CLIENT ALERT

OFAC Targets Iran's Financial Sector and Designates Additional Iranian Banks

October 28, 2020

On October 8, 2020, the Treasury Department's Office of Foreign Assets Control (OFAC) took a long-rumored final step in curtailing virtually all non-humanitarian financial flows with Iran, identifying the Iranian "financial sector" as a target for potential "secondary" sanctions designation, and simultaneously designating eighteen Iranian financial institutions, many of which had been the only remaining conduits by which funds flowed to or from Iran. OFAC designated sixteen banks for operating in the Iranian financial sector under the authority of Executive Order (EO) 13902, one bank for being owned or controlled by a bank designated under EO 13902, and one bank that serves Iran's armed forces under the non-proliferation authorities of EO 13382 (EO 13382). Following a 45-day wind-down period, the sanctions become effective on November 22, 2020.

The October 8 Designations

The October 8 actions relied on a pre-existing authority, EO 13902, which the President issued on January 10, 2020. EO 13902 was intended, in part, to "deny the Iranian government revenues, including revenues derived from the export of products from key sectors of Iran's economy, that may be used to fund and support its nuclear program, missile development, terrorism and terrorist proxy networks, and malign regional influence." The EO authorized sanctions on persons operating in the "construction, mining, manufacturing, or textiles sectors of the Iranian economy," or in any other sector of the Iranian economy identified by the Secretary of the Treasury in consultation with the Secretary of State. The secondary sanctions in EO 13902 authorized OFAC to designate non-U.S. persons for operating in or knowingly engaging in a "significant" transaction for the sale or supply to or from Iran of "significant" goods or services "in connection with" the identified sectors in Iran.

On October 8, the Treasury Secretary in consultation with the Secretary of State, utilized this open-ended authority, to add the "financial sector" to the above list. That identification authorizes OFAC to designate persons for operating in Iran's financial sector, and OFAC exercised this authority by designating the sixteen named Iranian banks along with one bank – Islamic Regional Cooperation Bank – for being owned or controlled by the now-designated Eghtesad Novin Bank.

Hekmat Iranian Bank was designated under a separate, longstanding authority under EO 13382 to impose sanctions on persons involved in the proliferation of weapons of mass destruction. Earlier this year, Hekmat merged with Bank Sepah, which was designated under EO 13382 in 2018 for providing financial services to Iran's ministry of defense and armed forces. Accordingly, Hekmat was designated for being owned or controlled by Bank Sepah.

Along with the designations, OFAC also issued General License L (GL L), and six Frequently Asked Questions (FAQs). GL L provides that exemptions and authorizations in the Iranian Transactions and Sanctions Regulations (ITSR) (31 CFR Part 560), including general and specific licenses issued pursuant to the ITSR, apply to transactions prohibited by EO 13902. This was necessary because EO 13902 has not been codified within the ITSR. GL L does not authorize transactions prohibited under any other OFAC sanctions authorities.

Treasury made a point to state several times in the press release that these designations are directed at the Government of Iran not the Iranian people, and authorized humanitarian trade can continue. To this point, GL L emphasizes that EO 13902 does not prohibit any transactions "for the provision (including any sale) of agricultural commodities, food, medicine, or medical devices to Iran."

FAQ 846 clarifies that the October 8 designations per EO 13902 do not affect waivers issued by the Department of State and exceptions set forth in Iranian Freedom and Counter-proliferation Act of 2012 (IFCA) *only for the duration of the 45-day wind-down period*. FAQ 846 explains that the State Department is currently assessing whether these waivers will be modified "prior to the close of the wind-down period to account for actions taken pursuant to EO 13902." OFAC directs any questions on this issue to the State Department for guidance.

Legal Implications

OFAC's action will have immediate legal impacts on U.S. and non-U.S. activity with Iran, including likely restricting even permissible trade as U.S. and non-U.S. parties further limit Iran-related payments:

- **Limited Legal Effect on U.S. Persons**: The designations should have a limited legal effect on U.S. Persons. Specifically, U.S. Persons were generally prohibited from conducting virtually all activity with Iranian financial institutions even prior to these designations. Further, pursuant to GL L, OFAC has clarified that to the extent activity was previously authorized under the ITSR, it remains authorized with these newly designated banks.
- **Designation Risk for Foreign Financial Institutions (FFIs)**: The designations do, however, increase risk for FFIs interacting with these banks. Specifically, prior to the designations, FFIs would not have been subject to sanctions risk simply for transacting with the Iranian financial sector or these newly designated banks, though of course they could have faced such designation risk for other aspects of Iran-related activity (*e.g.*, the payment being processed was ultimately for the benefit of an SDN or a previously identified sector). Now, pursuant to EO 13902, FFIs can be designated for having "knowingly conducted or facilitated any significant financial transaction" (1) for the sale, supply, or transfer to or from Iran of significant goods or services used in connection with Iran's financial sector; or (2) for or on behalf of any of the newly designated Iranian banks (or any other person designated pursuant to EO 13902). FFIs considering engaging in activity with these banks will therefore need to consider what activity might be considered "significant" by OFAC. OFAC did provide guidance that the following activities would not be considered "significant":
    1. **Activity within 45 Day Wind-down**: First, FAQ 845 provides a 45-day wind down period for non-U.S. persons engaged in previously non-sanctioned transactions with the designated Iranian banks to conclude such transactions without risking sanctions exposure.
    2. **Activity that Would Be Permissible for U.S. Persons**: Second, in FAQ 847, OFAC explains that it "would not generally view transactions or activities by non-U.S. persons to be sanctionable if they are consistent with activities permissible by U.S. persons." OFAC continues to emphasize that U.S. persons are authorized under GL L to undertake any activity authorized by the ITSR and also that EO 13902 does not prohibit any person to conduct or facilitate "a transaction for the provision (including any sale) of agricultural commodities, food, medicine, or medical devices to Iran."
    3. **Humanitarian Related Activity**:Third, OFAC notes that, consistent with prior guidance on EO 13902, "foreign financial institutions and other non-U.S. persons would not generally risk exposure to U.S. sanctions for engaging

in transactions for the purpose of supporting the sale, supply, or transfer of certain goods and services to Iran or for manufacturing of such goods in Iran … to ensure the protection of life, health, and safety," so long as such goods were for use in Iran and not for export. Covered items include "products used for sanitation, hygiene, medical care, medical safety, manufacturing safety, including soap, hand sanitizer, ventilators, respirators, personal hygiene products, diapers, infant and childcare items, personal protective equipment, manufacturing safety systems, safety devices, alarm systems, and ventilation systems."

4. **Activity Deemed Not "Significant"**: Finally, OFAC states that it "continues to analyze whether select types of transactions and activities may, nonetheless, be non-significant and, thus, not sanctionable even after the end of the wind-down period," and indicates that it expects to issue additional guidance on "the scope of transactions and activity by non-U.S. persons" that will be sanctionable following the wind-down period, as well as definitions relating to the financial sector of the Iranian economy and goods or services used in connection with the financial sector of the Iranian economy, for purposes of evaluating sanctions risk under EO 13902.

Practical Implications

The identification of Iranian's financial sector and the October 8 designation of 18 major Iranian financial institutions is in line with this Administration's use of sanctions as a national security tool to financially isolate the Iranian government. Although U.S. financial institutions have long avoided business with any Iranian bank, the new designations appear intended to deter non-U.S. financial institutions from doing business with the designated Iranian banks. Additional guidance from OFAC should shed light on how it intends to enforce the secondary sanctions provisions in EO 13902, but overall it remains to be seen how European banks in particular respond to this step, as the European Union, Germany, France, and the United Kingdom still participate in the Joint Comprehensive Plan of Action with Iran regarding its nuclear program.

Separate, while Treasury repeatedly emphasized that these actions should not interfere with humanitarian trade, it is unclear if the limitation in EO 13902 and the terms of GL L provide sufficient comfort for people to continue such authorized transactions to the extent they involve the designated banks. Banks seeing any of the designated Iranian financial institutions in transaction information or payment messages may decide the business is not worth the risk of a secondary sanctions designation and thus reject transactions that may be covered by EO 13902's humanitarian exemptions.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Caroline E. Brown
Partner – Washington, D.C.
Phone: +1.202.624.2509
Email: cbrown@crowell.com

Carlton Greene
Partner – Washington, D.C.
Phone: +1.202.624.2818
Email: cgreene@crowell.com

Jeffrey L. Snyder
Partner – Washington, D.C.
Phone: +1.202.624.2790

Email: jsnyder@crowell.com

David (Dj) Wolff
Partner; Attorney at Law – Washington, D.C., London
Phone: +1.202.624.2548, +44.20.7413.1368
Email: djwolff@crowell.com

Nicole Sayegh Succar
Counsel – New York
Phone: +1.212.803.4031
Email: nsuccar@crowell.com

Chandler S. Leonard
Associate – Washington, D.C.
Phone: +1.202.624.2905
Email: cleonard@crowell.com