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International Commercial & Trade

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US Trade Sanctions and Export Controls Targeting Iran – Potential Risk Exposure for Companies and Management Personnel

US trade sanctions and export controls targeting Iran have attracted increasing attention from Chinese companies doing business in Iran or with Iran counterparties. This client alert aims to provide a high-level overview on US trade sanctions and export controls targeting Iran, their implications (particularly in terms of their extraterritorial application), and the potential penalties that can be imposed on companies and their executives and employees in the event of violations.

US Trade Sanctions

The US Government currently maintains comprehensive sanctions against Iran enforced and administered by the US Treasury Department's Office of Foreign Assets Control (OFAC) under the Iranian Transactions and Sanctions Regulations, 31 C.F.R. Part 560 ("**ITSR**"). With limited exceptions, "US Persons" and their owned or controlled non-US entities (together "**ITSR Parties**") are generally prohibited from engaging directly or indirectly in virtually all transactions involving Iran, the Government of Iran (including entities owned or controlled by or acting for the Government of Iran), Iranian financial institutions, and any Iranian Specially Designated National ("**SDN**," including any entity 50% or more owned by one or more SDNs). "**US Persons**" include (i) entities organized under US laws and their non-US branches, (ii) individuals and entities physically located in the United States, and (iii) US citizens and permanent resident aliens ("Green Card" holders) wherever located or employed. In addition to direct dealings with Iran, ITSR Parties are prohibited from facilitating or participating in any transaction by non-US parties involving Iran that would otherwise be prohibited if engaged in directly by an ITSR Party.

Non-US parties can face primary sanction liability under the ITSR if they "cause" unauthorized (*i.e.*, prohibited) Iran-related transactions to occur in whole or in part in the United States or elsewhere by ITSR Parties. Non-US parties acting completely outside US jurisdiction (*e.g.*, no ITSR Parties, no US-dollar payments, etc.) may also face potential risks under US secondary sanctions. The risk of secondary sanctions being imposed has increased since the US Government's withdrawal from the *Joint Comprehensive Plan of Action* (JCPOA) was completed on November 4, 2018. Most of the lifted or waived sanctions pursuant to the JCPOA's terms were US secondary sanctions.

US Export Controls

Iran is also subject to a US comprehensive export/reexport ban under the Export Administration Regulations, 15 C.F.R. Part 730 *et seq.* ("**EAR**"), with respect to items (*i.e.*, goods, software, technology) "subject to the EAR." With regard to Iran, an item is "subject to the EAR" if it is (i) of US-origin (*i.e.*, manufactured or created in the United States), (ii) exported from the United

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States, (iii) a non-US-made item that incorporates more than *de minimis* US content (which is 10% or more controlled (*i.e.*, non-EAR99) US content by value for Iran), or (iv) certain foreign direct products of US technology controlled for national security reasons. Both ITSR Parties and non-US parties are subject to the EAR to the extent they export, reexport, or transfer items subject to the EAR, wherever such items are located.

Potential Penalties

US Primary Sanctions and Export Controls

In case of violation of primary sanctions and export controls, entities and individuals may be subject to civil liabilities, criminal liabilities, and/or administrative penalties (*e.g.*, the denial of export privileges and debarment, or revocation of US licenses or other authorizations). Civil penalties are applied on a strict liability basis, meaning that even inadvertent violations of these US regulations, can lead to significant penalties being imposed.

The current potential penalties for US sanctions and export control violations are as follows:

1. <u>Criminal</u>: Up to $1 million in fines and/or 20 years in prison, per violation;

2. <u>Civil</u> (imposed on a strict liability basis and adjusted annually for inflation):

   - <u>Trade sanctions</u>: Up to $295,141 or twice the value of the transaction, per violation

   - <u>Export controls</u>: Up to $300,000 or twice the value of the transaction, per violation

US Secondary Sanctions

US secondary sanctions do not involve civil or criminal penalties, but rather are retaliatory sanctions that may be imposed on parties that engage in certain activities contrary to US policy, including certain Iran-related transactions. These can be imposed by the US Government even for otherwise lawful activities conducted wholly outside US jurisdiction. The possible secondary sanctions that the US Government could impose varies depending on the sanctionable activity, and include collateral designation as an SDN (*e.g.*, for engaging in transactions with other SDNs), designation as a Foreign Sanctions Evader, restrictions on access to US correspondent banking accounts, a ban on US Government contracting, a ban on the ability to receive US export licenses, a prohibition on receiving Export-Import Bank financing, and a prohibition on principal corporate officers entering the United States.

The fallout from US secondary sanctions being imposed cannot be understated. Such actions typically have a significant impact on a company's business (both current and future), effect a company's ability to engage with the US financial system (*e.g.*, loans, operating US correspondent accounts), and have a detrimental effect on a company's reputation and relationships with US and non-US third parties(*e.g.*, suppliers, customers or joint venture partners).

Risk-mitigating Measures

The US Government regularly enforces US trade sanctions and export controls targeting Iran with criminal and civil enforcement as well as secondary sanctions. Chinese companies with Iranian business could be implicated in those enforcement actions should they run afoul of US sanctions or export controls targeting Iran. However, such US regulations do not necessarily mean that US trade sanctions and export controls prohibit Chinese companies from engaging in all Iran-related transactions. The key is to identify and properly manage potential risks. We suggest Chinese companies that engage in Iranian business consider the following risk mitigating measures:

1. Conduct a thorough risk assessment of a company's Iran-related business to determine (i) whether the company is at risk of implicating primary US sanctions or export control jurisdiction and, if not, (ii) whether any such activities may present US secondary sanctions risks; and

2. Implement a trade compliance program that puts in place safeguards based on the risk assessment results, *e.g.*, restricting or withdrawing from the high-risk business; screening business partners for trade sanction and export control risks; updating contract templates; and conducting trade compliance training and auditing.

If you would like to learn more about US trade sanctions and export controls, please feel free to contact us.

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