

# The Iran Nuclear Deal in the Trump Administration and the 115<sup>th</sup> Congress

November 30, 2016

## EXECUTIVE SUMMARY

The advent of a Trump Administration and Republican control of both houses of Congress opens the door to a period of intense debate on U.S. policy toward Iran generally and sanctions relief under the Joint Comprehensive Plan of Action (“**JCPOA**”) specifically. The JCPOA entered into force on October 18, 2015, and “Implementation Day” occurred on January 16, 2016. Because the JCPOA was negotiated and adopted under executive authority, congressional review of the arrangement has been limited, and the entire structure can be reversed by a subsequent administration.

President-elect Trump harshly criticized the JCPOA during the presidential campaign,<sup>1</sup> and some of his early nominees for national security positions are also noted opponents.<sup>2</sup> Nonetheless, unilateral U.S. abrogation of the JCPOA is not a foregone conclusion. The pact is broadly popular in Europe, and a return to the pre-JCPOA multilateral sanctions regime, which relied on support from U.N. Security Council (“**UNSC**”) members China and Russia, as well as Europe, currently seems unlikely. U.S. nullification could also prompt Iran to return to at least prior levels of uranium enrichment.<sup>3</sup>

The incoming administration will review its options in both this international context and a domestic political environment in which the JCPOA is one of many polarizing issues (although more so in Congress than with the public). Although the Iran Sanctions Extension Act<sup>4</sup> appears likely to be the only new Iran-related sanctions law enacted before the end of the current Congress, a number of bills are considered to have a reasonably high chance of enactment if re-introduced in the 115<sup>th</sup> Congress. Below is a review of certain representative bills that provides a sense of the options likely to be under consideration as the new administration addresses Iran as a foreign policy and national security priority.

## BACKGROUND

As detailed in our memoranda dated [August 11, 2015](#) and [January 20, 2016](#), on July 14, 2015, the permanent members of the UNSC plus Germany (the “**P5+1**”), the High Representative of the European Union (“**EU**”) for Foreign Affairs and Security Policy, and Iran agreed on the final text of the JCPOA to provide Iran with phased sanctions relief in exchange for Iranian implementation of certain nuclear-related

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<sup>1</sup> See, e.g., [“The first Trump-Clinton presidential debate transcript, annotated”](#) (Sept. 26, 2016); Donald Trump, [Speech to the American Israel Public Affairs Committee](#) (March 21, 2016); Reuters, [“Trump says he would ‘police’ U.S.-Iran deal, not rip it up”](#) (Aug. 16, 2015).

<sup>2</sup> Trump’s choices for Director of the CIA (Rep. Mike Pompeo) and National Security Adviser (retired Lt. Gen. Michael Flynn) are both strong critics of the JCPOA. Shortly before his selection as nominee for Director of the CIA was announced, Pompeo posted on Twitter, “I look forward to rolling back this disastrous deal with the world’s largest state sponsor of terrorism.” In an interview with the New York Observer, Flynn stated that the JCPOA was a “bad deal,” and the President should not override a congressional veto opposing the deal. See New York Observer, [“Lieutenant General \(Retired\) Michael Flynn and the Iranian Nuclear Agreement”](#) (Sept. 24, 2015).

<sup>3</sup> See, e.g., International Crisis Group, [“President Trump and the Art of the Iran Nuclear Deal”](#) (Nov. 23, 2016); Asharq Al-Awsat, [“Nuclear Deal on Verge of Collapse, Iran Speaker Threatens to Build New Uranium Enrichment Plant”](#) (July 21, 2016) (quoting the head of Iran’s Atomic Energy Organization regarding the consequences of a deal violation by a party other than Iran).

<sup>4</sup> Iran Sanctions Extension Act, H.R. 6297, 114<sup>th</sup> Cong. (2016).

measures. On January 16, 2016, Implementation Day, the International Atomic Energy Agency (the “IAEA”) verified that Iran had fulfilled certain nuclear-related commitments described in the JCPOA, and the United States and EU implemented certain sanctions relief. The United States lifted its nuclear-related “secondary” sanctions on Iran (that is, sanctions aimed at non-U.S. persons that engage in certain activities related to Iran outside the United States); removed a number of Iranian and Iran-linked persons from the list of Specially Designated Nationals and Blocked Persons (the “SDN List”) and certain other sanctions lists maintained by the U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”); and issued General License H, which authorizes many transactions by U.S.-owned or controlled foreign entities relating to Iran, with certain exceptions. Stringent restrictions continue to prohibit most direct or indirect transactions by U.S. persons with Iran or the Government of Iran (“GOI”). Further, “non-nuclear” U.S. secondary sanctions (such as those targeting Iran’s ballistic missile program or human rights abuses) remain in place.

## STATUS OF JCPOA AND NATURE OF U.S. COMMITMENTS

The JCPOA is not a treaty or an executive agreement and does not carry the force of U.S. law. Rather, the JCPOA reflects a set of political commitments and diplomatic understandings entered into between the P5+1, the EU, and Iran.<sup>5</sup> The United States’ JCPOA commitments have been achieved primarily by President Obama’s issuance of an executive order<sup>6</sup> to lift or modify certain nuclear-related sanctions and OFAC’s removal of over 400 specified persons from U.S. sanctions lists. Although the JCPOA commits the “U.S. Administration, acting consistent[ly] with the respective roles of the President and the Congress” to refrain from re-introducing or re-imposing sanctions lifted or waived under the JCPOA or imposing new “nuclear-related” sanctions, the JCPOA does not – and the executive branch could not – commit Congress to pass or refrain from passing specific legislation, including new statutory sanctions.<sup>7</sup> As discussed in further detail in our [January 20, 2016 memorandum](#), U.S. sanctions relief under the JCPOA relates only to U.S. “nuclear-related” sanctions, as specified in sections 4.1-4.9 of Annex II of the JCPOA.

## PRESIDENTIAL OPTIONS

Three general courses of action are open to the next President with respect to the JCPOA:

**U.S. Withdrawal from the JCPOA:** Because the JCPOA is an arrangement reflecting reciprocal voluntary commitments, if the next administration were so inclined, it could withdraw from the JCPOA or undertake measures approximating withdrawal. For example, it could re-impose the U.S. nuclear-related sanctions that were lifted or waived on Implementation Day, or it could decline to renew the waivers whose issuance and periodic renewal effectuate certain U.S. sanctions relief under the JCPOA.<sup>8</sup> The United States could also re-designate, pursuant to other, “non-nuclear” designation authorities, persons removed from the SDN List on Implementation Day. Such measures would likely prompt accusations by

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<sup>5</sup> See, e.g., [Letter from Julia Frifield, Assistant Secretary, Legislative Affairs, U.S. Department of State, to Rep. Mike Pompeo \(R-KS\)](#) (Nov. 19, 2015).

<sup>6</sup> Executive Order 13716, “Revocation of Executive Orders 13574, 13590, 13622, and 13645 with Respect to Iran, Amendment of Executive Order 13628 with Respect to Iran, and Provision of Implementation Authorities for Aspects of Certain Statutory Sanctions” (Jan. 16, 2016).

<sup>7</sup> See JCPOA, § 26. As noted in the Iran Nuclear Agreement Review Act of 2015 (“INARA”) (discussed in our [May 29, 2015 memorandum](#)), only Congress can “permanently modify or eliminate” the sanctions that Congress imposed through legislation (referred to in INARA as “statutory sanctions”).

<sup>8</sup> See U.S. Department of the Treasury, [Guidance Relating to the Lifting of Certain U.S. Sanctions Pursuant to the Joint Comprehensive Plan of Action on Implementation Day](#) (Jan. 16, 2016), 34-37.

Iran that the United States had breached its JCPOA commitments, a referral to the JCPOA dispute-resolution mechanism and potentially the UNSC, and ultimately, the dissolution of the JCPOA.<sup>9</sup>

**Attempt to Renegotiate the JCPOA:** Against the backdrop of a threat to cease performing its JCPOA commitments in whole or in part (including as a countermeasure against alleged Iranian non-performance), the United States could seek to renegotiate the JCPOA, for example to augment the stringency and/or duration of Iran's nuclear-related commitments.<sup>10</sup> Other JCPOA participants would not be obligated under the JCPOA to accede to a U.S. request for renegotiation, and indeed, have shown no appetite for doing so. Not surprisingly, Iranian leaders have pre-emptively rejected any notion that the JCPOA could be renegotiated.<sup>11</sup>

**Augmented Enforcement of the JCPOA:** As noted above and discussed in further detail in our [August 11, 2015 memorandum](#), the JCPOA contains a dispute-resolution mechanism, and stipulates that "significant non-performance" by a JCPOA participant constitutes grounds for an aggrieved JCPOA participant to "cease performing its commitments under [the] JCPOA in whole or in part."<sup>12</sup> The Trump Administration could potentially, within the framework of the JCPOA, respond more aggressively to reports of Iranian non-compliance, for example by referring Iran to the Joint Commission charged with dispute-resolution, and/or by withholding certain sanctions relief.<sup>13</sup>

Any of these courses of action would take place amidst considerable activity in Congress on Iran-related sanctions issues, with significant majorities seeking to enhance sanctions against Iran (although no single plan has yet passed both houses of Congress).

## IRAN SANCTIONS BILLS IN CONGRESS

In 2016, lawmakers have introduced dozens of bills proposing additional sanctions on Iran or limiting the executive branch's authority to authorize certain Iran-related transactions. Although the bills that passed the House of Representatives generally target activities that are outside the scope of the JCPOA (such as Iran's ballistic missile development, sponsorship of terrorism, or human rights violations), some could contradict U.S. commitments under the JCPOA. The Obama Administration has announced its opposition to certain of these bills or its belief that they are unnecessary; the Trump Administration may, of course, take a different view.

The chart below provides a high-level summary of representative bills' key provisions, in particular in relation to the themes mentioned above.

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<sup>9</sup> If the United States were to re-impose nuclear-related sanctions on Iran in a manner not provided for in the JCPOA, Iran (or any other JCPOA participant) might refer the matter to the Joint Commission charged with reviewing and resolving allegations of JCPOA nonperformance. If dispute resolution efforts failed to produce accord, the JCPOA would permit the complaining participant to treat the unresolved issue as grounds to cease performing its commitments in whole or in part "and/or notify the UN Security Council that it believes the issue constitutes significant non-performance." See JCPOA, § 36; Annex IV.

<sup>10</sup> The President-elect has voiced his apprehension that "[t]he deal with Iran will lead to nuclear problems. All they have to do is sit back 10 years, and they don't have to do much...And they're going to end up getting nuclear." ["The first Trump-Clinton presidential debate transcript, annotated"](#) (Sept. 26, 2016).

<sup>11</sup> Associated Press, ["Iran Minister Rejects Trump Vow to Renegotiate Nuclear Deal"](#) (June 1, 2016).

<sup>12</sup> See JCPOA, § 36; Annex IV.

<sup>13</sup> See, e.g., IAEA Board Report, [Verification and Monitoring in the Islamic Republic of Iran in Light of United Nations Security Council Resolution 2231 \(2015\)](#) (Nov. 9, 2016).

Title and Sponsor	Latest Action	Key Iran-Related Provisions	Commentary and Analysis
<p><b>Iran Terror Finance Transparency Act (H.R. 3662); introduced by Rep. Steve Russell (R-OK) and 62 cosponsors</b></p>	<p>Passed House on February 2, 2016 by a vote of 246-181.</p>	<ul style="list-style-type: none"> <li>■ Would prohibit the President (and, by extension, preclude agencies to which the President has delegated his authority) from removing from the SDN List a foreign financial institution (“<b>FFI</b>”) listed in Attachment 3 or Attachment 4 to Annex II of the JCPOA (i.e., an FFI removed, or which will be removed, from the SDN List pursuant to the JCPOA) unless the President certifies that the FFI has not knowingly, directly or indirectly, facilitated a significant transaction or provided significant financial services for or on behalf of the Islamic Revolutionary Guard Corps (“<b>IRGC</b>”), a foreign terrorist organization, or a person subject to blocking sanctions in connection with Iran’s proliferation of weapons of mass destruction (“<b>WMD</b>”) or delivery systems for WMD, or Iran’s development of ballistic missiles and destabilizing types and amounts of conventional weapons (§ 2).</li> <li>■ Would prohibit the President from removing a foreign person listed in Attachment 3 or Attachment 4 to Annex II of the JCPOA unless the President certifies that the foreign person has not knowingly acted in support of terrorism and has not knowingly materially contributed to the proliferation or Iranian WMD or their means of delivery (§ 3).</li> <li>■ Would prohibit the President from removing the designation of Iran as a jurisdiction of primary money laundering concern unless the President certifies that the GOI is no longer engaged in support for terrorism, pursuit of WMD, and illicit and deceptive financial activities (§ 4).</li> </ul>	<p>The Obama Administration has stated that H.R. 3662 would prevent the United States from implementing the JCPOA by tying U.S. commitments under the deal to unrelated issues.<sup>14</sup></p>

<sup>14</sup> White House, [Statement of Administration Policy](#) (Jan. 11, 2016).

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<p><b>Iran Accountability Act of 2016 (H.R. 5631); introduced by Rep. Kevin McCarthy (R-CA)</b></p>	<p>Passed the House on July 14, 2016 by a vote of 246-179.</p>	<ul style="list-style-type: none"> <li>■ Would expand the scope of mandatory (and in some cases unwaivable) sanctions under the Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 (“<b>CISADA</b>”) to include sanctions on: (a) FFIs that engage in certain transactions (i) relating to ballistic missile capabilities of Iran (§ 204) or (ii) on behalf of persons involved in human rights abuses or that export sensitive technology to Iran (§ 404); and (b) foreign persons who provide significant financial services or material support to the IRGC and other sanctioned persons (§ 102).</li> <li>■ Would prohibit the opening of correspondent accounts or payable-through accounts by any FFI that has knowingly conducted or facilitated a significant financial transaction on behalf of an individual who has been sanctioned under Section 221(a) of the Iran Threat Reduction and Syria Human Rights Act of 2012 (§ 403).</li> </ul>	<p>The Obama Administration has stated that H.R. 5631 would undermine the United States’ ability to meet its commitments under the JCPOA, by re-imposing sanctions on individuals and entities delisted on Implementation Day and by re-imposing financial and economic secondary sanctions lifted on Implementation Day.<sup>15</sup></p>
<p><b>United States Financial System Protection Act of 2016 (H.R. 4992); introduced by Rep. Ed Royce (R-CA) and 14 Republican cosponsors</b></p>	<p>Passed House on July 14, 2016 by a vote of 246-181.</p>	<ul style="list-style-type: none"> <li>■ Would prohibit the President from issuing a license permitting an offshore U.S. dollar (“<b>USD</b>”) clearing system or the provision of USD for any offshore USD clearing system for transactions involving or for the benefit of the GOI or an Iranian person, including to process funds to or from Iran (except in connection with certain humanitarian activities) (§ 3(c)).</li> <li>■ Would prohibit the President from removing the designation of Iran as a jurisdiction of primary money laundering concern unless the President certifies that the GOI is no longer engaged in support for terrorism, pursuit of WMD, and illicit and deceptive financial activities (§ 4).</li> </ul>	<p>The Obama Administration has stated that H.R. 4992 contravenes U.S. commitments under the JCPOA by prohibiting permissible financial transactions between Iran and the international community that are wholly outside the U.S. financial system.<sup>16</sup></p>

<sup>15</sup> White House, [Statement of Administration Policy](#) (July 11, 2016).

<sup>16</sup> *Id.*

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<p><b>No U.S. Financing for Iran Act (H.R. 5711); introduced by Rep. Bill Huizenga (R-MI); co-sponsored by Rep. Brad Sherman (D-CA)</b></p>	<p>Passed the House on November 17, 2016 by a vote of 243-174.</p>	<ul style="list-style-type: none"> <li>■ Would prohibit the Secretary of the Treasury from authorizing a transaction by a U.S. financial institution in connection with the export or re-export of a commercial passenger aircraft to Iran (§ 101).</li> <li>■ Would revoke licenses the Secretary of the Treasury (or by extension, OFAC) granted in connection with the export or re-export of a commercial passenger aircraft to Iran, such as the licenses granted by OFAC pursuant to the JCPOA to Boeing and Airbus in September 2016 to sell commercial jets to Iran (§ 102).</li> </ul>	<p>Under the JCPOA, the United States committed to “[a]llow for the sale of commercial passenger aircraft and related parts and services to Iran,” including by the issuance of certain relevant licenses.<sup>17</sup></p> <p>Precluding or revoking such licenses would likely be viewed by the other parties to the JCPOA as a violation of U.S. commitments under the JCPOA.</p>
<p><b>Iran Sanctions Extension Act (H.R. 6297); introduced by Rep. Ed Royce (R-CA), Rep. Eliot Engel (D-NY), and a bipartisan group of cosponsors</b></p>	<p>Passed the House on November 15, 2016 by a vote of 419-1; expected to come before the Senate for a vote before the end of the year.<sup>18</sup></p>	<ul style="list-style-type: none"> <li>■ Would extend the Iran Sanctions Act (“ISA”), set to expire December 31, 2016, until December 31, 2026 (§ 2).</li> </ul>	<p>To date, all extensions of the ISA have been for five, not ten, years.</p> <p>Under the JCPOA, the United States committed to cease the application of certain sanctions imposed by the ISA, which is currently accomplished through the President’s waiver authority to suspend (rather than fully lift) such sanctions. Extending the ISA would not affect such waivers and therefore would not in and of itself violate the JCPOA.</p> <p>Under the JCPOA, the United States has also committed to “seek... legislative action” to terminate ISA sanctions on “<b>Transition Day</b>” (October 18, 2023, or the date on which the IAEA reports that “all nuclear material in Iran remains in peaceful activities,” whichever is earlier). Extending the ISA past</p>

<sup>17</sup> See JCPOA, Annex II, § 5.1.1.

<sup>18</sup> See The Hill, “[McConnell: Senate Will Extend Iran Sanctions in Lame-Duck](#)” (Nov. 16, 2016).

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			Transition Day may send an ambiguous signal about the U.S. commitment to this provision of the JCPOA. <sup>19</sup>
<p><b>State Sanctions Against Iranian Terrorism Act (H.R. 4448); introduced by Rep. Ron DeSantis (R-FL)</b></p>	<p>Referred to the House Committee on Financial Services on February 3, 2016.</p>	<ul style="list-style-type: none"> <li>■ Would amend CISADA to affirm the authority of state and local governments to restrict investment activities in Iran (§ 2(a)).</li> <li>■ Would expressly note that such state and local restrictions are not preempted by federal law or regulation, or by executive branch policy (§ 2(a)).</li> </ul>	<p>The JCPOA commits the United States to “actively encourage officials at the state or local level to take into account the changes in the U.S. policy reflected in the lifting of sanctions under this JCPOA and to refrain from actions inconsistent with this change in policy.”<sup>20</sup></p> <p>The Obama Administration has sent letters to the governors of all 50 states asking them to consider how laws they currently have in place might be affected by changes under the JCPOA.<sup>21</sup></p>
<p><b>Iran Ballistic Missile Sanctions Act of 2016 (S. 2725); introduced by Sen. Kelly Ayotte (R-NH) and a group of 11 Republican cosponsors</b></p>	<p>Referred to the Senate Committee on Banking, Housing, and Urban Affairs on March 17, 2016.</p>	<ul style="list-style-type: none"> <li>■ Would require the President to submit a report to Congress every 180 days certifying that each person listed in the annexes to certain UNSC resolutions – including resolutions that have been superseded by the JCPOA and terminated by UNSC Resolution 2231 (2015) – is not directly or indirectly facilitating, supporting, or involved with the development of or transfer to Iran of ballistic missiles (or related parts or information). If the President cannot make such certifications, he would be required to impose sanctions on such persons (§ 6(a)).</li> <li>■ Would direct the President to impose blocking sanctions on any</li> </ul>	<p>The imposition of sanctions on persons whose names were listed in annexes to UNSC resolutions that were superseded by the JCPOA and terminated by UNSC Resolution 2231 (2015), and whose names were removed from the SDN List pursuant to the JCPOA, would likely be viewed as a violation of U.S. commitments under the JCPOA.</p> <p>If the President determines that sectors</p>

<sup>19</sup> See JCPOA, §§ 23, 34(iv); The Washington Post, “[Ayatollah threatens response to Iran sanctions extension, putting pressure on Obama](#)” (Nov. 23, 2016).

<sup>20</sup> JCPOA, § 25.

<sup>21</sup> Bloomberg View, “[Obama Administration Urges States to Lift Sanctions on Iran](#)” (Apr. 18, 2016).

Title and Sponsor	Latest Action	Key Iran-Related Provisions	Commentary and Analysis
		<p>person identified as having knowingly aided the GOI in the development of the ballistic missile program of Iran, persons affiliated with certain Iranian entities, and persons operating in sectors of the Iranian economy identified by the President as being involved with the development of ballistic missiles or related technology (§ 6(a)).</p> <ul style="list-style-type: none"> <li>■ Would direct the President to prohibit the opening, and prohibit or impose strict conditions on the maintaining in the United States of a correspondent or payable-through account by an FFI that knowingly conducts or facilitates a significant financial transaction for a blocked person under the Act (§ 6(a)).</li> </ul>	<p>which benefited from sanctions relief under the JCPOA (such as Iran’s energy, petrochemical, or automotive sectors) or sectors covered by general licenses issued by OFAC (such as “research (including universities and research institutions),” or “telecommunications”) are involved in ballistic missiles-related activity, persons operating in these sectors would be at risk of blocking sanctions. This could potentially negate one of the main forms of U.S. sanctions relief to date under the JCPOA.</p>
<p><b>Preventing Iran’s Access to United States Dollars Act of 2016 (S. 2752); introduced by Sen. Marco Rubio (R-FL) and Sen. Mark Kirk (R-IL)</b></p>	<p>Referred to the Senate Committee on Banking, Housing, and Urban Affairs on April 6, 2016.</p>	<ul style="list-style-type: none"> <li>■ Would require the Secretary of Treasury to submit to Congress every 90 days a list of financial institutions identified as operating offshore USD clearing systems that conduct certain transactions involving the GOI or an Iranian person (§ 3(a)).</li> <li>■ Would require the President to impose blocking sanctions on any such identified financial institutions (§ 3(b)).</li> <li>■ Would prohibit the President from issuing a license permitting an offshore USD clearing system or providing USD for any offshore USD clearing system for transactions that involve Iran (§ 2 (a)).</li> </ul>	<p>The restrictions on USD clearing would be at variance with the spirit of certain undertakings by the Obama Administration ancillary to the JCPOA, such as OFAC’s assurances regarding the permissibility of various USD transactions that involve Iran, provided that such transactions do not have a U.S. nexus and appropriate due diligence is performed.<sup>22</sup></p>

## PROSPECTS FOR THE JCPOA AND CONSIDERATIONS FOR U.S. AND NON-U.S. PERSONS

The recalibration of the American approach to the JCPOA is likely to be a protracted affair taking place in at least two branches of the U.S. government, each balancing multiple potentially conflicting objectives.

<sup>22</sup> See OFAC, [Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions Under the JCPOA on Implementation Day](#) (updated Oct. 7, 2016), Questions C. 7 and C. 15. See also Reuters, [“European Banks Still Wary on Iran Over Financing, Sanctions Risks”](#) (May 19, 2016) (“U.S. Secretary of State John Kerry told Europe’s top banks last week that they have nothing to fear from resuming business with Iran, as long as they make proper checks on accepted trade partners.”).



This recalibration will in turn shape and contend with the reactions of six other governments and a regional body and multiple international organizations. During this period of heightened uncertainty, companies considering doing business in or with Iran, and financial institutions considering processing Iran-related transactions (including USD-denominated transactions without a U.S. nexus) should operate with caution, and document meticulously the steps they take to ensure compliance with applicable U.S. sanctions. Contracts should apportion risks judiciously in light of a wide range of plausible outcomes, including the dissolution of the JCPOA or the “snapback” of some or all of the nuclear-related sanctions lifted or waived under the JCPOA. The divergence between U.S. and non-U.S. sanctions policies toward Iran, widened by the JCPOA, may become even broader. This in turn will impose on both U.S. and non-U.S. parties a complex compliance challenge involving potentially contradictory regulatory obligations, where violations of U.S. sanctions have led to many significant civil and criminal penalties.

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