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U.S. Withdraws from Iran Deal: What It Means for Businesses and Individuals - Update

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Summary: President Donald Trump's announcement on May 8, 2018, withdrawing the United States from the Joint Comprehensive Plan of Action (JCPOA) that relaxed sanctions on Iran is already having significant diplomatic effects around the world. On May 18, 2018, the European Union responded by resurrecting a 21-year old E.U. blocking regulation. European companies with United States affiliates now face the real prospect of being sanctioned by the United States if they keep their investments in Iran, or being sanctioned by the European Union if they disinvest. What legal tools exist to help them navigate these treacherous waters?

We concluded our May 10th, 2018 client update concerning the legal ramifications of President Trump's decision to withdraw the United States from the JCPOA by observing that "the regulatory and diplomatic environment remains fluid." As if to prove this point, the European Union responded by resurrecting an E.U. blocking regulation adopted in 1996 to prevent European companies from abiding by the sanctions against Iran that the United States is reimposing. Under the blocking regulation (Council Regulation (EC) 2271/96), European companies are forbidden from complying, either directly or indirectly, with U.S. "secondary" sanctions against investing in or doing business certain sectors of the Iranian economy. This regulation requires European companies not only to refuse to comply with U.S. sanctions but to refuse to comply with court orders from U.S. courts or government agencies seeking to investigate potential violations. It also prohibits European companies not only from acting directly themselves but from acting indirectly "through a subsidiary or other intermediary person." The regulation authorizes E.U. member states to adopt sanctions against European Union companies that comply with U.S. sanctions in violation of the regulation. The European Council, upon the recommendation of the European Commission (operating

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under special procedures), may authorize a company to comply with U.S. sanctions if non-compliance would seriously damage the company's interests or those of the European Community.

On May 18, 2018, the European Commission took the first steps towards adding the U.S. secondary sanctions against Iran to the list of foreign statutes subject to the E.U.'s blocking regulation. The European Council and the European Parliament will now have two months to object or request that the period to object be extended to four months. If neither the Council nor the Parliament objects and the objection period is not extended, the act will become law in two months.

The European Union's response highlights how dependent this area of the law is on the diplomatic and political climate. Although the blocking regulation has been in existence for over twenty years, the disputes that have arisen under it have been resolved mostly through diplomatic efforts rather than in the courts. From the beginning, the blocking statute was aimed at curbing the extraterritorial effect of U.S. sanctions against Cuba, among other things. In one of the most famous cases under the regulation, the Austrian government initiated an enforcement action against an Austrian bank for closing accounts held by Cuban clients because the bank had been acquired by a U.S. private equity firm and would have been subject to the U.S. sanctions against Cuba. The Austrian government ultimately dropped the matter when the U.S. government granted a special license authorizing the Austrian bank to keep the account for its Cuban clients.

As that history demonstrates, both the U.S. sanctions scheme and the E.U. blocking regulation give regulators considerable discretion in enforcing the statute. The primary tool the U.S. Department of Treasury Office of Foreign Asset Controls ("OFAC") has for enforcing U.S. sanctions is to place offenders on a sanctions list of companies, individuals, and other entities. Under U.S. law, it is illegal for U.S. banks, companies, and individuals to do business with anyone on the Specially Designated Nationals and Blocked Persons List ("SDN List") or similar lists, and any property in the U.S. of anyone on the SDN List (including a company's foreign subsidiaries) is immediately frozen. But making the decision to put an individual or company on the SDN List or any similar list is entirely within OFAC's discretion, operating in coordination with the U.S. Department of State. A company, moreover, can seek a special license from OFAC to engage in an investment or other activity that would otherwise be prohibited under U.S. sanctions law.

The E.U. blocking statute likewise has a certain amount of flexibility and discretion built into it. Member states are authorized to adopt measures to enforce the blocking regulation but many have chosen not to. A company, moreover, can seek relief from the European Commission if its interests or the European Community's interests are seriously damaged.

This degree of discretion is designed to allow U.S. and E.U. diplomats room to work out their differences and to guide the enforcement of these statutes in a way that is consistent with the foreign policy interests of the nations involved. But the consequence to companies operating in this space is to cloud the legal waters in which they must maneuver. Unless a company is prepared to accept the significant legal risks that this ambiguity presents, the best course is to avoid transactions that may drag it into this legal quagmire until the legal and diplomatic picture is clarified. Companies that are

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already committed to transactions that they must unwind to comply with the U.S. sanctions but cannot unwind without violating the E.U. blocking regulation may not be able to avoid these risks and must carefully consider the available legal options.

Butzel Long will continue to monitor the situation and to bring you updates as the situation warrants. If you or your company has any questions concerning these issues, please feel free to contact the author (listed below) or your regular Butzel Long attorney.

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