CLIENT ALERT

Developments in U.S. Policy Toward Iran: New Executive Order Targets the Iron, Steel, Aluminum, and Copper Sectors of Iran

MAY 10, 2019

In response to the Government of Iran's notice of intent to partially withdraw from its obligations under the Joint Comprehensive Plan of Action ("JCPOA"), on May 8, 2019, the President issued Executive Order of May 8, 2019, entitled "Imposing Sanctions with Respect to the Iron, Steel, Aluminum, and Copper Sectors of Iran" (the "E.O."). The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") also issued six new Frequently Asked Questions ("FAQs") addressing the new Executive Order. The E.O. went into effect on May 8, 2019, although OFAC also announced that there will be a 90-day wind-down period before sanctions are imposed. The Order specifically targets non-U.S. entities engaged in metals trade with Iran – even where there is no U.S. touch point; U.S. businesses have long been prohibited from direct or indirect dealings with Iran or Iranian origin goods, services, or technology.

BACKGROUND

OFAC's announcement comes exactly one year after the United States announced its withdrawal from the Joint Comprehensive Plan of Action ("JCPOA"), which led to the snap-back of secondary sanctions related to Iran. For more information on the U.S. withdrawal from the JCPOA, please see our May 9, 2018 briefing. So-called "secondary" sanctions are sanctions that may be imposed on non-U.S. persons that engage in activity where there is no U.S. nexus (*i.e.*, no U.S. dollar clearing services, no U.S. origin goods, services, or technology) but where the United States deems the activity contrary to its interests. These reinstituted secondary sanctions included sanctions on the direct or indirect sale, supply, or transfer to or from Iran of graphite and raw or semi-finished metals such as aluminum and steel, which snapped back on August 6, 2018. These secondary sanctions stem from Section 1245 of the Iran Freedom and Counter-Proliferation Act of 2012 (the "IFCA"), but were waived under the JCPOA. In addition, aside from the JCPOA waiver, they had not been fully implemented because certain assessments regarding the specific types of metals to be covered had not been finalized.

Prior to the E.O., the U.S. Department of State, in consultation with the Department of the Treasury, had determined, under Section 1245(e) of the IFCA, that "certain types" of aluminum, copper, and steel (but not iron) were used in connection with the nuclear, military, or ballistic missile programs of Iran, although the Department did not specify what those "certain types" were. Under the IFCA, persons (*i.e.*, an individual or an entity) who directly or indirectly sold, supplied, or transferred to or from Iran certain types of aluminum, copper, and steel would be subject to five or more of the menu-based sanctions described in section 6(a) of the Iran Sanctions Act of 1996. However, because the "certain types" of materials had not yet been defined, aluminum, copper, and steel transactions that would otherwise fall under the IFCA were, in effect, not subject to secondary sanctions.

As confirmed by OFAC guidance in FAQ no. 669, the E.O. expands beyond Section 1245 of the IFCA's existing sanctions on metals.

IMPACT OF THE E.O. ON INDIVIDUALS, BUSINESSES, AND FOREIGN FINANCIAL INSTITUTIONS

Under the E.O., persons involved in the steel, copper, iron, or aluminum sectors of Iran, and those who take part in a "significant transaction"[1] involving those sectors, will be subject to blocking sanctions. In addition, foreign financial institutions ("FFIs") will be subject to correspondent and payable-through account sanctions if it is determined that the FFI knowingly conducted or facilitated any significant financial transaction relating to Iran's steel, copper, iron, or aluminum sectors. Correspondent and payable-through account sanctions prohibit or severely restrict U.S. banks from opening or maintaining U.S. accounts for FFIs.

Specifically, section 1 of the E.O. authorizes blocking sanctions on any person determined:

i. to be operating in the iron, steel, aluminum, or copper sector of Iran, or to be a person that owns, controls, or operates an entity that is part of the iron, steel, aluminum, or copper sector of Iran;

ii. to have knowingly engaged, on or after May 8, 2019, in a significant transaction for the sale, supply, or transfer to Iran of significant goods or services used in connection with the iron, steel, aluminum, or copper sectors of Iran;

iii. to have knowingly engaged, on or after May 8, 2019, in a significant transaction for the purchase, acquisition, sale, transport, or marketing of iron, iron products, aluminum, aluminum products, steel, steel products, copper, or copper products from Iran;

iv. to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, any person whose property and interests in property are blocked pursuant to section 1; or

v. to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to section 1.

These prohibitions of section 1 include:

a. the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked under (i)–(v), above; and

b. the receipt of any contribution or provision of funds, goods, or services from any such person.

Section 2 of the E.O. of May 8, 2019, authorizes correspondent and payable-through account sanctions on FFIs determined to have knowingly conducted or facilitated any significant financial transaction:

i. for the sale, supply, or transfer to Iran of significant goods or services used in connection with the iron, steel, aluminum, or copper sectors of Iran;

ii. for the purchase, acquisition, sale, transport, or marketing of iron, iron products, aluminum, aluminum products, steel, steel products, copper, or copper products from Iran; or

iii. for or on behalf of any person whose property and interests in property are blocked pursuant to the order.

EXCEPTIONS TO THE E.O.

Under Section 7, the sanctions authorized under the E.O. do not apply to transactions for the conduct of the official business of the U.S. Government or the United Nations (including its specialized agencies, programs, funds, and related organizations) by employees, grantees, or contractors thereof.

WIND-DOWN PERIOD

While not included in the E.O., OFAC also announced that there would be a 90-day wind-down period, beginning May 8, 2019, for persons engaged in transactions that could be sanctioned under the E.O. OFAC's FAQ no. 668 advises such persons to take the necessary steps to wind down transactions by the end of the 90-day period (*i.e.*, August 6, 2019) to avoid exposure to sanctions. The FAQ also notes that the wind-down period does not allow persons to enter into *new* business that would be subject to sanctions under the E.O. Such activity could be sanctioned even during the wind-down period.

RECOMMENDATIONS

U.S. businesses were already subject to prohibitions on the activity covered by the E.O. Non-U.S. businesses should carefully review their activities that involve 1) Iran's aluminum, copper, iron, or steel sectors and 2) the purchase, acquisition, sale, transport, or marketing of aluminum, aluminum products, copper, copper products, iron, iron products, steel, or steel products to or from Iran, to determine which activities must be halted and how quickly pre-existing activities and transactions must wind down.

If you have questions as you address these complex matters, we recommend seeking the guidance of counsel. Please contact any of the attorneys listed below or your usual Winston & Strawn LLP contact.

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[1] OFAC stated in FAQ no. 671 that it anticipates interpreting "significant" in accordance with 15 C.F.R. § 561.404, which considers a number of factors when determining whether a transaction is significant, such as the size, number, and frequency of the transactions; the nature of the transactions; the level of awareness of management and whether the transactions are part of a pattern of conduct; the impact of the transactions on statutory objectives; whether the transactions involve deceptive practices; and other relevant factors that the Secretary of the Treasury deems relevant. *See* U.S. Dep't of Treas., OFAC, OFAC FAQs: Iran Sanctions no. 289, *available at* https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx#289.

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