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DISCLOSURE

As Iran Sanctions Wane, SEC Reporting Will Not

BY MARIK STRING AND DAVID HORN

As global companies assess the implications of Iran sanctions relief announced on January 16, 2016, they should remain mindful that their Iran-related activities will actually *increase* the complexity of their compliance obligations in several areas, including so-called "Section 219" Securities and Exchange Commission (SEC) disclosure requirements under the Iran Threat Reduction Act. In fact, requirements to disclose certain categories of Iran-related operations will remain unaffected by Iran sanctions relief, while continuing to cover many of the Iran-related business activities specifically contemplated by sanctions relief.

JCPOA Sanctions Relief

Under the 2015 Joint Comprehensive Plan of Action, or JCPOA, the United States, its "P5+1" partners, and the European Union agreed to lift a variety of Iran sanctions in return for Iran meeting certain benchmarks for dismantling its nuclear program. "Implementation Day" for this sanctions relief occurred on January 16. Under U.S. law, sanctions relief takes three principal forms:

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- A roll-back of all "nuclear-related" sanctions against Iran, which are applicable to non-U.S. persons and entities based on their dealings with Iran. Sectors covered by these "secondary" sanctions include financial services, insurance, energy and petrochemicals, shipping, software, and automotive.

- Delisting a number of Iranian individuals and entities from the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) Specially Designated Nationals and Blocked Persons (or SDN) and other sanctions lists. U.S. and non-U.S. firms, however, will (with certain exceptions) remain subject to "primary" and secondary sanctions for dealings with entities remaining on the SDN list.

- A new general license for non-U.S. entities that are owned or controlled by a U.S. person (such as foreign subsidiaries of U.S. firms) to engage in Iran-related business activities that are "consistent with" the JCPOA. Many non-U.S. entities are expected to utilize this license to re-enter the Iranian market.

All other primary U.S. sanctions currently in place against Iran – including nearly all Iran sanctions currently applicable to U.S. persons, such as the prohibition on "facilitation" of Iran-related transactions by non-U.S. persons – remain in effect. By contrast, EU sanctions relief is relatively comprehensive, resulting in the removal of nearly all Iran sanctions. Such general

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empowerment of non-U.S. firms under the proposed sanctions relief has led some non-U.S. firms to pursue new business in Iran.[1]

The Scope of Section 219 Filings

One of the many complex compliance challenges facing both U.S. and foreign firms following sanctions relief is the Section 219 or ''Iran Notice'' requirement, which is unaffected by the JCPOA.[2]

Section 219 has been a unique complement to Iran sanctions as it does not prohibit any specific conduct but instead requires that ''issuers'' under the Securities Exchange Act of 1934 disclose in reports filed with the SEC various types of transactions in Iran undertaken by the issuer or its ''affiliates.'' In some cases, such activities may be permissible under U.S. and/or EU law, yet remain reportable. Reportable activities under Section 219 include any transaction with the Government of Iran, its subdivisions and agencies, and the Central Bank of Iran; activities supporting the Iranian petroleum industry; facilitation of transactions with the Iranian Revolutionary Guard Corps (IRGC), an arm of the Iranian military with a pervasive presence in the Iranian economy; and transactions with persons sanctioned due to terrorism or weapons proliferations reasons (which encompasses many entities that likewise have a significant presence in the Iranian economy).

Since Section 219 was enacted, companies from around the world – including firms in Brazil, China, India, Japan, the United Kingdom, Switzerland, and Turkey – have filed more than 1,000 Iran Notice reports. The SEC Office of Global Security Risk has also inquired of companies whose Section 219 disclosures may have been insufficient,[3] and OFAC is likewise believed to have used Section 219 disclosures to investigate possible violations and pursue enforcement actions.

The breadth of Section 219 is reinforced by three other features. First, it applies not only to all issuers (U.S. and foreign) of publicly-traded securities in the United States, but also to all of their ''affiliates.'' Affiliates may include joint ventures, foreign-registered subsidiaries, overseas branches, and controlling shareholders, and their activities in Iran must be considered in preparing a Section 219 disclosure. The inclusion of ''affiliates'' will be particularly relevant after the implementation of Iran sanctions relief, because such relief will apply principally to non-U.S. persons, such as foreign subsidiaries, who might engage in new Iran business. Second, unlike other SEC disclosure requirements, Section 219 contains no ''materiality'' threshold, requiring, as to all covered activities, disclosure of ''the nature and the extent of the activity'' and its ''gross revenues and net profits, if any.'' Third, Section 219 often requires the disclosure of even non-sanctionable activities.

More Complex Section 219 Reporting Obligations Following Sanctions Relief

Section 219 disclosure requirements will remain in place despite the arrival of Iran sanctions relief, creating more burdensome Iran reporting requirements for issuers and their affiliates to the extent they increase their activity in Iran. Indeed, many of the activities triggering Section 219 disclosures have become permissible following sanctions relief.

For example, the JCPOA has resulted in an easing of secondary sanctions applicable to non-U.S. firms' dealings with the Iranian energy sector, such as certain new investment and the provision of goods, services, information, technology, and technical expertise. Many European and Asian firms – which have previously been deterred or prohibited from business in the Iranian energy sector due to U.S. secondary sanctions and/or EU sanctions – have focused heavily on that sector in anticipation of sanctions relief.[4] Those who are U.S. foreign private issuers (and their non-U.S. affiliates) will therefore confront increased Section 219 compliance challenges as they consider the challenges of (re-) entering Iran.

Moreover, Implementation Day led to the lifting of secondary sanctions applicable to activities undertaken by non-U.S. firms with entities considered part of the ''Government of Iran.'' As a result, many non-U.S. firms are determining whether to pursue business with previously sanctioned entities, such as through the transportation of crude oil from Iran or infrastructure projects (U.S. firms will still be prohibited from engaging with such counterparties due to primary sanctions against Iran). Even though such business may now be permissible, it may trigger Section 219 disclosure requirements.

In a further complication for Iran compliance, Section 219 exempts from disclosure dealings with the Government of Iran if undertaken pursuant to a U.S. Government license.[5] As noted, OFAC has authorized foreign subsidiaries of U.S. firms to engage in Iran business under a new general license, and such entities thus may escape Section 219 disclosure requirements under this exemption. By contrast, European foreign private issuers may find themselves in the paradox of no longer having *any* significant U.S. sanctions exposure following Iran sanctions relief because of the nearly complete lifting of secondary sanctions, but nevertheless being required to disclose their (and their affiliates') dealings with the Government of Iran because such activities will not technically fall under a U.S. Government ''license.''

Finally, any company operating in Iran will have to contend with the pervasive role of the IRGC (which will remain sanctioned by the United States, but not the EU) in the Iranian economy and the attendant Section 219

[1] Alissa J. Rubin, *After Deal, Europeans Are Eager to Do Business in Iran*, N.Y.Times, August 1, 2015.

[2] Section 219 is incorporated in to the Exchange Act as Section 13(r). The section will sunset after the President makes a determination that Iran no longer supports international terrorism and has ceased the pursuit of weapons of mass destruction and ballistic missile technology under Section 401(a) of the Comprehensive Iran Sanctions and Divestment Act, Pub. L. 111-195.

[3] *See, e.g.,* Letter from Office of Global Security Risk to Navios Maritime Acquisition Corporation, August 19, 2013.

[4] Benoit Faucon and Bill Spindle, *Western Oil Firms Will Find Tough Competition in Iran*, Wall Street Journal, July 21, 2015.

[5] Pub. L. 112-158, Section 219(a) (''. . .any person or entity identified under section 560.304 of title 31, Code of Federal Regulations (relating to the definition of the Government of Iran) without the specific authorization of a Federal department or agency.'')

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requirements to disclose dealings with entities like the IRGC whose assets OFAC has blocked pursuant to certain Executive Orders. According to Dow Jones, the IRGC has ownership stakes in more than 1,000 Iranian companies in Iran.[6] For example, the IRGC's largest business is reported to be Khatam-al Anbiya, a construction arm of the IRGC with 812 affiliated companies. Similarly, in 2011, the U.S. Department of the Treasury listed as an SDN Tidewater Middle East Company, which it described as an ''IRGC-owned port operating company that manages the main container terminal at Bandar Abbas'' and is ''responsible for some 90 percent of Iranian container traffic and has operations at six other Iranian ports.''[7] Navigating beneficial ownership and front companies in the Iranian economy will remain a highly complex compliance challenge.[8]

Compliance Controls for Section 219

U.S. authorities have made clear that all primary sanctions against Iran will remain in place and will have a particular interest in limiting the ability of companies linked to the IRGC and the Iranian military to profit from sanctions relief; indeed, OFAC sanctioned eleven entities linked to the Iranian ballistic missile program the day after Implementation Day. Section 219 disclosures will remain an important source of information for OFAC to monitor compliance with – and enforce – remaining sanctions. Accordingly, issuers considering new or increased business in Iran following Implementation Day (directly or via affiliates) should review their internal compliance procedures related to Iran disclosure in order to meet continuing Section 219 requirements.

[6] Samuel Rubenfeld, *Iran Business Prospects Complicated By Revolutionary Guard*, WALL STREET JOURNAL, Risk and Compliance Journal, November 20, 2015.

[7] U.S. Department of the Treasury, *Testimony of Under Secretary for Terrorism and Financial Intelligence David S. Cohen Before the Senate Committee on Banking, Housing, and Urban Affairs*, December 12, 2013.

[8] For example, the JCPOA envisions that the IRGC will no longer control Bandar Abbas.