

TRUMP ADMINISTRATION DESIGNATES THE ISLAMIC REVOLUTIONARY GUARD CORPS AS A FOREIGN TERRORIST ORGANIZATION, ADDING RISKS FOR NON-US PERSONS DEALING WITH IRAN

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Legal Briefings

On April 8, 2019, the White House [announced](#) that it is designating the Islamic Revolutionary Guard Corps ("IRGC") as a Foreign Terrorist Organization ("FTO"). [According to the Department of State](#), the designation will take effect on April 15, 2019. While the IRGC is already subject to extensive US primary and secondary sanctions, the FTO designation substantially augments those pre-existing sanctions, increasing the US legal danger for non-US persons dealing directly or indirectly with the IRGC.

Once the designation has taken effect, knowingly providing "material support or resources" to the IRGC may result in criminal liability under US law. The term "material support or resources" is defined broadly to include the provision of "any property, tangible or intangible, or service," including a broad range of non-exclusive examples, such as the provision of money, financial services, lodging, training, expert advice or assistance, communications equipment, facilities, personnel, or transportation. The designation also means that dealings with the IRGC are prohibited under US criminal law even if no US persons are involved in such dealings, and regardless of whether the underlying conduct has any relationship to the United States. Given the IRGC's non-transparent involvement in various sectors of the Iranian economy, the designation significantly complicates the compliance position of non-US companies who may continue to do business with Iran.

CURRENT US SANCTIONS TARGETING THE IRGC

The IRGC was designated as a Specially Designated Global Terrorist organization under Executive Order 13224 by the United States Department of the Treasury's Office of Foreign Assets Control ("OFAC") in 2017. The OFAC has also designated various individuals, entities and aircraft who are determined to be affiliates of the IRGC. US persons, including US citizens and permanent residents, entities organized under US laws (including their foreign subsidiaries and branches), and anyone temporarily in the US, are already prohibited from virtually all dealings with the IRGC and its designated affiliates. Notably, because the OFAC regulations relating to Executive Order 13224 do not provide for certain exemptions available for Specially Designated Nationals ("SDNs") designated under other sanctions programs, even personal communications, humanitarian donations, provision of information or informational materials and travel-related transactions involving the IRGC or its designated affiliates are prohibited for US persons. US persons who engage in such prohibited activities can face criminal and civil liabilities, while non-US persons can also face liabilities for "causing" US persons to violate such prohibitions.

In addition, even though, under current OFAC sanctions, non-US persons are not absolutely prohibited from dealing with the IRGC (or Iranian SDNs in general) if such transactions do not otherwise involve US persons, non-US persons could face secondary sanctions for knowingly engaging in "significant transactions" involving the IRGC. Secondary sanctions are not criminal or civil penalties, but economic restrictions that can involve the blocking of the sanctioned non-US persons' assets and their ability to transact business with US parties or to use the US financial system. In general, secondary sanctions have only been imposed in a limited number of cases, and their application is largely discretionary, subject to a multi-factor test for assessing "significance."

ADDITIONAL CONSEQUENCES ARISING FROM THE FTO DESIGNATION

Notwithstanding the existing primary and secondary sanctions targeting the IRGC, the designation of IRGC as an FTO carries additional consequences.

First, the jurisdictional reach of the "material support" prohibitions is broader than the reach of the current US primary sanctions against Iran. US law provides that US jurisdiction for providing material support to an FTO can apply if "after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States." This means that a non-US person's dealing with the IRGC that occurs entirely outside of the US can still lead to criminal liability in the US, whereas under current secondary sanctions such dealing is generally only punishable through the imposition of secondary sanctions.

Other jurisdictional grounds include offenses that "occur[] in or affect[] interstate or foreign commerce" or involve aiding or abetting of another offense subject to US jurisdiction. This expansive jurisdictional reach has thus far generally survived due process-based judicial challenges. See, e.g., *United States v. Al Kassar*, 660 F.3d 108 (2011).

Second, as noted above, the definition of "material support" does not appear to have a clear "materiality" threshold. It can be interpreted to cover almost all support to an FTO, and arguably may be triggered based on support to an FTO's affiliate. For non-US persons, this goes beyond the "significant transaction" threshold necessary to permit the imposition of current secondary sanctions.

One issue to be monitored is further guidance on dealing with the National Iranian Oil Company ("NIOC"). At one point, the US authorities designated NIOC as an IRGC affiliate, but removed the designation when the Joint Comprehensive Plan of Action was implemented. Recently, NIOC was re-designated as an SDN for being an instrumentality of the Iranian government, but not for being an affiliate of the IRGC. In addition, the current US secondary sanctions permit certain limited petroleum purchase from NIOC by a few countries. Therefore, it appears unlikely that mere dealing with NIOC, if not sanctionable under US secondary sanctions, would be regarded as "material support" to the IRGC, but we expect the US authorities to clarify this point further.

Therefore, the FTO designation further increases the risk faced by non-US persons wishing to continue dealings with Iran or Iranian persons, especially given the IRGC's significant role in Iranian economy and the opaque business environment in Iran. For such non-US persons, proper due diligence on the counterparty's potential connection with the IRGC becomes even more critical.

EU SANCTIONS

As companies with EU exposure will no doubt be aware, the EU has imposed sanctions on the IRGC since 2010, listing it as a "designated person" with the result that EU persons are prohibited from dealing with funds or economic resources belonging to, owned, held or controlled by the IRGC and from directly or indirectly making funds or economic resources available to the IRGC or for its benefit. As such, companies that are required to (or have taken a policy decision to) comply with EU sanctions will likely already regard themselves as prohibited from dealing with the IRGC (subject to licensing by the competent EU authorities) and will be aware of the need to carry out appropriate due diligence to identify potential links to the IRGC.

The legislation under which the FTO designation is to be imposed does not currently fall within the list of measures subject to EU "blocking measures" (further detail on which is available [here](#)). Companies should, however, continue to monitor the position in the event that the EU updates its current blocking statute and any divergence between the regimes (for example regarding dealings with IRGC affiliates) brings those measures into play.

FATF DEVELOPMENTS

Companies who continue to do business with Iran will also wish to monitor Iran's progress in reform of its anti-money laundering/terrorist finance regime. This remains under review by the Financial Action Taskforce ("FATF").

In FATF's latest public statement on Iran, in February 2019, FATF noted Iran's progress on its action plan (including new legislation, which has passed through Parliament but which is not yet in force), but expressed concern regarding a number of outstanding actions. These include (1) adequately criminalizing terrorist financing; (2) identifying and freezing terrorist assets in line with the relevant UN Security Council resolutions; (3) ensuring an adequate and enforceable customer due diligence regime; (4) ensuring the full operational independence of the Financial Intelligence Unit and clarifying that the submission of STRs for attempted terrorist financing-related transactions are covered under Iran's legal framework; (5) demonstrating how authorities are identifying and sanctioning unlicensed money/value transfer service providers; (6) ratifying and implementing the Palermo and Terrorist Financing Conventions and clarifying Iran's capability to provide mutual legal assistance; and (7) ensuring that financial institutions verify that wire transfers contain complete originator and beneficiary information.

The FATF decided to continue the suspension of counter-measures against Iran but said that if, by June 2019, Iran had not enacted the remaining legislation in line with FATF Standards, then FATF will require increased supervisory examination for branches and subsidiaries of financial institutions based in Iran.

FATF continues to call on its members and urges all jurisdictions to continue to advise their financial institutions to apply enhanced due diligence with respect to business relationships and transactions with natural and legal persons from Iran, consistent with FATF Recommendation 19.

We continue to monitor developments in this area. Please contact the authors of this e-bulletin or your usual Herbert Smith Freehills contact for more information.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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