

## CLIENT ALERT:

### EXECUTIVE ORDER RE-IMPOSES U.S. SECONDARY SANCTIONS AGAINST IRAN

August 14, 2018

#### **Introduction**

On May 8, 2018 President Trump announced that the United States was withdrawing from the Joint Comprehensive Plan of Action (“JCPOA”) and would re-impose the U.S. secondary sanctions against Iran which had been suspended upon the commencement of the JCPOA. On August 6, 2018 President Trump issued Executive Order 13846 which re-imposes the secondary sanctions. However, for certain categories of transactions, including those relating to Iranian petroleum and petroleum products, a previously established wind-down period remains in effect until November 4, 2018. To view Executive Order 13846, click [here](#). To view FAQs issued by the Office of Foreign Asset Control (“OFAC”) regarding the Executive Order, click [here](#).

#### **Background**

On January 16, 2016, Implementation Day under the JCPOA, the U.S. statutory secondary sanctions against Iran were not completely terminated. Rather, those statutory sanctions were waived for successive six-month periods. At the same time, various Executive Orders which included sanctions were revoked. On May 8, 2018, when the U.S. withdrew from the JCPOA, the State Department revoked the statutory waivers which had implemented the JCPOA and, at the same time, issued the necessary statutory sanctions waivers to permit the winding down of Iranian transactions which had been commenced before May 8. At that point in time, the prior Executive Orders which contained sanctions were not re-imposed. However, as of August 7, 2018 those prior Executive Orders are back in effect. Except for the one wind-down period which expires on November 4, 2018, the U.S. secondary sanctions against Iran have now returned to their pre-JCPOA status, with some expansion of the sanctions. FAQ 601 details the expanded scope of the sanctions.

#### **Executive Order 13846**

The purpose of this Executive Order is to re-impose all the U.S. secondary sanctions against Iran which were lifted when the JCPOA was implemented in January 2016. The stated goal of the re-imposition of secondary sanctions is to apply “financial pressure on the Iranian regime in pursuit of a comprehensive and lasting solution to the full range of threats posed by Iran....” Toward that end, the Executive Order puts the previously lifted secondary sanctions back in place.

## Section 1

This section calls for the blocking of all property and interests in property that are in the United States, or that hereafter come within the United States, or which are in the possession and control of any U.S. persons, of any person who:

- (i) On or after August 7, 2018 assists in the purchase or acquisition of U.S. bank notes or precious metals by the Government of Iran.
- (ii) On or after November 5, 2018 materially assists, or provides goods or services in support of, the National Iranian Oil Company (“NIOC”), Naftiran Intertrade Company (“NICO”), or the Central Bank of Iran.
- (iii) On or after November 5, 2018 materially assists, or provides goods or services in support of:
  - (A) Any Iranian person on the U.S. Specially Designated Nationals List (“SDN List”), or
  - (B) Any person whose property is blocked under this Executive Order or under Executive Order 13599.
- (iv) Is part of the energy, shipping or shipbuilding sectors or Iran, operates a port in Iran, or knowingly provides significant financial, material, technological or other support to, or goods and services in support of, a person determined under Section 1244(c)(2)(B) of the Iran Freedom and Counter-proliferation Act (“IFCA”) to be part of the energy, shipping and shipbuilding sectors of Iran, to operate a port in Iran or to an Iranian person on the U.S. SDN List.

## Section 2

This section provides for sanctions against foreign financial institutions who knowingly conduct or facilitate a significant financial transaction:

- (i) On or after August 7, 2018 for significant goods or services used in connection with the Iranian automotive sector;
- (ii) On or after November 5, 2018, on behalf of any Iranian person on the SDN List, or any person whose property is blocked under this Executive Order or under Executive Order 13599,
- (iii) On or after November 5, 2018 with NIOC or NICO, except for sales to those entities of refined petroleum products with a fair market value of less than \$1,000,000, or an aggregate value of less than \$5,000,000 over a 12 month period.
- (iv) On or after November 5, 2018 for the purchase, sale, acquisition, transport or marketing of petroleum, petroleum products or petrochemical products from Iran.

The sanctions relating to financial transactions involving petroleum and petroleum products will only apply if the President determines that there is a sufficient supply of such commodities from countries other than Iran to permit a significant reduction in the amount of petroleum and petroleum products purchased from Iran.

This section shall not apply to any transactions for the provision of agricultural commodities, food, medicine or medical devices to Iran. This section will also not apply to a to a significant financial transaction by a foreign financial institution for the sale, supply or transfer to or from Iran of natural gas only if the financial transaction is solely for trade between the country with primary jurisdiction over the foreign financial institution and Iran, and any funds owed to Iran as a result of such trade are credited to an account located in the country with primary jurisdiction over the foreign financial institution.

If a foreign financial institution is determined to have engaged in sanctionable activity contrary to this section, the Secretary of the Treasury may prohibit the opening of a correspondent account or a payable-through account in the United States by that institution, or may impose strict conditions on maintaining such an account

### Section 3

A variety of sanctions, including freezing a person out of the U.S. financial system, may be imposed on any person who:

- (i) On or after August 7, 2018 knowingly engages in a significant transaction for the sale, supply or transfer to Iran of significant goods or services used in connection with the automotive sector of Iran;
- (ii) On or after November 5, 2018, knowingly engages in a significant transaction for the purchase, acquisition, sale, transport or marketing of petroleum, petroleum products or petrochemical products from Iran;
- (iii) Is a successor entity to an entity which is engaged in the activities described in (i) or (ii) above, owns or controls an entity which is engaged in the activities described in (i) or (ii) above, or is owned or controlled by an entity which is engaged in the activities described in (i) or (ii) above.

Once again, the sanctions relating to petroleum and petroleum products will only apply if the President determines that there is a sufficient supply of such commodities from countries other than Iran to permit a significant reduction in the volume of petroleum and petroleum products purchased from Iran.

Sections 4 and 5 of the Executive Order set forth the “menu-based” sanctions which may be imposed against persons who engage in sanctionable activity as described in Section 3.

Section 6 provides for the imposition of sanctions against a foreign financial institution that has conducted or facilitated a significant transaction related to the purchase or sale of Iranian rials or who has maintained significant accounts outside of Iran denominated in the Iranian rial.

Section 7 of the Executive Order provides for sanctions against any person who has diverted goods, including agricultural commodities, food, medicine and medical devices which are intended for the people of Iran, any person who has engaged in activities related to human rights abuses against the people of Iran, or any person who has engaged in activities related to censorship in Iran.

### Section 8

This is section of the Executive Order re-confirms the revocation by OFAC of General License H, which permitted foreign entities owned or controlled by U.S. persons to engage in Iran-related activities which are prohibited to U.S. persons. OFAC revoked General License H on June 27, 2018 and at the same time issued a wind-down general license that authorizes, through November 4, 2018, the wind-down of activities involving Iran that were previously authorized by General License H. Section 8 of the Executive Order confirms that no foreign entity

owned or controlled by a U.S. person can engage directly or indirectly in any Iran-related transaction which would be prohibited if the transaction were engaged in by a U.S. person.

Note that penalties for violations of this section may be assessed against the U.S. person who owns or controls the foreign entity that engaged in the prohibited transaction.

## Section 9

Section 9 provides that Executive Order 13846 revokes and supersedes Executive Orders 13628 and 13716. Most of the provisions of Executive Order 13628 are repeated and included in Executive Order 13846. Executive Order 13716 was issued to implement the JCPOA and revoked prior Executive Orders 13574, 13590, 13622 and 13645. Those Executive Orders have now been restored.

### **The Wind-down Periods**

Two separate wind-down periods were established on May 8, 2018 for the winding-down of activities undertaken under the JCPOA sanctions relief, one for 90 days and the other for 180 days.

The 90 day wind-down period expired on August 6, 2018 and, as stated in FAQ 606, the following activities became sanctionable from August 7 onward:

- The purchase or acquisition of U.S. dollar banknotes by the Government of Iran;
- Iran's trade in gold or precious metals;
- The direct or indirect sale, supply, or transfer to or from Iran of graphite, raw, or semi-finished metals such as aluminum and steel, coal, and software for integrating industrial processes (see Section 1245 of IFCA);
- Significant transactions related to the purchase or sale of Iranian rials, or the maintenance of significant funds or accounts outside the territory of Iran denominated in the Iranian rial;
- The purchase, subscription to, or facilitation of the issuance of Iranian sovereign debt; and
- Transactions with Iran's automotive sector.

Note that Section 1245(a)(1) does not make the sale, supply or transfer to or from Iran of the materials listed in Section 1245(d) (graphite, raw or semi-finished metals, etc.) sanctionable under all circumstances. Instead, those activities are sanctionable if:

- Iran is using any materials as a medium for barter, swap or any other exchange transaction; or
- Iran is listing any of the materials as assets of the Government of Iran for purposes of the national balance sheet; or
- The material is to be used in connection with the energy, shipping, or shipbuilding sectors of Iran or any sector of the Iranian economy controlled directly or indirectly by Iran's Revolutionary Guard Corps; or
- The material is sold, supplied or transferred to or from an Iranian person on the SDN List; or
- The material is to be used in the nuclear, military or ballistic missile programs of Iran.

In recent conversations OFAC has expressed strong reservations regarding the transparency of Iranian transactions, questioning whether it is possible to be confident in the identity of the suppliers, shippers, receivers or end-users of cargoes shipped to and from Iran. As a consequence, OFAC has suggested that non-U.S. entities engaged in the shipment of IFCA Section 1245 materials to or from Iran should use “extreme caution” to ensure that they are not engaged in a sanctionable activity

After 180 days, on November 4, 2018, sanctions will be re-imposed on:

- Iran’s port operators, and shipping and shipbuilding sectors, including on the Islamic Republic of Iran Shipping Lines (IRISL), South Shipping Line Iran, or their affiliates;
- Petroleum-related transactions with, among others, the National Iranian Oil Company (NIOC), Naftiran Intertrade Company (NICO), and National Iranian Tanker Company (NITC), including the purchase of petroleum, petroleum products, or petrochemical products from Iran;
- Transactions by foreign financial institutions with the Central Bank of Iran and designated Iranian financial institutions under Section 1245 of the National Defense Authorization Act for Fiscal Year 2012 (NDAA);
- The provision of specialized financial messaging services to the Central Bank of Iran and Iranian financial institutions described in Section 104(c)(2)(E)(ii) of the Comprehensive Iran Sanctions and Divestment Act of 2010 (CISADA);
- The provision of underwriting services, insurance, or reinsurance; and
- Iran’s energy sector.

### **Dealings with Iranian Port Operators**

A question which frequently arises is whether, after November 4, all dealings with Iranian Port operators will be sanctionable. On August 6, 2018 OFAC issued a new FAQ, FAQ 315, dealing with this issue. After cautioning that there should be no dealings with a port operator which has been designated to the U.S. SDN List, the FAQ then reads in relevant part:

*However, to the extent that a shipping company transacts with port operators in Iran that have been identified as such under IFCA but not otherwise designated, and as long as such payments are limited strictly to routine fees including port dues, docking fees, or cargo handling fees, paid for the loading and unloading of non-sanctioned goods at Iranian ports, we anticipate that such transactions would not be considered significant transactions for the purposes of IFCA. Non-routine and/or large payments or fees that materially exceed standard industry rates could expose a person to sanctions. Furthermore, providing any port operator in Iran with any significant financial, material, technological, or other support could expose a person to sanctions. [08-06-18]*

Therefore, it appears that routine payments to a port operator relating to the loading or discharging of non-sanctioned cargoes in Iran will not be a sanctionable activity.

## EU Blocking Statute

In an effort to counteract the re-imposition of U.S. secondary sanctions, the EU has updated what is known as a “Blocking Statute,” which was first enacted in 1996 to protect European operators from the U.S. sanctions against Cuba, Libya and Iran. The Blocking Statute, which applies to all EU operators, has been updated to include all U.S. sanctions against Iran from 1996 to the present. The Blocking Statute attempts to protect EU operators from the effects of the U.S. secondary sanctions by providing the following relief:

- It nullifies in the EU the effect of any foreign decision, including court rulings and arbitration awards, based on the sanctions listed under the blocking statute.
- It allows EU operators to recover damages caused by the application of the sanctions from “the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary.”
- It allows EU operators to seek an authorization to comply with the sanctions, if failing to do so would cause serious harm to their interests.

The Blocking Statute does not require EU operators to deal with Iran, but rather seeks to create an environment in which an operator can make a free decision as to whether to trade with Iran or not, without being pressured by the U.S. secondary sanctions. It remains to be seen whether the Blocking Statute passed by the EU, effective as of August 7, 2018, will counteract the U.S. secondary sanctions. There does not appear to be any way for the blocking statute to protect EU operators from the ultimate U.S. penalties, that is, a blocking of the operator’s property in the U.S. and loss of access to the U.S. financial system. That being the case, the extent to which the Blocking Statute will counteract the U.S. secondary sanctions is questionable.

The EU Blocking Statute, Regulation 2018/1100, with an attached Annex of affected legislation, can be viewed by clicking [here](#). A Guidance Note issued by the EU with respect to the updated Blocking Statute can be viewed [here](#).

## Summary

With the re-imposition of the U.S. secondary sanctions against Iran, companies that had resumed trading with Iran must now recalibrate and assess whether their trading activities are now or will be sanctionable after November 4, 2018. The stated goal of the re-imposed sanctions is to pressure Iran back to the negotiating table and to achieve a comprehensive agreement addressing not only Iran’s nuclear program but also its ballistic missile program and its activities in support of other regimes and terrorist groups. Since the U.S. has not been joined by the EU, Russia and China in re-imposing the pre-JCPOA sanctions, it seems likely that in order to exert maximum pressure OFAC will apply a strict interpretation of the sanctions and will enforce them with renewed vigor.

Any parties trading with Iran should now exercise caution and carefully review the status of the U.S. secondary sanctions against Iran to determine whether their activities may expose them to penalties.

*Disclaimer: This Client Alert provides only a general summary of Executive Order 13846 of August 6, 2018 and the re-imposition of U.S. secondary sanctions against Iran and is not intended to constitute comprehensive legal advice. Specific legal advice should be taken with respect to each individual inquiry regarding the designations. For additional clarification, please feel free to contact Bill Juska ([juska@freehill.com](mailto:juska@freehill.com)), Gina Venezia ([venezia@freehill.com](mailto:venezia@freehill.com)) or Bill Pallas ([pallas@freehill.com](mailto:pallas@freehill.com)).*

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