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REMIT: PRACTICAL IMPLICATIONS OF U.S. DECERTIFICATION OF JCPOA AND NEW SANCTIONS

OVERVIEW

On October 13, 2017 the incumbent U.S. President, speaking in a televised address delivered from the White House, announced that he refused to re-certify Iran's compliance with the nuclear deal ("JCPOA") and thereby authorized the U.S. Treasury to sanction the Islamic Revolutionary Guard Corps ("IRGC") as supporters of terrorism as well as to place new sanctions on various Iranian entities for their alleged involvement in actions that the president described as running against U.S. national interest.

JCPOA: FUTURE IN PERIL?

President Trump, despite repeated verifications by the International Atomic Energy Agency ("IAEA") attesting to Iran's full compliance with the JCPOA and despite many high-ranking U.S. officials, including the Secretary of State and Defense Secretary, confirming the same, made clear in his address that come the official deadline of October 15, he would refrain from certifying to the U.S. Congress that Iran is complying with the terms of the JCPOA.

The certification requirement to be made every 90 days is bestowed upon the president by the Iran Nuclear Agreement Review Act ("INARA"), a legislative move by Congress to ensure it plays a role in deciding the fate of the JCPOA. Its tenure in this role has now begun since the president avowed that he cannot certify to congress that:

As per Section d(6)(A) of INARA:

(i) Iran is transparently, verifiably, and fully implementing the agreement, including all related technical or additional agreements;

(ii) Iran has not committed a material breach with respect to the agreement or, if Iran has committed a material breach, Iran has cured the material breach;

(iii) Iran has not taken any action, including covert activities, that could significantly advance its nuclear weapons program; and

(iv) suspension of sanctions related to Iran pursuant to the agreement is —

(I) appropriate and proportionate to the specific and verifiable measures taken by Iran with respect to terminating its illicit nuclear program; and

(II) vital to the national security interests of the United States;

This decertification now entitles either house of congress, that is, the House of Representatives or the Senate, to introduce what INARA describes in section e(2)(A) as "*a bill reinstating statutory sanctions imposed with respect to Iran*". Congress will have 60 calendar days to introduce such a bill through an expedited consideration procedure granted to it pursuant to INARA.

If congress refrains from endorsing the president's decertification, which Congress could do, in practice, by voting to continue the lifting of Iran sanctions, the president could alternatively decline to exercise the waivers that have thus far suspended the implementation of sanctions legislation. He could also use his executive power to reinstate certain designations of Iranian persons and entities as Specially Designated Nationals (SDNs).

Ultimately, if the president believes that U.S. law is not enough to dismantle what he has called the "worst deal ever", he can use the terms of the JCPOA itself to kill the deal by triggering the "snapback" mechanism. Under the "snapback" mechanism envisaged in paragraphs 11-13 of Resolution 2231 of the UN Security Council (which endorsed the JCPOA in its entirety), the United States could trigger the re-imposition ("snapback") of UN sanctions by notifying the Security Council of "an issue that [the United States] believes constitutes significant non-performance of commitments under the JCPOA." This finding, as subjective as it may be, will be subject to a good faith obligation to resolve the issue pursuant to the JCPOA's dispute resolution mechanism.

Although the decertification does not, on its own, immediately unravel the JCPOA, it may nonetheless adversely affect its future. If decertification becomes the first domino leading to unilateral re-imposition of U.S. secondary sanctions and assuming that Iran would nonetheless remain committed to its JCPOA obligations, then non-U.S. persons (as defined by OFAC for the purposes of secondary sanctions) engaging in certain Iranian business, and at the same time maintaining ties to the United States, its financial markets, banking institutions, or its currency could, in some circumstances, face the risk of penalties for violating renewed U.S. secondary sanctions.

As a consequence of this possible eventuality, some entities may choose to reconsider or modify their engagements in Iran.

Non-U.S. persons with no exposure to the U.S., its banks, financial markets, or currency, on the other hand, would likely be less affected given that the practical reach of OFAC secondary sanctions is principally limited to those areas of commerce with U.S. dollar-nexus or other U.S. nexus.

Iran, as confirmed by Foreign Minister Zarif, will soon issue a formal letter of complaint to the Joint Commission established under the JCPOA, which will need to decide, possibly in conjunction with the Ministers of Foreign of Affairs and an Advisory Board, if there has been a significant non-performance by the U.S. This process could take up to 35 days.

If the outcome of the Joint Commission does not cause the U.S. to alter its decision, Iran could rely on the terms of the JCPOA and cease performing its commitments in whole or in part. The UN Security Council would then need to vote on a resolution as to whether to continue the lifting of UN sanctions, which is currently stipulated under the JCPOA.

Based on the modified voting mechanism provided for in the JCPOA, if the resolution (for the continued lifting) is not adopted within 30 days, or a permanent member of the UN Security Council were to veto such resolution, preventing its adoption, all UN sanctions may be reimposed, unless the UN Security Council reaches an alternative resolution / decision.

That is, in summary, in the event that U.S. exercises its veto right at the time of consideration of the resolution for the continued lifting of sanctions, then, by default, the resolution cannot be adopted, and all previous sanctions of United Nations Security Council will snap back, absent an alternative resolution. The practical implication of this scenario is that a large number of businesses, whether U.S. persons or otherwise, engaged in the Iranian market may, in order to comply with the UN regulations, have to wind-down their operations in Iran and could ultimately exit. OFAC guidelines currently provide for 180 days for the wind-down period, and EU regulations currently do not specify a timeframe.

Under this worst-case situation, essentially only those businesses hailing from jurisdictions not subject to UN regulations would lawfully be able to continue business in and with Iran, as was the case in the years between 2012 and 2015.

IRGC NEW SANCTIONS

Moments after President Trump concluded his announcement, OFAC declared that the IRGC is henceforth designated under U.S. terrorism authority global terrorism Executive Order (“EO”) 13224 and consistent with the Countering America’s Adversaries Through Sanctions Act (“CAATSA”).

CAATSA, signed into law by President Trump on August 2, 2017, requires the president to impose sanctions on the IRGC and foreign persons that are officials, agents, or affiliates of the IRGC. Thus, OFAC has, on October 13, 2017, followed the president’s instructions and designated the IRGC under EO 13224. OFAC has also declared that it further intends to implement the remaining requirements of CAATSA with respect to foreign persons that are officials, agents, or affiliates of the IRGC when the authority under section 105 of CAATSA becomes effective on October 31, 2017.

OFAC on the same day also designated three Iran-based entities pursuant to EO 13382 which are: Shahid Alamolhoda Industries ("SAI"), Rastafann Ertebat Engineering Company ("Rastafann"), and Fanamoj, the parent company of Rastafann. In addition to these Iran-based entities, Wuhan Sanjiang Import and Export Co. LTD, a China-based entity was also designated pursuant to the same executive order.

The IRGC’s designation under EO 13224, in addition to currently imposed sanctions on it, will, in theory, prevent IRGC from availing itself of the so called “Berman exemptions” under the International Emergency Economic Powers Act (IEEPA) relating to personal communication, humanitarian donations, information or informational materials, and travel.

Currently, prior to President Trump's announcement, there were only about 50 entities on OFAC's SDN list which were IRGC-related, and in the wake of the 13 October statement, it can be reasonably surmised that there could be meaningful additions to sanctions listings which are related to IRGC or IRGC affiliates.

IRGC AND THE SPECTER OF FTO DESIGNATION

On top of all the above there also seems to be an appetite in Washington for designating IRGC as a Foreign Terrorist Organization (“FTO”). The U.S. State Department through the Secretary of State may designate an entity determined to be (A) a foreign organization; (B) that “engages in terrorist activity or terrorism, or retains the capacity and intent to engage in terrorist activity or terrorism”; if (C) “the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.” (8 U.S.C. §1189(a)(1)).

An FTO designation by virtue of 18 U.S.C § 2339B makes it illegal to knowingly provide "material support or resources" to a designated FTO, which includes, but is not necessarily limited to, property, currency or monetary instruments, financial services, lodging, training, expert advice or assistance, safe-houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, and transportation, advice or assistance derived from scientific, technical or other specialized knowledge. Violations of this law are subject to both civil and criminal penalties, including imprisonment for not more than 20 years (or even for life if death results from the offense). This law also provides for extraterritorial jurisdiction, meaning that the conduct occurring outside of the U.S. can, in certain circumstances, be civilly and criminally penalized in the courts of the United States.

Accordingly, U.S. financial institutions must block "any funds in which [a] foreign terrorist organization or *its agent* has an interest" [emphasis added] (31 C.F.R §597.201). The determination of who qualifies as "agent" is the responsibility of U.S. financial institutions based on how OFAC defines the term: an individual or entity (1) owned by an FTO; (2) controlled by an FTO; or (3) acting or purporting to act directly or indirectly on behalf of an FTO. (31 C.F.R. §597.301). This responsibility, despite OFAC's efforts in making the determinations of "control" and "acting for or on behalf of" through its different designations, would in practice be burdensome for the U.S. institutions involved as they may be expected to exhaust considerable additional resources to determine whether funds shall be blocked if a potential agent is holding an indirect interest in a transaction.

WHAT WOULD AN FTO DESIGNATION, IF SO DETERMINED BY THE STATE DEPARTMENT, MEAN IN PRACTICE?

An FTO designation, in light of the multiple existing classifications which already place the IRGC on OFAC's list of Specially Designated Nationals ("SDN"), may seem practically redundant.

Indeed, the differences between SDN, a designation which has been applied for quite some time to certain individuals and entities affiliated with the IRCG, and the potential FTO designation, may be considered subtle. The following comparison between FTO and SDN helps elucidate the more significant factors which distinguish one from the other and relies partly on publicly available resources provided by the U.S. Justice Department.

The Department of State, as previously noted, is responsible for designating an entity as FTO whereas the Department of the Treasury is charged with identifying an SDN.

The FTO list originated in 1997 and is subject to bi-annual review by the U.S. Court of Appeals for the District of Columbia Circuit. FTO determinations are made according to whether the group may be considered as a foreign organization engaging in terrorist activity that "threatens the security of United States persons or the national security of the United States."

SDNs, by contrast, may include, but are not limited to, Specially Designated Global Terrorists ("SDGT"s) or Specially Designated Terrorists ("SDT"s). It is the responsibility of OFAC, within the U.S. Treasury, to maintain and update this list, and it often includes entities which the State Department has designated as FTOs.

An additional key difference between FTO and SDNs is that FTO is limited to foreign organizations, whereas the SDN list may include both individuals and entities (companies, organizations, etc.).

In terms of violations and penalties, with respect to FTO, the justice department indicates that "persons who support or contribute to an FTO may be prosecuted for providing material support to an FTO in violation of Title 18, United States Code, Section 2339B" (as indicated above) whereas, by contrast, "knowingly giving [support] to an SDN may result in violation of title 50, United States Code, Sections 1701-07", which constitute the IEEPA, among other relevant statutes, which may also, in the specific case of Iran, include the ITSR and ISA. Violations pertinent to SDNs may also be violations with respect to Title 18, to the extent that an FTO is also an SDN, which is often, but not always the case.

Therefore, in summary, while the potential designation of the IRGC as an FTO, in terms of its headline shock, may be thought of as dramatic, its legal implications may be thought of as incremental / marginal. The relevant regulatory authorities, in one case the State Department, in the other the U.S. Treasury (and OFAC), both have extraterritoriality in terms of enforcement. Moreover, some of the implications of the regulations under IEEPA, ITSR, and ISA have practically similar consequences as Title 18 with respect to FTOs. In both cases, there are potential civil and criminal penalties at stake for violators.

Undoubtedly, any provisional FTO designation, should it come to pass, would widen the net of potential violations of which individuals / entities engaging in Iranian business could run afoul, but as a comprehensive assessment, the aggregate thrust of differences between SDN and FTO should be considered minimal. Furthermore, there are reasons to believe that, for geopolitically pragmatic reasons, the action to make such an FTO designation may be withheld since it is speculated that U.S. military forces may fight in conjunction with IRGC affiliate entities in the war against ISIS, in Iraq and Syria, for instance, and applying a full-blown FTO designation could, if such speculation were true, create complications which U.S. authorities are unwilling to accept.

In consideration of all of the above, an FTO designation, albeit unlikely, for the IRGC may, on the margin, influence the decision of parties intending to enter the Iranian market since an FTO designation for the IRGC may pose additional counterparty risks. Any such incremental augmentation of risk can, however, be mitigated by robust due diligence and compliance mechanisms principally tailored for the type of activity and the specific sector that parties intend to enter to ensure compliance with the applicable regulations in the face of any new FTO designation.

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