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Welcome, 2016

What does 2016 hold for export controls and sanctions? *WorldECR* invited experts from around the globe to gaze into the crystal ball and share their predictions. We kick off with the U.S.

As in Iran, 2016 is a major election year in the United States – and so far, the run-up indicates that it'll be a picaresque affair. The incumbent entered office on a wave of international good will, welcomed near universally as a sign that the United States was capable of delivering on two centuries of rhetoric around freedom, equality and the rights of man.

As at writing time, it's looking unlikely that the next president elect will have the world behind him or her with quite the same gusto. But he or she will have a host of serious international issues – crises, indeed – to address. With the proviso that the world in 2015 has only lived up to its reputation for springing surprises upon itself, a number of themes at least lend themselves to speculation – indeed educated guessing, which we undertake with the assistance of some experienced observers of export control and sanctions law and policy.

Export control reform

As Brian Nilsson has outlined in this

issue's Talking Export Controls, the departments of State and Commerce have a full programme ahead of them in 2016 – their priority being to complete the remaining revisions to the USML and harmonising key definitions in the ITAR and EAR.

Observers say they expect the respective agencies to continue on these projects 'at full steam', aware of the need to have established the bedrock of reform before the initiation of a new administration:

'We think we'll see a really big push on export control reform,' says Hogan Lovells' Stephen Propst. 'There are some major challenges with the proposed rule that seeks to harmonise key definitions. It has already received over 900 comments. Clearly, there are major implications here for our clients.'

Would a new administration complete the task? 'My sense is that a Democrat administration would follow through, and that the Republicans support the idea of export control reform, but would probably want to conduct a policy review before continuing.' Ultimately, he suggests,

the process is 'so embedded' that it will be carried by its own momentum.

Iran

Clearly, President Obama has put to the top of his agenda a programme of revising the traditional U.S. stance on foreign policy, especially as regards Cuba and Iran.

Iran, of course, arguably represents the most seismic shift in U.S. foreign policy in over a decade: no longer a part of the 'Axis of Evil', but a potential partner against greater foes.

Les Carnegie of Latham & Watkins has no doubt that the 'sanctions landscape' will be keeping his team as busy in 2016 as it did in 2015: 'I suspect that we'll see Implementation Day – the day on which the U.S. repeals most of its secondary sanctions under the JCPOA – likely by the end of the first quarter of 2016. There's a lot of curiosity about a contemplated authorisation that would allow foreign subsidiaries of U.S. companies to engage in certain non-sensitive trade with Iran, provided there is no U.S. support, approval or other forms of



facilitation. Such an authorisation would effectively turn back the clock to pre-fall 2012'

Post-Implementation Day, he suspects that Congress will be placing 'a lot of pressure on the Administration,' to maintain a hawkish stance on Iran's compliance with the JCPOA, and OFAC will continue

'This is definitely a part of the president's foreign policy legacy,' says Peters. 'He's trying to make changes that are irreversible, to progress them to a place where they cannot be undone.' But she adds: 'A lot depends on Congress, and government to government negotiations. And there are difficult issues, at stake, such as

a reputation for sometimes going harder and faster than its federal colleagues, the NYDFS has made some major cuts in 2015, by way of penalties paid by Deutsche Bank (\$258 million) and Credit Agricole (\$787 million) for alleged sanctions violations. Early in 2015, Superintendent Benjamin Laws left the NYDFS to enter private consultancy, and was succeeded by his deputy, Anthony Albanese.

Albanese has now announced that he also is quitting the top job while there are rumours that New York governor Andrew Cuomo had been lobbied by banks to 'rein in' Albanese, who has shown no less zeal in the post than his predecessor.

A successor has yet to be found, but whoever that will be will have custody of a new rule that may yet cause sleepless nights for chief compliance officers ('CCOs') across the banking community:

Under the terms of the proposed Banking Division Transaction Monitoring And Filtering Program Requirements And Certifications, CCOs would be required to certify that their institutions maintain robust anti-terrorist financing and anti-money laundering programmes – facing potential personal criminal consequences if false or misleading certifications are provided.

If the proposed rule becomes a reality, says Beth Peters, 'This will be



'vigorously to enforce the U.S. primary sanctions programme.'

Given that all the Republican candidates have as good as vowed to reverse the Iran deal in the event that they win office, business is understandably circumspect about venturing too far into this new territory. But DJ Wolff of Crowell & Moring is sceptical: 'By the time that we have a new government, we're going to be well past Implementation Day, and there's going to be substantial engagement with Iran. Yes, there's likely to be quite a lot of public noise. But will they actually reverse it?' Either way, he says, the uncertainty could have a chilling effect in some quarters.

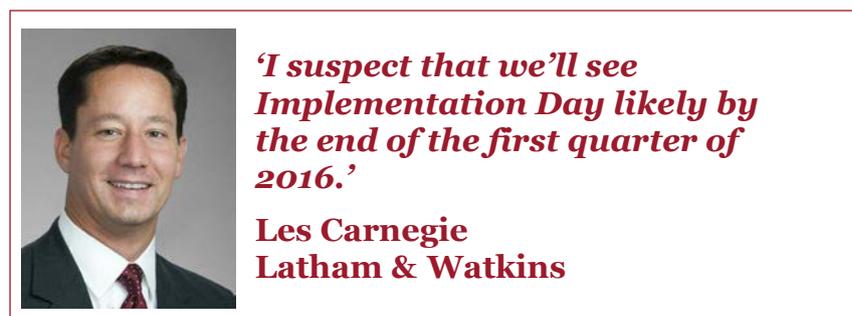
Cuba

Vis a vis Cuba, DJ Wolff wonders whether, given that the topic is such a 'hot button,' the Administration will shy away from pushing for a further easing of the relationship with its tiny former nemesis in its remaining months in office: 'I'd be surprised if we see a great deal more movement on Cuba. Possibly the embargo is as relaxed as it's ever going to be [under the current presidency]. Already, you've got a lot of bills out there that would pull back [from further relaxation] and many of those have significant Congressional support. The government has got to be asking: "Is it worth the hit?"'

Stephen Propst and Beth Peters at Hogan Lovells note that Cuba has become, in 2015, a 'very hot topic,' on which they receive questions daily.

property claims, human rights, and enforcement. The embargo might stick around for a couple of years. But we will see a push for change [in the remaining months of the presidency].'

Latham & Watkins' Les Carnegie also points out that the effectiveness of U.S. sanctions relief depends in large part on the response of major financial institutions: 'With respect to Iran, if major non-U.S. financial institutions choose not to be involved in non-U.S. trade with Iran because of enforcement fears, Iran will not realise the promises of the nuclear agreement. To some



extent, we're starting to see that with the U.S. sanctions relief relating to Cuba. The U.S. sanctions now permit banks to allow U.S. and non-U.S. travellers to use U.S.-issued debit and credit cards in Cuba, but with one small regional bank exception, no U.S. banks have actually yet "flipped the switch," he points out.

New York Department of Financial Services

The 'bete noire' of U.S. regulators, with

big. It requires certification by CCO of a reasonable risk-based compliance programme – including a screening programme (even OFAC doesn't require this). And it also demonstrates a trend toward increasing overlap with AML compliance.'

Cybersanctions

2016 may also see a whole new chapter opening in the sanctions space – in the event that the president makes designations under his executive order

of 1 April 2015, 'Blocking The Property Of Certain Persons Engaging In Significant Malicious Cyber-Enabled Activities.'

'So far we've seen no designations under this new executive order,' says Les Carnegie, 'but it could be very significant once we do. It's an interesting use of the sanctions framework and mechanics to try and combat network intrusions to secure a competitive advantage or private financial gain. This new executive order also shows the importance economic sanctions have taken on as effective foreign policy tool.'

Stephen Propst at Hogan Lovells says that companies handling controlled data should be watching the arena particularly closely: 'So far what we've seen is some high-profile cases in the commercial sector. But what I think we're going to see soon is a greater focus on companies that have export controlled-data. For example, we've already seen the Department of Defense ('DoD') imposing data security

increasing move to cloud computing there's potential for a perfect storm.'

There will also be, says, Propst, 'interesting questions' around how the government intends to introduce mandatory notification of cyber incidents: 'So, if you know that a hacker from China has attempted to gain ITAR data that you possess – what kind of obligation would you be under to report that?'

The 'so-called Islamic State'

In November, the UN Security Council passed Resolution 12132 which described the so-called Islamic State as an 'unprecedented threat' to international peace and security and 'called upon Member States with the requisite capacity to take "all necessary measures" to prevent and suppress its terrorist acts on territory under its control in Syria and Iraq.'

The last quarter of 2016 has seen growing international consensus as to the need to tackle ISIL, if not a commensurate unanimity as to what

Russia

The intricate dance between Russia and the United States is certainly one to watch in 2016 (for deeper analysis see the Pillsbury article below) as they navigate obstacles including the Minsk Agreement, Russia's fractious relationship with NATO member Turkey, and overlapping ambitions for Syria. But the majority of observers believe it unlikely that the U.S. will reverse the sanctions against Russia that are in place. Indeed, says DJ Wolff: 'I wouldn't be surprised if we were to see the first Russia-related enforcement action,' possibly he says, with an EU element that would 'dovetail with some interesting politics in the EU.'

In the U.S., he thinks, 'Russia sanctions are not going anywhere. There may be some concessions, but we might end up with a situation whereby the EU lifts sanctions against Russia, while the U.S. sanctions remain.' A sharp divergence that would see EU companies enjoying very much greater advantages than their U.S. counterparts.



'I'd be surprised if we see a great deal more movement on Cuba.'

**DJ Wolff
Crowell & Moring**

'officials and facilitators,' with Adam J. Szubin, Acting Under Secretary for Terrorism and Financial Intelligence at OFAC, stating that the U.S. Treasury 'remains relentless about depleting ISIL's financial strength and denying this violent terrorist group access to the international financial system [and] we will continue to hinder ISIL's ability to gain, move, and use funds, and will work closely with our partners across the U.S. government and the international community to destroy this brutal organisation.'

2016 is going to be interesting.

requirements on government contracts. University clients are also taking heed of this. Combined with the

that something should be.

Both the U.S. State Department and OFAC have also designations of ISIL

