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PERSPECTIVES

# THE IRAN NUCLEAR DEAL: SANCTIONS RELIEF BRINGS COMPLIANCE CHALLENGES

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The implementation of the Iran nuclear deal early in 2016 will bring new risks and compliance challenges, both for businesses that are able to take advantage of new opportunities in Iran and those that are not. Indeed, significant differences between the US and EU commitments and the intentions of countries not party to the deal will create a complex business environment for global companies.

Based upon the pace of Iran's compliance with its commitments under the Joint Comprehensive Plan of Action (JCPOA), Implementation Day is estimated to occur early in 2016. Implementation Day is not specified in the JCPOA but rather is defined as the day on which the International Atomic Energy

Agency (IAEA) verifies implementation by Iran of its nuclear related commitments and sanctions relief begins.

Virtually all UN and EU sanctions will be lifted, save for those EU sanctions targeting human rights abuses in Iran. However, while almost all US 'secondary' sanctions (which principally target activities of non-US persons) will be removed, the 'primary' sanctions (which prohibit most trade and transactions with Iran by US persons) will remain in place. The only sanctions relief for US persons will come in the form of general and specific licences issued by the US Office of Foreign Assets Control (OFAC) allowing trade in food, carpets and commercial passenger aircraft and related parts

and services. Furthermore, most countries with autonomous Iranian sanctions regimes, in addition to UN mandated sanctions, have signalled an intention to follow the EU approach. Thus, Implementation Day will bring a return to the pre-CISADA era of unilateral US sanctions against Iran.

At first blush, this discrepancy may appear to be a boon for EU firms, which will be in a position to enter the Iranian market and trade freely with Iran without competition from their US counterparts. However, the lingering US primary sanctions will continue to pose risks for EU companies that trade with Iran.

First, apart from goods and services currently (or scheduled to be) the subject of general or specific OFAC licences, re-export of US origin goods and services to Iran will remain broadly prohibited. Thus, EU companies must take care to ensure that their trade with Iran does not involve unlicensed trade in US origin goods and services. Second, as US banks will remain prohibited from processing US dollar transactions related to unlicensed trade with Iran, such transactions must be avoided in order to avoid blocking of funds by US banks. In this regard, it is important to recognise that lawful transactions by non-US firms that are not subject to US law will not be treated by US banks as OFAC-licensed transactions, even if the transaction

would be covered by an OFAC general licence if entered into by US persons.

Furthermore, high fines meted out to EU banks over the past few years will certainly act as a deterrent to any EU banks or their customers who may be tempted to look for ways to disguise transactions in order to process them through the US banking system, and enhanced compliance

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programmes implemented by both US and EU banks in the wake of these enforcement actions will ensure a higher likelihood that banks will identify any such attempts.

Foreign subsidiaries of US companies will face a unique set of risks. Under the JCPOA, the US has committed to licence certain activities of foreign subsidiaries, which, since 2012, have been subject to the same constraints on trade and transactions with Iran as their US parent companies. OFAC has yet to signal the scope of this general licence, which it



has promised to issue in advance of Implementation Day, along with the other general licences and interpretative guidance. Therefore, the extent to which secondary sanctions relief, which is applicable to other non-US persons, will apply to foreign entities owned or controlled by US persons remains unclear. If the general licence, once issued, does not put foreign subsidiaries of US companies on the same footing as other non-US companies, foreign subsidiaries of US companies will face compliance challenges as they attempt to engage in trade with Iran that is permitted under applicable local law while remaining subject to certain US restrictions.

Regardless of the scope of sanctions relief for their foreign subsidiaries, the US parents of such

companies will face new compliance challenges of their own. OFAC has indicated that it intends to maintain the prohibition against US person facilitation of activities by non-US persons that would be impermissible if undertaken by US persons. This means that US companies whose foreign subsidiaries may be authorised to trade with Iran must avoid participating in, or facilitating, any such authorised trade that goes beyond the scope of trade and transactions in which US persons are authorised to participate. Similar challenges will be faced by individual US persons who are directors, officers or employees of the foreign subsidiaries or, indeed, any non-US entity.

US companies and individuals who decide to take advantage of the new general and specific licences will require a keen understanding of the applicable conditions of the new licences, as well as existing exemptions, licences, prohibitions and reporting requirements. Among other things, US persons are subject to more restrictions than their EU counterparts on what they can do to plan for getting back into business in Iran, but can take certain steps consistent with current exemptions and licences. Similarly, non-US persons wishing to take advantage of the contingent waivers of US secondary sanctions issued on Adoption Day must familiarise themselves with the limitations to which the waivers are subject. For example, most of the waivers do not cover activities involving persons on the US SDN List. Furthermore, while the JCPOA notes that the US will 'delist' many SDNs for the purposes of implementing the promised secondary sanctions relief, delisted entities falling within the definition of 'government of Iran' contained in OFAC's Iranian Transactions and Sanctions Regulations will remain subject to the primary US embargo and shall remain off-limits for transactions with US persons, including banks.

These discrepancies between the EU and US approaches to sanctions relief, together with uncertainty regarding the scope of US sanctions relief and the timing of sanctions relief generally, almost certainly will result in a spike in inadvertent violations, particularly of US sanctions, and an attendant increase in enforcement actions.

All new players in the Iranian market also must weigh the risk of re-implementation of sanctions if Iran does not live up to its obligations under the JCPOA. The JCPOA provides that sanctions will be suspended, not terminated, on Implementation Day, and other provisions of the JCPOA allow certain sanctions to 'snap back' or be reinstated if Iran does not live up to its obligations under the JCPOA. Permanent sanctions relief will not come until 'Transition Day' – i.e., 18 October 2023 or upon a favourable IAEA report regarding Iran's pursuit of only peaceful nuclear activities. This means that those that take advantage of sanctions relief on Implementation Day will bear the risk of reinstatement of sanctions for as much as eight years. Furthermore, the US government has indicated that contracts entered into during the period of sanctions relief will not be grandfathered if snapback occurs.

Companies doing business in or with Iran also will face significant corruption risks. Transparency International ranked Iran at 136th of 175 countries on its 2014 Corruption Perception Index (CPI), which ranks countries according to how corrupt their public sectors are perceived to be. According to Transparency International, the CPI is "a composite index, drawing on corruption-related data from expert and business surveys carried out by a variety of independent and reputable institutions". Transparency International reports that Iran scored only 20 out of 100 on the surveys, on which scores

ranged from 0 (highly corrupt) to 100 (very clean). This high level of corruption risk assumes even greater significance in the context of an economy in which most business is conducted through agents, distributors and other third parties.

Of course, in addition to these 'legal' risks, those re-entering the Iranian market must also carefully manage a host of other commercial risks. On the political risk front, the possibility of changes in US policy arising from the 2016 presidential and congressional elections cannot be discounted entirely.

For all of these reasons, companies looking to take advantage of the upcoming sanctions relief must undertake careful risk analysis based on thorough due diligence and screening of potential business partners and all parties and banks likely to

be involved in contemplated transaction, not only with respect to applicable legal opportunities and constraints, but with respect to commercial and political risks as well. **RC**



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