OFAC PROVIDES PROSPECTIVE GUIDANCE ON POTENTIAL "SNAP-BACK" OF IRAN SANCTIONS

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International Trade Alert

On December 15, 2016, the Office of Foreign Assets Control ("**OFAC**") in the Department of the Treasury amended its Frequently Asked Questions guidance document ("**FAQs**") regarding the Joint Comprehensive Plan of Action ("**JCPOA**"), the nuclear deal between the so-called P5+1 (China, France, Germany, the Russian Federation, the United Kingdom, and the United States), the European Union, and the Islamic Republic of Iran ("**Iran**"), to include prospective guidance on the wind-down of authorized business involving Iran in the event there is a "snap-back," or re-imposition, of the U.S. sanctions on Iran that were eased earlier this year.

As we reported in our earlier International Trade Alert, in January 2016, upon implementation of the JCPOA ("**Implementation Day**"), the P5+1 parties took actions to lift certain sanctions measures against Iran. In particular, the U.S., among other actions, removed over 400 Iranian individuals and entities from the OFAC list of Specially Designated Nationals and Blocked Persons ("**SDN List**") (although such parties remain subject to OFAC restriction, and in some cases blocking, as persons in Iran and/or owned or controlled by the Iranian Government). The U.S. also lifted most "secondary sanctions" relating to dealings with Iran and issued a limited general authorization (General License H) that permits foreign entities that are owned or controlled by a U.S. Person to engage in Iran-related transactions subject to certain restrictions. Prior to the issuance of General License H, foreign owned or controlled affiliates had been broadly restricted from Iran-related transactions pursuant to the Iran Threat Reduction and Syria Human Rights Act of 2012, which effectively extended U.S. sanctions on Iran to cover foreign subsidiaries of U.S. companies, even those operating independently of their U.S. parent. Since Implementation Day, a number of foreign owned or controlled entities have been using the new authorization under General License H to explore commercial opportunities in Iran and preliminarily reenter the Iranian market.

POTENTIAL WIND-DOWN ACTIVITIES

In what could be a signal of changes to the current Iran sanctions landscape, OFAC has amended two FAQs in the JCPOA guidance (M.4 and M.5) to address the practical implications for persons engaged in Iran transactions in the event of a "snap-back" of the sanctions. (The JCPOA provides for sanctions to "snap-back" into place should Iran fail to materially comply with the JCPOA, although U.S. sanctions could certainly be reimposed unilaterally without complementary action by other P5+1 members.)

While OFAC does not formally commit itself to any course of action, the revised FAQs provide that, in the event there is a sanctions snap-back, OFAC would expect to adopt certain measures permitting a wind-down and termination of Iran-related business that had been covered by authorizations previously in existence. In particular, the FAQs indicate the following:

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- There would be a 180-day period following a snap-back for non-U.S., non-Iranian persons to wind-down business that was permissible prior to the snap-back (for example, business that had been conducted by a foreign subsidiary of a U.S. company pursuant to General License H, or that had been covered by a specific license that is revoked by the snap-back); and
- Non-U.S., non-Iranian persons owed payment for goods and services fully provided under a written contract prior to the snap-back would be permitted to receive payment under the terms of the contract, provided the payment does not involve U.S. persons or the U.S. financial system (which, in any case, is not permitted even prior to any snap-back). Similar measures would apply to loans and credits extended to Iranian counterparties prior to the snap-back.

OFAC's revised FAQs also note that the United States has committed itself to not retroactively impose sanctions for transactions prior to a snap-back that had been undertaken pursuant to legitimate authorization. However, consistent with the manner in which OFAC sanctions have been imposed in other contexts, there would be no grandfathering of contracts in existence prior to snap-back.

It is important to note that this new guidance is only prospective, and it does not commit the U.S. government to actually following these specific processes should a snap-back occur. The release of the revised guidance at this time may have been prompted by questions some are raising on the future of the current Iran sanctions regime, given that incoming President Donald J. Trump has been critical of the roll-back of sanctions measures under the JCPOA.

PRACTICAL TAKEAWAYS

While little is known at this time, there are certain steps that companies can take to reduce their risks, should a snap-back of the Iran sanctions occur:

- Iran-related transactions should be pursuant to written contracts and agreements that clearly obligate the parties to performance and payment. Based on the revised FAQs, payments after a snap-back occurs may not be authorized if pursuant to a verbal or handshake agreement.
- Transaction agreements should incorporate strong walk-away rights and force majeure provisions that specifically contemplate a sanctions snap-back.

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