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Implementation of Sanctions Relief for Iran

On January 16, 2016, following a favorable report from the International Atomic Energy Agency, the P5+1 powers (the United States, United Kingdom, China, France, Russia, and Germany) and Iran declared that "Implementation Day" had occurred under the Joint Comprehensive Plan of Action (JCPOA), bringing into force agreed relief from sanctions against Iran.¹ The scope of relief was largely as expected, but the timing of the declaration was significantly earlier than unofficial estimates provided last year by U.S. officials.

To summarize the impact of JCPOA implementation:

- The majority of U.S. secondary sanctions against Iran have been lifted, as have most EU and UN sanctions. In particular, dealings with the Iranian energy sector and most (but not all) Iranian financial institutions are now unrestricted, so long as the dealings have no connection to the United States.
- U.S. primary sanctions remain in place, meaning that all transactions involving Iran within U.S. jurisdiction are still prohibited.
 - U.S. persons generally cannot do business in Iran outside of narrow sectors such as food, medicine, and (with specific licenses) civil aviation.
 - Non-U.S. persons may not engage in transactions with Iran that fall within U.S. jurisdiction; most notably, U.S. dollar transactions involving Iran remain prohibited if they clear through the U.S. financial system, as most do.
 - Non-U.S. subsidiaries of U.S. persons may be able to deal with Iran outside U.S. jurisdiction, subject to a number of conditions and complications.
- While European and other non-U.S. businesses now have considerably more freedom to do business with Iran, aggressive U.S. enforcement of direct U.S. sanctions against foreign persons acting within U.S. jurisdiction is likely to continue. Moreover, important U.S. secondary sanctions remain in place, particularly with respect to dealings with the remaining entities on the U.S. sanctions list. The need to monitor and address continuing secondary sanctions, as well as to avoid any contact with U.S. jurisdiction, will continue to raise

¹ See Cleary Gottlieb Alert Memorandum, *Sanctions Against Iran: Changing, Not Gone*, dated July 21, 2015, available at <http://www.cgsh.com/Sanctions-Against-Iran-Changing-Not-Gone>. The JCPOA and its annexes may be found at http://eeas.europa.eu/statements-eeas/2015/150714_01_en.htm.

potentially complex compliance issues for non-U.S. companies doing business with Iran.

- “Snap-back,” or reimposition of sanctions, remains a risk over the medium to long term.

The United States has issued detailed guidance regarding JCPOA implementation,² including a comprehensive catalog of statutory and regulatory provisions affected. The European Union has also issued guidance in the form of an information note³ aimed at providing practical information. This memorandum will provide a general overview of the key developments.

Sanctions Relief

A. U.S. Sanctions

Most, but not all, U.S. secondary sanctions relating to Iran are terminated. Secondary sanctions target dealings by non-U.S. companies occurring outside U.S. jurisdiction by threatening companies engaging in such dealings with the prospect of themselves being placed on U.S. sanctions lists. Secondary sanctions targeting the following activities have been lifted:⁴

- i. Financial and banking transactions with specified Iranian banks and financial institutions, including the Central Bank of Iran but notably excluding Ansar Bank, Mehr Bank, and Bank Saderat;
- ii. Transactions in Iranian Rial;
- iii. Provision of U.S. banknotes to the Government of Iran;
- iv. Disposition of proceeds from the purchase of Iranian oil products;
- v. Purchase, subscription to, or facilitation of the issuance of Iranian sovereign debt, including governmental bonds;
- vi. Provision of financial messaging services to the Central Bank of Iran and specified Iranian financial institutions (again excluding the banks remaining on the U.S. sanctions list);
- vii. Underwriting services, insurance, or reinsurance;

² See U.S. Dept. of the Treasury, *JCPOA Implementation*, available at https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/jcpoa_implementation.aspx.

³ See European External Action Service, *Information Note on EU sanctions to be lifted under the Joint Comprehensive Plan of Action (JCPOA)*, available at http://eeas.europa.eu/top_stories/pdf/iran_implementation/information_note_eu_sanctions_jcpoa_en.pdf.

⁴ The U.S. has indicated that it will not pursue the imposition of secondary sanctions against foreign persons who engaged in sanctionable conduct in these areas prior to the granting of sanctions relief.

- viii. Purchases of Iranian crude oil;
- ix. Investment, including participation in joint ventures, goods, services, information, technology and technical expertise and support for Iran's oil, gas and petrochemical sectors;
- x. Purchase, acquisition, sale, transportation or marketing of petroleum, petrochemical products and natural gas from Iran;
- xi. Export, sale or provision of refined petroleum products and petrochemical products to Iran;
- xii. Transactions with Iran's energy sector;
- xiii. Transactions with Iran's shipping and shipbuilding sectors and port operators;
- xiv. Trade in gold and other precious metals;
- xv. Trade with Iran in graphite, raw or semi-finished metals such as aluminum and steel, coal, and software for integrating industrial processes (these sanctions have only been partially lifted, as discussed further below);
- xvi. Sale, supply or transfer of goods and services used in connection with Iran's automotive sector; and
- xvii. Associated services relating to the foregoing.

Additionally, an extensive list of Iranian persons and entities have been removed from the U.S. sanctions designation lists.⁵ Note, however, that a substantial list of sanctioned persons remain, and any event dealings within U.S. jurisdiction are still prohibited if they relate to entities located in Iran or controlled by the Government of Iran (whether or not they appear on the SDN list).⁶

The United States has also issued a general license that reverses in part the 2012 extension of U.S. sanctions against Iran to entities owned or controlled by U.S. persons. However, this general license comes with a number of significant conditions and caveats. First, it is only valid if no specially designated national, or "SDN," is involved in the transaction. Second, it does not apply to any transaction that would violate any other OFAC sanctions program were it carried out in the United States. Thus, for example, foreign subsidiaries of U.S. companies are not directly bound by U.S. sanctions against Syria, but if they engage in Syria-related dealings through Iran, the general license does not apply and U.S. Iranian sanctions would be violated. Third, and perhaps of most practical significance, prohibitions on the direct

⁵ The list of de-designated entities is found in JCPOA Annex II, Attachment 3, *available at* https://www.treasury.gov/resource-center/sanctions/Programs/Documents/annex2_attachment_3.pdf.

⁶ Government-controlled entities are identified with an asterisk on the list of delisted entities.

or indirect exportation and re-exportation of goods and services from the United States to Iran remain in force, as does the prohibition against U.S. persons' (including the U.S. parent entity and any U.S. citizen or permanent resident employees) facilitating transactions with Iran. Narrow exceptions exist for an initial change in policy permitting foreign subsidiaries to deal with Iran and for the use of shared IT systems to support business with Iran (without the active involvement of any U.S. person),⁷ but the U.S. parent and U.S. persons associated with the subsidiary may not refer Iran-related business to the subsidiary, provide active support and supervision, provide goods or services specifically destined for Iran, and so on. Any entity owned or controlled by a U.S. person intending to deal with Iran must do so entirely independently of the United States, and it must observe all conditions of the license (including ensuring that its transactions with Iran do not implicate any SDN or any other U.S. sanctions program). If it does not, both the non-U.S. company and its controlling U.S. person may be held liable.

Finally, the United States is issuing a general license permitting the importation of foodstuffs (including pistachios and caviar) and carpets to the United States from Iran, and it has announced a licensing policy favoring the exportation of civil aircraft, parts, and services to Iran (conditioned on use exclusively for commercial passenger aviation and excluding exports to SDNs, notably including Mahan Air).

B. EU Sanctions

The European Union has also lifted the bulk of its nuclear-related sanctions, including those affecting the following sectors and activities:

- i. Transfers of funds between EU persons and entities, including financial institutions, and Iranian persons and entities, including financial institutions;
- ii. Banking activities, including the establishment of new correspondent banking relationships and the opening of new branches and subsidiaries of Iranian banks in the territories of EU Member States;
- iii. Provision of insurance and reinsurance;
- iv. Supply of specialized financial messaging services, including SWIFT, to the Central Bank of Iran and specified (but not all) Iranian financial institutions;
- v. Financial support for trade with Iran (export credit, guarantees or insurance);
- vi. Commitments for grants, financial assistance and concessional loans to the Government of Iran;
- vii. Transactions in public or public-guaranteed bonds;

⁷ The scope of the license indicates how broadly the U.S. government views the general prohibition against facilitation; implicitly, absent the license, even the use of a common corporate e-mail system on which messages relating to Iranian transactions were transmitted could constitute a violation by the U.S. parent.

- viii. Import and transport of Iranian oil, petroleum products, gas and petrochemical products;
- ix. Export of key equipment or technology for the oil, gas and petrochemical sectors;
- x. Investment in the oil, gas and petrochemical sectors;
- xi. Export of key naval equipment and technology;
- xii. Design and construction of cargo vessels and oil tankers;
- xiii. Provision of flagging and classification services;
- xiv. Access to EU airports of Iranian cargo flights;
- xv. Export of gold, precious metals and diamonds; and
- xvi. Delivery of Iranian banknotes and coinage.

In addition, a number of designations of specified persons, entities and bodies for asset freezes and visa bans have been terminated.⁸

Remaining Sanctions

A. U.S. Sanctions

Significant U.S. sanctions remain in place. First, as noted above, the U.S. continues to maintain a comprehensive set of direct sanctions against Iran that is almost entirely unaffected by the JCPOA. All dealings with Iran, entities controlled by the Government of Iran, and persons and entities still listed on the SDN List (as well as their subsidiaries) remain prohibited within U.S. jurisdiction.⁹ U.S. persons (including citizens, “green card” holders, legal entities organized in the U.S., and overseas branches of U.S. legal entities) may not deal with Iran except pursuant to an OFAC license. Non-U.S. persons may not cause the export or re-export of goods and services from the United States to Iran,¹⁰ take any action in the United States in connection with an Iranian transaction, or otherwise involve the United States in their dealings with Iran. Most notably, U.S. dollar transactions relating to Iran may not clear through the U.S. financial system (as virtually all interbank U.S. dollar transfers do); the prior “U-turn” exception

⁸ The list of terminated designations is annexed to Council Implementing Regulation (EU) 2015/1862, OJ 2015 L 274/161, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R1862>.

⁹ Sanctions against SDNs extend to any entity 50% or more owned by one or more SDNs, directly or indirectly through a chain of entities 50% or more owned by an SDN.

¹⁰ U.S.-origin goods that are not subject to heightened U.S. export controls (so-called “EAR99” goods) and were not exported from the United States with knowledge or reason to know that they were intended for Iran may be re-exported to Iran by non-U.S. persons, as may foreign-made goods with less than 10% controlled U.S.-origin content.

that once permitted non-U.S. persons to engage in dollar transactions relating to Iran has not been reinstated.

More complicated are the remaining secondary sanctions, which are much narrowed but still potentially significant to non-U.S. actors.

- i. Most importantly, non-U.S. actors remain exposed to secondary sanctions, as do participating financial institutions, if they knowingly engage in a significant transaction with any SDN in Iran or any SDN outside Iran designated in connection with Iranian WMD or terrorism activities or the Iranian Revolutionary Guard Corps.¹¹ This applies even if the transaction otherwise falls within the scope of sanctions relief (e.g., a shipping transaction for an SDN), though the list of SDNs has itself been cut substantially.¹² The IRGC in particular is a significant economic actor in Iran, and other major institutions such as Bank Saderat and Mahan Air also remain designated as SDNs. OFAC's sanctions lists will continue to identify entities subject to secondary sanctions (though there is some ambiguity as to whether the secondary sanctions risk extends to entities 50% or more owned by an entity subject to secondary sanctions).
- ii. Secondary sanctions against the provision to Iran of graphite, raw or semi-finished metals such as aluminum and steel, coal, and software for integrating industrial processes have generally been lifted. However, such transactions are still sanctionable if the material is subject to United Nations nonproliferation approvals and such approvals are not obtained, or if the material is sold, supplied, or transferred, or resold, retransferred, or otherwise supplied directly or indirectly, to any SDN or for use in connection with the military or ballistic missile program of Iran. Thus, the end user or end use of the materials may present risks to the non-U.S. supplier.
- iii. The secondary sanctions program against "Foreign Sanctions Evaders" remains in place, and it continues to target those facilitating "deceptive transactions" that fail to identify any interest of a U.S.-sanctioned Iranian or Syrian person in the transaction (even if the transaction itself does not violate sanctions) as well as parties actually engaging in transactions that violate U.S. sanctions.
- iv. Secondary sanctions programs against human rights abuses and the supply of equipment that can be used for surveillance, censorship, or other oppressive activities remain in place, as do long-standing authorities to designate persons involved in terrorism or WMD proliferation.

¹¹ Secondary sanctions for providing or facilitating access to specialized financial messaging services to Iranian financial institutions remaining on the SDN list for terrorism or WMD-related activities, of which there are currently three, also continue to apply.

¹² The U.S. has explicitly stated, however, that dealing with an Iranian financial institution that in turn deals with SDNs is not sanctionable, so long as the third party's dealings with the Iranian financial institution do not relate to the specific transactions or banking relationships involving SDNs.

Finally, there is no change to SEC reporting requirements pursuant to Section 13(r) of the Securities Exchange Act, requiring issuers to disclose transactions or dealings with any entity controlled by the Government of Iran or designated for U.S. sanctions (regardless of the sanctioned party's nationality) in connection with terrorism or proliferation of weapons of mass destruction. A number of U.S. states also maintain divestment policies prohibiting investment by state-owned entities (such as pension funds) in the securities of companies doing business in Iran, which continue in force.

B. EU Sanctions

The EU maintains a number of human rights-related sanctions that will remain in force.¹³ These sanctions include asset freezes directed at specified persons engaged in human rights abuses and restrictions on the supply of items that might be used in internal repression.¹⁴ The EU is also retaining a limited set of nuclear-related sanctions and designations. Thus, it will remain important for persons subject to EU jurisdiction (EU nationals and entities acting within the EU) to check EU sanctions lists when engaged in dealings with Iran.

Re-Imposition of Sanctions

The JCPOA provides a non-binding consultation mechanism to resolve any disputes, and the parties have indicated their commitment to use it. However, if the consultation mechanism fails, any party may unilaterally denounce the agreement. In that case, UN sanctions would automatically be reimposed unless all five permanent members of the Security Council agree to the contrary, and countries would be free to re-impose sanctions (the so-called "snap-back").

Should a snap-back occur, the scope of the reimposed U.S. and EU sanctions would be determined at the time. While the most obvious approach would be to reinstate some or all of the existing sanctions, the U.S. and EU could impose additional or different sanctions, and they may or may not be the same. For procedural reasons, the EU would most likely reinstate the existing sanctions at first, with changes potentially coming at a later stage.¹⁵ The reimposition of sanctions would not be retroactive in the sense that activities properly engaged in while sanctions relief was in effect would be punished, but the U.S. has indicated that there will be no general grandfathering rule permitting the continued performance of contracts entered into during the suspension of sanctions. Thus, parties may be faced with a choice between breaching their contractual obligations or engaging in potentially sanctionable conduct – a

¹³ Council Decision 2011/235/CFSP, OJ 2011 L 100/51, as amended; Council Regulation (EU) No 359/2011, OJ 2011 L 100/1, as amended.

¹⁴ See Council Decision 2011/235 and Council Regulation 359/2011, as amended.

¹⁵ Most provisions of Council Decision 2010/413/CFSP, OJ 2010 L 195/39 have been suspended, not terminated (see Article 1(17) of Council Decision (CFSP) 2015/1863, OJ 2015 L 274/174). A snap-back would therefore require a Council Decision ending the suspension, without, at first, having to draft a Council Decision with new sanctions provisions.

situation that may not be captured by typical illegality clauses – and should take that risk into consideration when contemplating dealings with Iran.

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