International Trade & Regulatory ADVISORY ■

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Five Questions Curious Minds Want to Know About the Joint Comprehensive Plan of Action with Iran

U.S. and non-U.S. companies and financial institutions are struggling to understand the implications for their business if and when sanctions on Iran are lifted under the Joint Comprehensive Plan of Action (JCPOA). Five questions stand out that could materially affect the degree to which companies might or might not be able to do business with Iran.

1. **Does the Administration have the authority to allow foreign subsidiaries of U.S. parent companies to do business with Iran?**

   Section 5.1.2 of Annex II (Sanctions-Related Commitments) of the JCPOA contains a commitment that the United States will "license non-U.S. entities that are owned or controlled by a U.S. person to engage in activities with Iran that are consistent with this JCPOA." However, the prohibition on transactions with Iran by non-U.S. subsidiaries is contained at § 4(a) of Executive Order 13628 of October 9, 2012 and at § 560.215 of the Iranian Transactions and Sanctions Regulations (ITSR), 31 C.F.R. § 560.215. Neither of these provisions is included in the commitment by the United States at § 4 of Annex II of the JCPOA to "cease the application of, and to seek such legislative action as may be appropriate to terminate, or modify to effectuate the termination of, all nuclear related sanctions …."

   Moreover, the underlying statutory authority that these provisions implement, § 218(b) of the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRSHRA), frames the prohibition on transactions by foreign subsidiaries in mandatory terms so as to seemingly leave the Administration no discretion as to its implementation. Specifically it states that "… the President shall prohibit an entity owned or controlled by a United States person and established or maintained outside the United States from knowingly engaging in any transaction directly or indirectly with the Government of Iran or any person subject to the jurisdiction of the Government of Iran that would be prohibited … if the transaction were engaged in by a United States person or in the United States." Thus, because the prohibition is mandatory and not discretionary and is imposed by statute, it appears that Congressional action to amend or modify that statute is a prerequisite to the exercise of any licensing authority by the Executive Branch. Whether

Congress would make such a modification of the legislation and, if so, how long such action would take are two significant uncertainties.

2. **May a U.S. person take any action to facilitate licensed transactions with Iran by its foreign subsidiary?**

Related to the above question, § 560.208 of the ITSR provides that "no United States person, wherever located, may approve, finance, facilitate, or guarantee any transaction by a foreign person where the transaction by that foreign person would be prohibited by this part if performed by a United States person or within the United States." Additionally, § 560.204 of the ITSR prohibits the supply of services by a U.S. person or from the United States to Iran. Assuming that the existing prohibitions under the ITSR remain in place as to U.S. persons, which the Administration has indicated would be the case, the question arises as to whether any U.S. person can take any action to facilitate licensed transactions with Iran by its foreign subsidiary.

The answer seemingly is no, meaning that the ITSR prohibitions would essentially revert to what they were prior to enactment of § 218 of the ITRSHRA. However, the question is not so simple. For example, if the U.S. parent company adopted a company-wide prohibition on transactions with Iran, including by its non-U.S. subsidiaries, could that U.S. parent now take action to change that policy so as to allow the foreign subsidiary to conduct transactions with Iran? Seemingly, under the current wording of the anti-facilitation provision above, as well as under its related interpretive provision at § 560.417 of the ITSR, this would not be allowed. Thus, it may be that the Office of Foreign Assets Control (OFAC), which is responsible for administering U.S. sanctions, may have to amend the anti-facilitation provision or otherwise include in any license authorizing a foreign subsidiary to deal with Iran a provision allowing such limited activity by a U.S. person.

3. **What are the implications of continuing to disallow U.S. dollar transactions with Iran?**

The Administration has made clear that existing prohibitions on facilitating and providing financial services will remain in place. Therefore, there will be no reinstitution of the U.S. dollar U-turn clearing exemption that existed until November 10, 2008 under § 560.516 of the ITSR, and U.S. financial institutions will continue to be prohibited from clearing any U.S. dollar-denominated transactions that directly or indirectly involve Iran. Indeed, the prohibition is not limited to U.S. dollar clearing but would also apply to clearing euro or any other currency-denominated transactions through the U.S. banking system or by a U.S. person. As a result, the U.S. banking system will remain off limits to any unlicensed or otherwise non-exempt transactions that directly or indirectly involve Iran. At least three obvious consequences flow from this fact.

First, any new non-U.S. business with Iran cannot be dollar-denominated because U.S. banks cannot clear those dollars. Even if not dollar-denominated, such business will inevitably steer clear of the U.S. banking system because of these prohibitions on U.S. banks. This would appear to be the case, notwithstanding the broad lifting, at Section 7 of Annex II of the JCPOA, of the "financial and banking measures" enumerated at Section 4 of Annex II, such as engaging in activities with the Government of Iran, the Central Bank of Iran and Iranian financial institutions, but applicable only to non-U.S. persons. However, even as to non-U.S. persons, if no U.S. dollar clearing is allowed, it is unclear how some of these liberalizations can be carried out, including those allowing "the provision of U.S. banknotes to the Government of Iran" and removing "bilateral trade limitations on Iranian revenues held abroad."

Second, on October 16, 2007, Congress amended the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.* to add the following language: "[i]t shall be unlawful for a person to violate or attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under [IEEPA] [emphasis added]." Since then, OFAC has had the statutory authority, which it has on occasion exercised, to penalize any person, including any non-U.S. person wherever located, who "causes" a violation of any OFAC requirement. This authority to enforce extraterritorially against non-U.S. persons, particularly in the context of foreign banks clearing transactions that involve Iran through the U.S. banking system, will remain in force and thus in effect perpetuate extraterritorial sanctions.

Third, the above facts will likely accelerate broader movement away from the U.S. dollar as the currency of choice in major international transactions. This would appear to be particularly the case in the energy, pharmaceutical and aircraft sectors, which have traditionally been dollar-denominated and which are likely to be areas of primary focus for Iran. The long-term effect of this trend from the sanctions perspective could be to diminish U.S. leverage over foreign transactions as non-U.S. persons increasingly turn to alternative currencies for their transactions.

In a somewhat ironic variant on this scenario, U.S. Secretary of State John Kerry recently testified before Congress that if the United States rejects the JCPOA and demands that its allies comply with U.S. sanctions, a loss of confidence in U.S. leadership could threaten the dollar's position as the world's reserve currency. Similarly, President Obama said in his recent speech at American University on the JCPOA that, "We cannot dictate the foreign, economic and energy policies of every major power in the world. In order to even try to do that, we would have to sanction, for example, some of the world's largest banks. We'd have to cut off countries like China from the American financial system. And since they happen to be major purchasers of our debt, such actions could trigger severe disruptions in our own economy and, by the way, raise questions internationally about the dollar's role as the world's reserve currency."

4. **Will there be contract sanctity under the snapback provisions?**

Under § 37 of the JCPOA, the so-called "snapback" provisions provide contract sanctity for contracts signed with Iranian parties following implementation of the JCPOA but before re-imposition of any sanctions under the snapback provisions, provided the contracts are consistent with the JCPOA. The underlying intent appears to be to give certainty to transactional parties operating in good faith under the JCPOA. However, recent testimony by senior U.S. Treasury officials before Congress could be interpreted as hedging the plain meaning of the language in the JCPOA by inferring that while such contracts might continue to exist following the snapback, they could not be "implemented." If this is the final position of the U.S. government, this would inject a significant measure of uncertainty into transactions with Iran and probably have a chilling effect on such transactions by non-U.S. persons. Therefore the question is what does § 37 mean and how is it to be interpreted?

5. Will all secondary sanctions on Iran be removed?

Separate from but related to the nuclear sanctions on Iran, the Iran Sanctions Act (ISA) contains a variety of secondary sanctions on Iran, some of which relate to Iran's missile activities and support for terrorism. More recent amendments to the ISA, such as by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA), have added nuclear-related secondary sanctions to the ISA.

The ISA is set to expire on December 31, 2016. Although Annex II of the JCPOA requires the lifting of certain CISADA-based designations of persons or entities on OFAC's Specially Designated Nationals and Blocked Persons List, as well as the lifting of nuclear-related sanctions added to the ISA by CISADA, it does not specifically require either the non-renewal of the ISA or the termination of other sanctions contained in the ISA.

Senate Foreign Relations Committee Chairman Bob Corker (R-Tenn.) has predicted that no matter how Congress votes on the JCPOA in September, it will pass an extension of the ISA (including its secondary sanctions on Iran) shortly thereafter as a high priority. Iran reportedly has already indicated that it believes that an extension of the ISA would violate § 26 of the JCPOA, which requires the Administration, "acting consistent with respective roles of the President and the Congress," to "refrain from re-introducing or re-imposing the sanctions specified in Annex II that it has ceased applying under this JCPOA" and thus would provide grounds, under § 26, for Iran to "cease performing its commitments under this JCPOA in whole or in part." Therefore, the questions are what will Congress do about extending the ISA, and what will the effect of any such extension be on the continued validity of the JCPOA?

Please direct any questions concerning the JCPOA to ***Tom Crocker***, ***Ken Weigel*** or ***Eric Shimp*** of Alston & Bird's International Trade and Regulatory Group.

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