy, shipping, or shipbuilding sectors; Iranian port operators; or Iranian SDNs (excluding certain Iranian financial institutions);[17]
- "Menu-based" sanctions on non-U.S. persons who:
 - knowingly engage in significant transactions in Iranian petroleum, petroleum products, or petrochemical products;[18]
 - are successors, subsidiaries, parents, or affiliates of persons who have knowingly engaged in significant transactions in Iranian petroleum, petroleum products, or petrochemical products or in Iran's automotive sector;[19]
 - provide underwriting services, insurance, or reinsurance for sanctionable activities with or involving Iran;[20] or
 - provide specialized financial messaging services to the Central Bank of Iran;[21]
- Correspondent and payable-through account sanctions on foreign financial institutions that conduct or facilitate significant transactions:

- on behalf of Iranian SDNs or other SDNs (as described above);[22]
- with NIOC or NICO;[23] or
- for transactions in Iranian petroleum, petroleum products, or petrochemical products.[24]

Key Issues

Oil Waivers

The recently re-imposed U.S. restrictions on the export of Iran's oil could have a significant impact on the Iranian economy. Iranian oil exports have already dropped by one-third since hitting a peak of 2.8 million barrels per day in April 2018—shortly before the Trump administration announced it would re-impose nuclear-related sanctions.[25] South Korea and Japan have stopped buying Iranian oil, and India has reduced its imports.[26] Chinese imports are more difficult to determine given a robust black market oil trade.[27]

Notably, the United States has agreed to temporarily waive these sanctions for eight jurisdictions that have agreed to significantly reduce or eliminate their imports of Iranian oil, including China, India, South Korea, Japan, Italy, Greece, Taiwan, and Turkey.[28] The revenue owed to Iran for continued trade subject to these waivers will not be paid directly to Iran, but instead will be held in escrow accounts in the waiver jurisdictions for use by Iran, but only for humanitarian trade or bilateral trade with waiver jurisdictions in non-sanctioned goods. This is the same model that existed during the Obama administration and that, given trade surpluses (and the value of oil), resulted in the buildup of billions of dollars of "trapped" Iranian money in bank accounts around the world. This money represented the difference between the revenue paid to Iran by jurisdictions who had waivers and the remaining funds after Iran purchased various non-sanctioned goods from those jurisdictions.

The waivers are only temporary—lasting for six months—and their extension is dependent on the Trump administration's assessment that the benefiting jurisdictions have continued their efforts to significantly reduce their dependence on Iranian oil. The United States has indicated that it expects two of the eight exempt jurisdictions to eliminate their Iranian oil imports within the first six-month period. These waivers were granted despite initial indications from Trump administration officials that OFAC would only grant waivers if countries entirely eliminated their Iranian oil imports. Interestingly, as with the waivers granted prior to the JCPOA, none of these documents or materials have yet been made public.

SWIFT

In connection with the re-imposition of sanctions, the United States has successfully cut off certain Iranian financial institutions from access to the SWIFT network,[29] the financial messaging system by which more than 11,000 banks worldwide facilitate transactions.[30] According to Secretary of the Treasury Steven Mnuchin, the United States has advised the Belgium-based cooperative that runs the messaging service that it must disconnect certain designated Iranian financial institutions "as soon as technologically feasible" or else become subject to U.S. sanctions.[31] In that sense, the approach taken by the Trump administration represents a sort of compromise in that the United States has stopped short

of pressuring SWIFT to disconnect each and every Iranian financial institution.[32] Instead, the United States has (for now) left open at least some international payment channels.

In response, without specifically mentioning the re-imposition of U.S. sanctions, SWIFT on November 5, 2018 announced that it would suspend certain unspecified Iranian financial institutions from the messaging service.[33] (In a brief statement, SWIFT attributed its decision instead to its interest in maintaining "the stability and integrity of the wider global financial system," an explanation likely calculated to avoid running afoul of Council Regulation (EC) No 2271/96 (as amended, the "EU Blocking Statute").[34])

Viewed in broader context, there is certainly precedent for cutting off Iranian access to the messaging network. SWIFT did precisely that in 2012 at the behest of the United States and the European Union, before restoring Iranian access in 2016 in connection with implementation of the JCPOA.[35] However, given that the European Union strongly supports the JCPOA, it is possible that SWIFT—which is headquartered in Belgium and subject to European law—could have declined to disconnect the Iranian financial institutions designated by the United States.[36] For now, however, the practical result of SWIFT's action is that targeted Iranian banks will be almost entirely severed from the international financial system, severely complicating Iran's ability to move funds in and out of the country.

SDN Designations

OFAC has also added 700 individuals, entities, aircraft, and vessels to the SDN List. This is OFAC's largest single addition to the SDN List and it increases the total number of SDNs by over 10 percent. These 700 additions to the SDN List include the re-designation of persons previously granted sanctions relief under the JCPOA, the transfer of Iranian government or financial entities from the List of Persons Blocked Solely Pursuant to E.O. 13599 (the "E.O. 13599 List"), and the imposition of sanctions on 300 first-time designees. U.S. persons, including their non-U.S. subsidiaries, are broadly prohibited from engaging in transactions with or involving these persons.

Notably, the restrictions on non-U.S. persons engaging with SDNs vary based on the authority under which such SDNs were designated. For example, U.S. secondary sanctions do not apply to dealings with Iranian banks that are designated solely because of their status as "Iranian financial institutions" pursuant to Executive Order 13599.[37] That said, some entities moved to the SDN List from the E.O. 13599 List also have been designated under additional authorities and, therefore, have received new unique identification numbers ("UIDs") when added to the SDN List.[38] In October and November 2018, OFAC designated multiple Iranian financial institutions and other persons previously blocked solely pursuant to E.O. 13599 under E.O. 13224 (relating to counterterrorism), E.O. 13382 (relating to WMD proliferation), and E.O. 13553 (relating to serious human rights abuses by the Government of Iran).[39]

Furthermore, the volume of SDNs in Iran means that non-U.S. persons must continue to assess the risks of a transaction on the basis of the sectoral sanctions that may apply, as well as the restrictions that pertain to SDNs based on the nature of their designation.

Foreign Subsidiaries of U.S. Companies

U.S. sanctions again prohibit non-U.S. entities owned or controlled by U.S. persons (e.g., foreign subsidiaries of U.S. companies) from generally engaging in business operations with or involving Iran. Under the JCPOA, General License H had permitted U.S.-owned or -controlled non-U.S. entities to engage in Iran. On June 27, 2018, the U.S. government revoked General License H, replacing it with a narrower authorization permitting the wind-down of such activities on or before the end of the 180-day wind-down period on November 4, 2018.^[40] These non-U.S. entities are now no longer permitted to provide goods, services, or financing to Iranian counterparties, even pursuant to agreements pre-dating the U.S. withdrawal from the JCPOA. In this regard, these non-U.S. entities now are generally subject to the same limitations on engagement with Iran that restrict their U.S. parents. We discuss the implications with respect to the EU Blocking Statute below.

Iranian Ports

While U.S. sanctions have now been re-imposed on certain Iranian port operators, the Trump administration has preserved a lenient regulatory interpretation adopted during the Obama era. Transactions at Iranian ports that do not involve one particular port operator or other designated entities will not generally trigger secondary sanctions.

As a general matter, non-U.S. persons can trigger secondary sanctions by engaging in significant transactions involving two types of entities: (i) designated entities identified as "port operators," and (ii) other designated Iranian entities performing shipping and logistics services inside Iranian ports. In an FAQ published this past August, OFAC clarified that to the extent that a shipping company transacts with port operators in Iran that have not been designated, except as "port operators" under the Iran Freedom and Counter-Proliferation Act of 2012, and "as long as such payments are limited strictly to routine fees including port dues, docking fees, or cargo handling fees, paid for the loading and unloading of non-sanctioned goods at Iranian ports," such transactions are unlikely to be considered "significant."^[41] As of now, there are no Iranian entities designated solely as "port operators" that would qualify for this exception.

To date, only one identified Iranian "port operator," Tidewater Middle East Co., has been added to the SDN List, in this case for its involvement in Iran's proliferation of weapons of mass destruction.^[42] Critically, although Tidewater is the only port operator identified as such, the company has operations at many of Iran's largest ports. Tidewater has historically had operations at seven Iranian ports, including Bandar Abbas' main container terminal, Shahid Rajaei, and played a key role in facilitating the Government of Iran's weapons trade prior to the implementation of the JCPOA. Importantly, when the JCPOA was implemented, OFAC announced that Tidewater was no longer the port operator of Bandar Abbas and that transactions with that port would not be prohibited if other designated entities were not involved.^[43] However, OFAC now cautions that companies should "exercise great caution to avoid engaging in transactions" with Tidewater in ports where Tidewater currently operates, as transactions with Tidewater may trigger secondary sanctions.

Additionally, as a result of Monday's designations, several Iranian shipping and logistics companies with operations at Bandar Abbas, Fujairah Port, the B.I.K. Port Complex, and Assaluyeh Port, among others, were designated to the SDN List. As noted above, non-U.S. persons may face secondary sanctions for providing goods, services, or support to these entities. However, non-U.S. persons are not broadly restricted from engaging with the ports where these entities operate. The designations of both Tidewater and the Iranian shipping and logistics companies do not result in the blocking of all Iranian ports or port operators.

Interestingly, the United States has purportedly carved out an exception from the imposition of sanctions with regard to Iran's Chabahar port, the construction of an associated railway, the shipment of non-sanctionable goods through the port for Afghanistan's use, and Afghanistan's continued imports of Iranian petroleum products. The exemption for Chabahar is most likely linked to the port's importance for both India and Afghanistan, and likewise the importance of India and Afghanistan to U.S. foreign policy aims.^[44] India has invested heavily in developing the Chabahar port, which provides strategic access not just to Iran but Central Asia, bypassing Pakistan. After U.S. sanctions were relaxed pursuant to the JCPOA, India announced its plans to spend \$500 million on developing Chabahar and in December 2017 Iran inaugurated the latest phase of the port, including five new piers. Plans to link the port to the Iranian rail system, which connects to Afghanistan and on to Central Asia, likely featured in the U.S. State Department's decision. Landlocked Afghanistan also has few better options for importing petroleum products than Iran for the time being.^[45] It is not clear whether the reported waiver extends to erstwhile prohibited engagements with SDNs—in our view that would be unlikely. Indeed, the mention of the Chabahar port is likely tangential to the waiver for Afghanistan and India's oil imports.

Permissible Post-Wind Down Activities

At the same time that the Trump administration is promising to conduct a "maximum pressure" economic campaign against the regime in Tehran,^[46] OFAC has also clarified that U.S. persons and non-U.S. persons are expressly permitted to engage in certain narrow categories of transactions involving Iran. Among the general licenses and authorizations that remain in effect even after U.S. nuclear-related sanctions have been fully re-imposed are the following:

Collecting Payment for Goods, Services, Loans or Credits Provided to an Iranian Counterparty During the Wind-Down Period

In the event a non-U.S., non-Iranian person is owed payment after the applicable wind-down period for goods, services, loans or credits lawfully provided to an Iranian counterparty during the wind-down period, the U.S. government will allow that person to receive payment according to the terms of the written contract or written agreement.^[47] The policy rationale behind this allowance appears to be that, in order to promote an orderly wind-down of existing activities involving Iran, OFAC felt that such persons needed to be given comfort that they would be made whole for any final goods, services, loans or credits they might deliver to an Iranian counterparty.^[48] Absent such an allowance, Iranian counterparties could conceivably have continued to receive goods, services, loans and credits during the 90- and 180-day wind-down periods and then use the re-imposition of U.S. sanctions as a pretext to refuse payment.

In order to avail itself of this allowance, a non-U.S., non-Iranian person must satisfy three criteria. First, the goods, services, loans or credits must have been provided to an Iranian counterparty pursuant to a written contract or written agreement entered into prior to May 8, 2018.[49] Second, the goods or services must have been fully provided or delivered, or the loans or credits extended, to an Iranian counterparty prior to the end of the applicable wind-down period.[50] Third, any payments would need to be consistent with U.S. sanctions, including that payments could not involve U.S. persons or the U.S. financial system, unless the transactions are exempt from regulation or authorized by OFAC.[51]

OFAC has also indicated that, prior to the receipt of payment, non-U.S., non-Iranian persons can seek guidance from OFAC or the U.S. Department of State, as appropriate, regarding whether a particular payment would satisfy the criteria described above.[52] Non-U.S., non-Iranian persons are encouraged to seek such guidance if the counterparty from whom they are seeking repayment has subsequently been added to the SDN List.[53]

Authorized Activities

General License J-1: Civil Aircraft on Temporary Sojourn to Iran

General License J-1, which authorizes non-U.S. persons to fly U.S.-origin civil aircraft into Iran, remains in effect.[54] This license represents a recognition that almost any aircraft that flies into Iran is "U.S.-origin" under U.S. law and that without such a license nearly all international flights to and from Iran would violate U.S. sanctions.[55] With this license still in effect, non-U.S. air carriers may continue to fly U.S.-origin civil aircraft into and out of Iran, subject to the conditions in the license and the U.S. Export Administration Regulations.

General License D-1: Services, Software and Hardware Incident to Personal Communications

General License D-1, which authorizes U.S. persons to export or reexport to Iran certain hardware, software and services "incident to the exchange of personal communications over the Internet, such as instant messaging, chat and email, social networking, sharing of photos and movies, web browsing, and blogging," also remains in effect.[56] The fact that the Trump administration has elected to leave this license undisturbed is not altogether surprising and implies a continued U.S. policy interest in facilitating the ability of the Iranian people to communicate and organize among themselves, which requires access to certain telecommunications services and equipment.

Humanitarian Exceptions

Finally, humanitarian exceptions for transactions involving the export of agricultural commodities, food, medicine and medical devices to Iran, continue to apply.[57] As they have previously, these exceptions extend to transactions by both U.S. persons and non-U.S. persons and are limited only in that such transactions cannot involve persons on the SDN List.[58] These authorities have likely remained in effect for several reasons. First, as a technical matter, they were not provided pursuant to the JCPOA and thus did not need to be removed in order for the United States to withdraw from the JCPOA. Second, and more broadly, these humanitarian exceptions are consistent with long-standing U.S. policy that sanctions should target only the Iranian regime, and not the Iranian people.[59]

Despite the flexibility afforded by the general licenses and authorizations described above—which will be very helpful to certain industries active in the implicated sectors (such as airlines and telecommunications)—it is important to remember that these exceptions operate at the margins. In general, the Trump administration has stressed that it plans to adopt "the toughest sanctions regime ever imposed on Iran," including aggressive enforcement efforts against persons that attempt to violate or circumvent U.S. sanctions.^[60]

The EU Response

As we described [here](#), on August 6, 2018 the European Union enacted Commission Delegated Regulation (EU) 2018/1100 (the "Re-imposed Iran Sanctions Blocking Regulation"), which supplements the EU Blocking Statute. The combined effect of the EU Blocking Statute and the Re-imposed Iran Sanctions Blocking Regulation is to prohibit compliance by EU entities with U.S. sanctions on Iran which have been re-imposed following the U.S. withdrawal from the JCPOA. To date, the dominance of the U.S. dollar, together with robust U.S. sanctions enforcement, forces many global firms to comply with the re-imposed U.S. sanctions described above, even in light of legal risks arising from the EU Blocking Statute and other national anti-boycott legislation.

European Union leaders have discussed creating a clearinghouse to manage trade with Iran denominated in Euros,^[61] but no EU member state is as of yet willing to play host.^[62] Major European companies have already abandoned their Iranian deals,^[63] yet others are moving away from the use of U.S. dollar and/or business with the United States altogether in an attempt to be able to continue business with Iran. Additionally, while not all Iranian banks have been disconnected, the significant new restrictions on Iranian access to the SWIFT network discussed above will further discourage European engagements with Iran.^[64]

These competing obligations are a concern for U.S. companies seeking to acquire EU firms that have a history of engagement with Iran. Once acquired and as discussed above, the EU "target" would be considered a U.S. person from an U.S. sanctions perspective and thus obliged to comply with U.S. sanctions—in potential violation of the EU Blocking Statute, due to being considered an EU person by EU jurisdictions. We have described the generally available possible options for affected companies [here](#). In the discussion below we shall focus on the option to acquire respective licenses to remain compliant with both the re-imposed U.S. sanctions and the EU Blocking Statute.

One way forward in such situations is to reach out to the U.S. authorities to request a specific license for a particular transaction with Iran. Apart from the time such process might take and the potentially limited chance of success, according to the EU Commission, requesting from the U.S. authorities an individual license granting a derogation/exemption from the listed extra-territorial legislation, which include the re-imposed U.S. sanctions, would amount to complying with the latter. The EU Commission notes that this would necessarily imply recognizing the U.S. jurisdiction over EU operators^[65] which should be subject to the jurisdiction of the EU/Member States. Applying for a special license is thus considered a breach of the EU Blocking Statute. EU operators may, nevertheless, under a new streamlined process, request the EU Commission directly, not the EU member state authorities, to authorize them to apply for

a special license with the U.S. authorities, pursuant to Article 5, second paragraph of the EU Blocking Statute.

Another way forward is to apply directly for an exception from the EU Blocking Statute to be able to comply with the re-imposed U.S. sanctions in a fashion that is legally permissible. This will not only limit the risk of prosecution and litigation, but also ease reasonable worries of management and employees of the acquired EU subsidiary. According to article 5 (2) of the EU Blocking Statute the applicant will have to provide in their application sufficient evidence that non-compliance would cause serious damage to at least one protected interest. "Protected interests" are defined as the interest of any EU operator, the interest of the EU or both.

The EU has legislated that when assessing whether serious damage to the protected interests as referred to in the second paragraph of Article 5 of Regulation (EC) No 2271/96 would arise, the Commission will consider, among other things, "the existence of a substantial connecting link with the third country which is at the origin of the listed extraterritorial legislation (including the re-imposed U.S. sanctions) or the subsequent actions; for example the applicant has parent companies or subsidiaries, or participation of natural or legal persons subject to the primary jurisdiction of the third country which is at the origin of the listed extra-territorial legislation or the subsequent actions."^[66]

As first cases appear, any company caught between the re-imposed U.S. sanctions and the EU Blocking Statute should also be aware of a heightened risk of litigation and position themselves accordingly. Third parties might successfully sue under using the EU Blocking Regulation, for example if the above mentioned EU company with a U.S. parent were to decide to not deliver a product to Iran based on compliance with the re-imposed U.S. sanctions, despite a prior contractual obligation, a European court will likely not accept termination merely on the grounds of such U.S. sanctions compliance.

Finally, EU operators are required to inform the EU Commission within 30 days from the date on which information is obtained that the economic and/or financial interests of any EU operator is affected, directly or indirectly, by the laws specified in the Annex of the EU Blocking Statute (including the re-imposed U.S. sanctions) or by actions based thereon or resulting therefrom. If the EU operator is a legal person, this obligation applies to the directors, managers and other persons with management responsibilities of such legal person.

Conclusion

In our assessment, November 5, 2018 marks a new phase in U.S. sanctions implementation against Iran. National Security Adviser John Bolton warned on November 5 that the administration will impose "sanctions that even go beyond" those imposed this week or which existed under the Obama administration.^[67] "More are coming," he noted, adding that the United States would "have very strict, very tight enforcement of the sanctions that exist."^[68]

In particular, we assess that this new phase will be marked by robust U.S. government activities across three distinct work streams. First, we assess that the U.S. government will continue and likely expand diplomatic outreach efforts to negotiate, cajole, and perhaps threaten states and corporations that do not comply with U.S. measures. The eight oil waiver jurisdictions are likely to receive significant attention,

as will jurisdictions of concern with respect to sanctions evasion and subversion—among others, we expect U.S. outreach to Qatar, Oman, Turkey, the Caucasus, Iraq, Central Asia, and perhaps Sri Lanka and South Africa. All were the focus of sustained attention during the last round of robust secondary sanctions under President Obama. Second, we assess that OFAC and other agencies will be active in enforcement of violations. We note that OFAC has only published three enforcement actions this year—which is comparatively very light for an agency that historically has published 20 or more. We assume that there are other enforcement actions that have yet to be published—even if those actions concern activities that far pre-dated November 5, there could be a significant deterrent benefit in announcing substantial enforcement actions shortly after the resumption of the Iran sanctions. The unilateral approach to Iran sanctions under President Trump may compel a more public and robust enforcement action to achieve the same level of deterrence as the multilateral approach achieved under President Obama. Finally, the third work stream involves the continuing efforts of OFAC's Office of Global Targeting (which constructs the evidentiary material needed to list entities). We are confident that OFAC will be very active in both identifying more Iranian actors for listing and potentially changing the designations of some already listed entities so as to impose secondary sanctions as needed.

Even so, uncertainty abounds. It is unknown whether an aggressive approach to U.S. enforcement will lead European signatories to the JCPOA to enforce the EU Blocking Statute. Or will the U.S. steamroll such efforts by virtue of its economic power? Will Iranian president Hassan Rouhani consider renegotiating the nuclear deal to meet U.S. demands, or will he be replaced by a hardliner when he leaves office in 2021? Whatever happens next, we anticipate a continuing fluidity in the sanctions environment and consequently an increasingly complex set of compliance challenges for global companies.

[1] Press Release, White House, *Remarks by President Trump on the Joint Comprehensive Plan of Action* (May 8, 2018), available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action>; see also Presidential Memorandum, *Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon* (May 8, 2018), available at <https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon>.

[2] See Press Release, U.S. Dep't of Treasury, *U.S. Government Fully Re-Imposes Sanctions on the Iranian Regime as Part of Unprecedented U.S. Economic Pressure Campaign* (Nov. 5, 2018), available at <https://home.treasury.gov/news/press-releases/sm541>.

[3] Press Release, U.S. Dep't of State, *Press Availability With Secretary of Treasury Steven T. Mnuchin* (Nov. 5, 2018), available at <https://www.state.gov/secretary/remarks/2018/11/287132.htm>.

[4] Eli Lake, Opinion, *Trump Bank Sanctions Will Hit Iran Where It Hurts*, Bloomberg (Nov. 2, 2018), available at <https://www.bloomberg.com/opinion/articles/2018-11-02/trump-s-iran-bank-cutoff-from-swift-will-make-u-s-sanctions-hurt>.

- [5] U.S. Dep't of Treasury, *Frequently Asked Questions Related to the "Snap-Back" of Iranian Sanctions in November, 2018*, FAQ No. 637 (Nov. 5, 2018), available at https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx#630.
- [6] U.S. Dep't of State, *Joint Comprehensive Plan of Action* (July 14, 2015), available at <https://www.state.gov/documents/organization/245317.pdf>.
- [7] Press Release, White House, *Remarks by President Trump on the Joint Comprehensive Plan of Action* (May 8, 2018), available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action>; see also Presidential Memorandum, *Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon* (May 8, 2018), available at <https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon>; Press Release, U.S. Dep't of Treasury, *Guidance Relating to the Lifting of Certain U.S. Sanctions Pursuant to the Joint Comprehensive Plan of Action on Implementation Day* (Jan. 16, 2016), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/implement_guide_jcpoa.pdf.
- [8] Press Release, U.S. Dep't of Treasury, *Statement by Secretary Steven T. Mnuchin on Iran Decision* (May 8, 2018), available at <https://home.treasury.gov/news/press-releases/sm0382>.
- [9] Exec. Order No. 13,846, 83 Fed. Reg. 38,939 (Aug. 6, 2018), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/08062018_iran_eo.pdf.
- [10] In connection with the end of the 90-day wind-down period, the U.S. government also revoked authorizations to import into the United States Iranian carpets and foodstuffs and to sell to Iran commercial passenger aircraft and related parts and services. U.S. Dep't of Treasury, *Revocation of JCPOA-Related General Licenses; Amendment of the Iranian Transactions and Sanctions Regulations; Publication of Updated FAQs* (June 27, 2018), available at <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20180627.aspx>.
- [11] U.S. Dep't of Treasury, *Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA)* (May 8, 2018), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf, FAQ No. 1.3.
- [12] Exec. Order No. 13,846 § 1(a)(ii) (Aug. 6, 2018), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/08062018_iran_eo.pdf.
- [13] *Id.* § 1(a)(iii).
- [14] *Id.*
- [15] *Id.* § 1(a)(iv).

[16] *Id.*

[17] *Id.*

[18] *Id.* § 3(a)(ii)-(iii).

[19] *Id.* § 3(a)(iv)-(vi).

[20] *Id.* § 5.

[21] *Id.* This provision refers to the electronic messaging provided principally by the SWIFT inter-bank messaging system.

[22] *Id.* § 2(a)(ii).

[23] *Id.* § 2(a)(iii).

[24] *Id.* § 2(a)(iv)-(v).

[25] *Turning the Screws*, *The Economist* (Nov. 3, 2018).

[26] *Id.*

[27] *Id.*

[28] Press Release, U.S. Dep't of State, *Press Availability With Secretary of Treasury Steven T. Mnuchin* (Nov. 5, 2018), available at <https://www.state.gov/secretary/remarks/2018/11/287132.htm>.

[29] Michael R. Pompeo & Steven T. Mnuchin, *Briefing on Iran Sanctions*, U.S. Dep't of State (Nov. 2, 2018), available at <https://www.state.gov/secretary/remarks/2018/11/287090.htm>.

[30] SWIFT, *Introduction to SWIFT*, <https://www.swift.com/about-us/discover-swift> (last visited Nov. 4, 2018); see also Peter Eavis, *Trump's New Iran Sanctions May Hit Snag with Global Financial Service*, *N.Y. Times: DealBook* (Oct. 12, 2018), available at <https://www.nytimes.com/2018/10/12/business/dealbook/swift-sanctions-iran.html> ("The messaging service is run by a Belgian cooperative called Swift. The service, which is owned and used by banks around the world, plays a central role in the flow of money across the globe. If, say, a Bank of America customer wants to send money to a client of Barclays, Bank of America will send a message over Swift's network to Barclays, notifying it of its intention to move the money. Swift does not hold any of the money itself.").

[31] See Michael R. Pompeo & Steven T. Mnuchin, *Briefing on Iran Sanctions*, U.S. Dep't of State (Nov. 2, 2018), available at <https://www.state.gov/secretary/remarks/2018/11/287090.htm>. Secretary Mnuchin has also indicated that a narrow class of humanitarian transactions (e.g., providing food or medicine to non-designated entities) will still be allowed to use the SWIFT network.

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- [32] Eli Lake, Opinion, *Trump Bank Sanctions Will Hit Iran Where It Hurts*, Bloomberg (Nov. 2, 2018), available at <https://www.bloomberg.com/opinion/articles/2018-11-02/trump-s-iran-bank-cutoff-from-swift-will-make-u-s-sanctions-hurt>.
- [33] Arshad Mohammed, *SWIFT Says Suspending Some Iranian Banks' Access to Messaging System*, Reuters (Nov. 5, 2018), available at <https://www.reuters.com/article/us-usa-iran-sanctions-swift/swift-says-suspending-some-iranian-banks-access-to-messaging-system-idUSKCN1NA1PN>.
- [34] *Id.*
- [35] *E.g.*, Peter Eavis, *Trump's New Iran Sanctions May Hit Snag with Global Financial Service*, N.Y. Times: DealBook (Oct. 12, 2018), <https://www.nytimes.com/2018/10/12/business/dealbook/swift-sanctions-iran.html>.
- [36] *See id.*
- [37] *See* Exec. Order No. 13,846 § 1(a)(iii) (Aug. 6, 2018), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/08062018_iran_eo.pdf. In accordance with this authority and OFAC FAQ No. 3.1, the SDN List entries for these Iranian financial institutions do not have the notation warning that they are "Subject to Secondary Sanctions."
- [38] OFAC FAQ No. 638 (Nov. 5, 2018).
- [39] OFAC FAQ No. 639 (Nov. 5, 2018).
- [40] U.S. Dep't of Treasury, *Revocation of JCPOA-Related General Licenses; Amendment of the Iranian Transactions and Sanctions Regulations; Publication of Updated FAQs* (June 27, 2018), available at <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20180627.aspx>.
- [41] *See* OFAC FAQ No. 315.
- [42] *Id.*
- [43] *See* U.S. Dep't of Treasury, *Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions Under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day* (updated Dec. 15, 2016), FAQ No. 3.2, available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_faqs.pdf.
- [44] *See* Catherine Putz, *Iran's Chabahar Port Scores an India- and Afghanistan-Inspired Sanctions Exemption*, The Diplomat (Nov. 8, 2018), available at <https://thediplomat.com/2018/11/irans-chabahar-port-scores-an-india-and-afghanistan-inspired-sanctions-exemption>.
- [45] *Id.*

[46] *See, e.g.*, Michael R. Pompeo & Steven T. Mnuchin, *Briefing on Iran Sanctions*, U.S. Dep't of State (Nov. 2, 2018), *available at* <https://www.state.gov/secretary/remarks/2018/11/287090.htm>.

[47] OFAC FAQ No. 631 (Nov. 5, 2018).

[48] *See id.*

[49] *Id.* The logic behind this requirement appears to be a desire on the part of OFAC to avoid an unseemly rush to generate new business inside Iran on the eve of sanctions being re-imposed. Contracts entered into after President Trump's May 8, 2018 announcement do not enjoy any such assurance of the ability to collect payment after the wind-down periods end.

[50] OFAC FAQ Nos. 630 and 631 (Nov. 5, 2018). According to OFAC, "[a]s a general matter, goods or services will be considered fully provided or delivered when the party providing or delivering the goods or services has performed all the actions and satisfied all the obligations necessary to be eligible for payment or other agreed-to compensation. With respect to goods exported to or from Iran, at a minimum, title to the goods must have transferred to the relevant party." OFAC FAQ No. 633 (Nov. 5, 2018). To the extent a non-U.S., non-Iranian person continues to perform under such a contract after the applicable wind-down period has ended, they would not only have no assurance of being repaid, but would also risk incurring secondary sanctions liability.

[51] OFAC FAQ No. 631 (Nov. 5, 2018).

[52] OFAC FAQ No. 632 (Nov. 5, 2018).

[53] OFAC FAQ No. 636 (Nov. 5, 2018).

[54] OFAC, *General License J-1: Authorizing the Reexportation of Certain Civil Aircraft to Iran on Temporary Sojourn and Related Transactions* (Dec. 15, 2016), *available at* https://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran_glj_1.pdf.

[55] Foreign-made items incorporating more than 10 percent U.S.-origin content by value, including civilian aircraft, may not be reexported by non-U.S. persons to Iran without authorization (31 C.F.R. § 560.205). Most civilian aircraft—even those produced by non-U.S. manufacturers outside the United States—exceed this threshold.

[56] OFAC, *General License D-1: General License with Respect to Certain Services, Software, and Hardware Incident to Personal Communications* (Feb. 7, 2014), *available at* https://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran_gld1.pdf.

[57] Exec. Order No. 13,846, 83 Fed. Reg. 38,939, 38,941 (Aug. 6, 2018), *available at* https://www.treasury.gov/resource-center/sanctions/Programs/Documents/08062018_iran_eo.pdf; *see also* Fact Sheet, *President Donald J. Trump Is Reimposing All Sanctions Lifted Under the Unacceptable Iran Deal*, White House (Nov. 2, 2018), *available at* <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-reimposing-sanctions-lifted-unacceptable-iran-deal> ("Sales of

food, agricultural commodities, medicine and medical devices to Iran have long been—and remain—exempt from our sanctions.").

[58] OFAC FAQ Nos. 630 and 637 (Nov. 5, 2018).

[59] *E.g.*, Michael R. Pompeo & Steven T. Mnuchin, *Briefing on Iran Sanctions*, U.S. Dep't of State (Nov. 2, 2018), *available at* <https://www.state.gov/secretary/remarks/2018/11/287090.htm> ("[O]ur actions today are targeted at the regime, not the people of Iran, who have suffered grievously under this regime. It's why we have and will maintain many humanitarian exemptions to our sanctions including food, agricultural commodities, medicine, and medical devices.").

[60] *See, e.g.*, Fact Sheet, *President Donald J. Trump Is Reimposing All Sanctions Lifted Under the Unacceptable Iran Deal*, White House (Nov. 2, 2018), *available at* <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-reimposing-sanctions-lifted-unacceptable-iran-deal>.

[61] *Europe Accelerates Work on So-Called SPV to Counter U.S.'s Iran Sanctions*, Bloomberg (Nov. 8, 2018), *available at* <https://www.bloomberg.com/news/articles/2018-11-07/europe-accelerates-work-on-spv-to-counter-u-s-s-iran-sanctions>.

[62] *Turning the Screws*, The Economist (Nov. 3, 2018).

[63] *How Companies Around the World are Reversing Course on Iran Business*, Iran Watch (Nov. 5, 2018), *available at* <https://www.iranwatch.org/our-publications/policy-briefs/how-companies-around-world-are-reversing-course-iran-business>.

[64] Michael R. Pompeo & Steven T. Mnuchin, *Briefing on Iran Sanctions*, U.S. Dep't of State (Nov. 2, 2018), *available at* <https://www.state.gov/secretary/remarks/2018/11/287090.htm>; *see also* SWIFT, *Introduction to SWIFT*, *available at* <https://www.swift.com/about-us/discover-swift> (last visited Nov. 4, 2018); Peter Eavis, *Trump's New Iran Sanctions May Hit Snag with Global Financial Service*, N.Y. Times: DealBook (Oct. 12, 2018), *available at* <https://www.nytimes.com/2018/10/12/business/dealbook/swift-sanctions-iran.html> ("The messaging service is run by a Belgian cooperative called Swift. The service, which is owned and used by banks around the world, plays a central role in the flow of money across the globe. If, say, a Bank of America customer wants to send money to a client of Barclays, Bank of America will send a message over Swift's network to Barclays, notifying it of its intention to move the money. Swift does not hold any of the money itself.").

[65] The respective EU Guidance refers to EU operators when referring to the natural and legal persons for whom the EU Blocking Statute applies according to Article 11 of the EU Blocking Statute. Those are (i) any natural person being a resident in the Community (EU) (whereas "being a resident in the Community" means: being legally established in the Community for a period of at least six months within the 12-month period immediately prior to the date on which, under this Regulation, an obligation arises or a right is exercised) and a national of a EU Member State, (ii) any legal person incorporated within the Community, (iii) any natural or legal person referred to in Article 1 (2) of Regulation (EEC) No 4055/86 (i.e. nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member

State, if their vessels are registered in that Member State in accordance with its legislation), (iv) any other natural person being a resident in the Community, unless that person is in the country of which he is a national, and (v) any other natural person within the Community, including its territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity.

[66] Article 4(c) of Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.

[67] Emily Birnbaum, *Bolton: Even More Iran Sanctions Planned*, The Hill (Nov. 5, 2018), available at <https://thehill.com/policy/finance/414891-bolton-even-more-iran-sanctions-planned>.

[68] *Id.*



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