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WHITE PAPER

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Global Issues Under the Trump Administration: What the Future May Hold for Sanctions and Export Controls

President Trump and Republican leaders in Congress have identified U.S. sanctions and national security as central issues for the Trump Administration. Based on publicly announced policy positions, including a possible rollback of the recent easing of sanctions involving Iran and Cuba, the Trump Administration is poised to make potentially significant changes in these areas. This *White Paper* analyzes some of the more prominent statements from and issues facing the Trump Administration in the areas of sanctions and export controls and discusses the major factors that will shape the Administration's efforts.

TABLE OF CONTENTS

U.S. SANCTIONS AND EMBARGOES1

 Iran Sanctions1

 Ukraine/Russia-Related Sanctions..... 4

 Activities-Specific Sanctions/Specially Designated Nationals..... 5

EXPORT CONTROLS AND FOREIGN MILITARY SALES 5

LAWYER CONTACTS 6

U.S. SANCTIONS AND EMBARGOES

U.S. country- and activity-based sanctions and embargoes are authorized and implemented through an array of statutes, regulations, and executive orders. In general, country-based U.S. sanctions and embargoes are authorized under two statutes—the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* (“IEEPA”), and the Trading With the Enemy Act, 12 U.S.C. §§ 95a-95b (“TWEA”). These statutes give the President continuing authority to impose sanctions to deal with declared threats. The President exercises this power by issuing executive orders that declare national emergencies and direct that certain actions be taken as a result, such as blocking property or imposing restrictions on imports, exports, and transactions in general. These executive orders also often direct departments and agencies to issue regulations to govern and administer the President’s directives. The department primarily responsible for administering the President’s sanctions directives is the Department of the Treasury (“Treasury”). Pursuant to executive orders, Treasury issues [regulations](#) that define the contours and procedures relevant to each specific program.

Although activity-based sanctions programs may be implemented through IEEPA or TWEA, they can also be authorized by other statutes, such as the Foreign Narcotics Kingpin Designation Act, that impose unique, program-specific requirements. Otherwise, activity-based sanctions programs are often implemented through the same executive order structure as country-based programs.

These country-based and activity-based sanctions programs are designed to restrict the activities of U.S. persons in order to exert economic pressure on countries, governments, individuals, and entities that have been deemed a threat to U.S. national security. In practice, the effect of such programs can be wider than only upon U.S. persons, and non-U.S. financial institutions in particular must pay close attention to the risk of a violation as a result of transactions directly or indirectly connected to the U.S. financial system.

In some instances, Congress has authorized or imposed sanctions by passing legislation, providing the President with additional tools to impose punitive measures or requiring the President to expand the scope of existing sanctions. The most prominent example of this is the Iran Sanctions Act (“ISA”), which imposed an entirely separate set of requirements and

consequences that target the activities of non-U.S. persons. The ISA identifies a list of possible sanctions that the President can impose upon a determination that specific activity has taken place. Many of these measures are designed to cut off access to the U.S. financial system, thereby providing a strong incentive to avoid the sanctionable activity.

U.S. sanctions can also be affected by international agreements. A recent example of this is the Joint Comprehensive Plan of Action (“JCPOA”), implemented in January 2016. As discussed further below, the JCPOA is a multilateral plan of action pursuant to which, in return for various commitments from Iran, the United States and the other countries party to the JCPOA relaxed certain sanctions they had imposed on Iran. The Obama Administration effectuated changes to the U.S. sanctions by [executive order](#), [administrative regulations](#), and [interpretive guidance](#) from Treasury regarding enforcement of the sanctions.

Presidential administrations have great flexibility in how U.S. sanctions are enforced. More so than most punitive laws, the U.S. sanctions are political creatures, and how strictly they are enforced often ebbs and flows with political developments. Further, the agencies administering the sanctions—primarily the Treasury’s Office of Foreign Assets Control (“OFAC”)—have great discretion in how they interpret the laws, and that discretion can significantly affect sanctions enforcement. Indeed, more and more, OFAC has been relying on guidance regarding its interpretations by posting [Frequently Asked Questions](#) (“FAQs”) to define the scope of its sanctions regulations.

The above framework will affect how the Trump Administration may approach U.S. sanctions and the extent to which President Trump will be able to implement changes he suggested during his campaign. In addition, how President Trump staffs the particular offices responsible for sanctions implementation and enforcement, including the Under Secretary of the Treasury for Terrorism and Financial Intelligence, will greatly affect future developments. With this backdrop in mind, we address some of the most consequential sanctions programs that could be affected by Trump Administration policies.

Iran Sanctions

The United States has long maintained extensive sanctions on Iran. The primary component of these sanctions is a trade embargo that prohibits essentially all transactions between

U.S. persons and individuals and entities in Iran. Over the years, the United States added extraterritorial sanctions that were designed to influence the behavior of non-U.S. persons. These secondary sanctions authorized the President to take specified actions designed to dissuade non-U.S. persons from investing in or entering into major activities with certain industries in Iran. More recently, the United States increased the type and severity of these secondary sanctions. Other nations joined the United States in imposing sanctions on Iran in an attempt to, among other things, pressure Iran into abandoning its nuclear program.

Early last year, on January 16, 2016 international sanctions on Iran changed drastically. Following the International Atomic Energy Agency's announcement that it had verified that Iran had fulfilled its commitments under the JCPOA, the United States [lifted certain sanctions](#) on Iran and [provided extensive guidance](#) regarding the scope of that sanctions relief. Concurrently, the United Nations and the European Union lifted certain sanctions on Iran.

President Trump has noted that his "number-one priority" is to "dismantle the disastrous deal with Iran." In the interim, however, he said that the United States "must enforce the terms of the previous deal to hold Iran accountable," stating that his Administration will "enforce it like you've never seen a contract enforced before."

The implementation of international sanctions relief in January 2016 has provided opportunities for global businesses to enter into the large, and previously isolated, Iranian market. Continued U.S. sanctions that prohibit U.S. businesses from engaging in transactions with Iran, however, have limited the ability of international companies to explore new options. In fact, many European companies continue to decline to do business with Iran because of real or perceived complications with financing arrangements and contractual relationships where U.S. banks or persons may be involved. These issues can even arise where U.S. persons are not involved, but the parties take a cautious approach as a safeguard against potential problems, resulting in an effect on financial activity that may have no direct connection to the United States.

The implementation of the JCPOA occurred almost six months to the day after the United States, the United Kingdom, Germany, France, Russia, and China (the "P5+1"), and the

European Union, reached an agreement with Iran regarding Iran's nuclear weapons development efforts. The JCPOA built on an April 2015 framework developed by the parties pursuant to which Iran committed to undertake certain measures to prepare for and implement inspections and other processes intended to limit its ability to develop nuclear weapons in exchange for specified relief from international nuclear-related sanctions imposed over the past decade.

As part of its implementation of the JCPOA, on January 16, 2016, the United States—through a combination of waivers, partial or complete revocation of executive orders, commitments to refrain from imposing sanctions measures, and agency findings—took three main steps to fulfill its obligations. First, the United States lifted its nuclear-related secondary, or extraterritorial, sanctions that had been imposed on certain Iranian industries, services, and trade. Second, the United States removed certain individuals and entities identified in the JCPOA from its sanctions-related prohibited parties lists. Finally, the United States took several licensing actions under the existing Iran sanctions structure. It implemented a [general license](#) to permit certain activities involving entities owned or controlled by U.S. persons. It announced that it would be adding a general license for the import of Iranian-origin carpets and certain foodstuffs to the United States. It also issued a Statement of Licensing Policy indicating a more favorable stance related to the export or reexport to Iran of commercial passenger aircraft and related parts and services. Notably, with limited exceptions, the sanctions relief implemented on January 16, 2016, did not lift the primary trade embargo that prohibits U.S. persons from transacting with Iran, and substantial U.S. sanctions affecting U.S. and non-U.S. persons remain in force, including sanctions addressing Iran's support for terrorism, human rights abuses, and ballistic missile programs.

Throughout his campaign, President Trump sharply criticized the JCPOA. He has described it as "the worst deal ever negotiated," and in an op-ed in *USA Today* in September 2015, he stated that he would "renegotiate with Iran" and that a "Trump presidency will force the Iranians back to the bargaining table to make a much better deal." While it would likely be relatively simple for the United States to withdraw from the JCPOA, the effects of a withdrawal could depend to a great extent on the actions of the other countries involved in the plan. The other parties to the deal have not signaled any intention to withdraw from the JCPOA. The [European Union, for example, has](#)

recently expressed “its will to develop further its relations with Iran, in a manner fully consistent with the JCPOA” and reiterated “its resolute commitment” to the JCPOA. Numerous politicians and businesses in Europe have signaled that they wish to expand business opportunities in Iran. Accordingly, Iran’s ability to continue trade with the European Union, Russia, and China could dampen the effect of a U.S. withdrawal from the JCPOA on Iran’s economy.

Even if the Trump Administration decides to withdraw the United States from the JCPOA, the question of whether it will reinstate and enforce all of the sanctions lifted as part of implementation of the commitments made in the JCPOA could have major consequences for global business and international relations. A return to the sanctions that were lifted as a result of the implementation of the JCPOA could result in the reinstatement of extraterritorial sanctions that had targeted foreign companies that engage in certain types of business with or investment in Iran. In remarks since the election, [President Obama appeared to allude](#) to the potential difficulties the United States could face if it sought to sanction foreign companies from JCPOA signatory countries that engage in activities that were sanctionable before the JCPOA was signed but were not sanctionable after its implementation. Examples of businesses that could be affected by such a course of action are companies that may seek to engage in Iran’s energy industry or in maritime transportation involving Iranian ports. Another pertinent issue is that Iran has already received certain benefits under the JCPOA, such as money that had been frozen in Western countries prior to the JCPOA, including substantial sums that the United States itself has already transferred.

Whether or not President Trump withdraws from the JCPOA, the effect on many U.S. companies may be relatively minimal. Current sanctions still prohibit U.S. companies and persons from engaging in almost all trade with Iran. The reimposition of the secondary sanctions lifted under the JCPOA could, however, more directly affect foreign subsidiaries of U.S. companies. Currently, under General License H to the Iranian Transaction and Sanctions Regulations (“ITSR”), U.S.-owned or -controlled foreign subsidiaries are authorized to engage in certain activities involving Iran, subject to certain limitations, including, most notably, that U.S. persons cannot be involved in any transactions. If President Trump decides to withdraw from the JCPOA, General License H could be revoked as well, in which case U.S.-owned or -controlled foreign subsidiaries

would have to withdraw from business with Iran, and also extricate themselves from relationships with EU companies where the relationship is dedicated to that business. Further, even short of withdrawing from the JCPOA, President Trump might opt to impose further limitations on the ability of U.S.-owned or -controlled foreign subsidiaries to do business in Iran.

U.S. companies operating under General License H, or planning to use General License H, must closely follow developments on this issue, and it would be prudent for these businesses to have a plan ready in the event that the license is revoked. Prior to the change in Administrations, OFAC updated its FAQs relating to the JCPOA to provide additional guidance regarding winding down activities in Iran in the event the United States reimposes currently lifted sanctions. The revised FAQs provide that if there is a JCPOA sanctions “snapback,” the U.S. government will provide “non-U.S., non-Iranian persons a 180-day period to wind down operations in or business involving Iran.”

The revised FAQs also provides that non-U.S., non-Iranian persons who are owed payment at the time of snapback may receive those payments, subject to certain conditions. Under the guidance, U.S. persons and U.S.-owned or -controlled foreign entities also will be authorized to receive such payments owed, subject to such payments being consistent with U.S. sanctions.

Of note, however, companies engaged in wind-down activities in the event of a snapback could face the imposition of sanctions for providing or delivering additional goods or services and/or extending additional loans or credits to an Iranian counterparty after the snapback, including pursuant to written contracts or written agreements entered into prior to the snapback, except for those goods or services necessary to wind down operations involving Iran. Perhaps most important, it is unclear if OFAC will maintain this policy guidance under the Trump Administration.

Regardless of whatever action President Trump pursues with respect to the JCPOA, he could support additional sanctions on Iran that are not prohibited under the JCPOA, such as sanctions relating to Iran’s human rights abuses, ballistic missile program, and sponsorship of terrorism, which many in Congress appear eager to pursue. Late last year, Congress voted, by overwhelming majorities, to pass a 10-year extension of the ISA, which was set to expire at the end of 2016 and forms the basis for many of the extraterritorial sanctions against Iran’s activities. Senate

Foreign Relations Committee Chairman Bob Corker has stated that the Senate may consider broader measures in the new year. Current proposals in the Senate tie an extension of the ISA to funding for Israel or the imposition of additional sanctions designed to discourage Iranian ballistic missile tests, activities concerning cyber-espionage, or allowing U.S. dollar-denominated transactions involving Iran.

Ukraine/Russia-Related Sanctions

The United States has [imposed significant sanctions](#) targeting Russia, including following Russia's encroachment into and annexation of Crimea. In March 2014, President Obama issued executive orders under the authority of IEEPA authorizing Treasury to impose sanctions on individuals and entities working in specified sectors of the Russian economy. Following these orders, OFAC issued sanctions targeting individuals and entities throughout the region, including in Ukraine and other countries, who were viewed as close to Russian President Vladimir Putin or otherwise involved in the annexation of Crimea. In addition, OFAC imposed a comprehensive set of sanctions on the Crimea region. These have been formalized in the Ukraine-Related Sanctions Regulations. Later in 2014, Congress passed the Ukraine Freedom Support Act of 2014 ("UFSA"). Similar to the ISA, the UFSA authorizes additional punitive measures that the President could impose on foreign persons if they engage in certain sanctionable activities. When signing the UFSA, President Obama issued a [Statement](#) indicating that his Administration did not intend to impose sanctions under the UFSA but recognized that it provided "additional authorities that could be utilized, if circumstances warranted."

The United States imposed sanctions involving Ukraine and Russia in coordination with the European Union. The European Union's sanctions are similar to the U.S. sanctions, and the United States and European Union regularly coordinate regarding extension of these sanctions programs. They have crafted these sanctions narrowly to attempt to pressure Russia while not severely disrupting the significant amount of trade between Russia and the European Union.

More recently, on December 29, 2016, the United States amended Executive Order 13964, which was issued in April 2015 to grant the President authority to issue sanctions relating to malicious cyber-related activities. The amendment authorized sanctions on persons determined to be "tampering with, altering, or causing a misappropriation of information with the

purpose or effect of interfering with or undermining election processes or institutions." President Obama used this new authority to sanction several Russian individuals and entities.

President Trump has indicated that he would [consider lifting U.S. sanctions on Russia](#) and has stated that he wants to improve the United States' relationship with Russia. Following the imposition of the most recent round of sanctions, President Trump has given multiple [public statements](#) reiterating that he would consider this option. Given that the sanctions currently in place have been imposed by executive order and administrative regulations, the President has the authority to rescind these sanctions. It is unclear whether or how the Trump Administration will address U.S. sanctions on Russia. Further, developments regarding hostilities in Syria may also drive this issue in ways not currently anticipated.

Cuba Sanctions

On December 17, 2014, President Obama announced a [historic shift](#) in U.S. policy toward Cuba and pledged that the United States would reestablish diplomatic relations and ease certain aspects of its long-standing trade embargo against Cuba. Since then, OFAC and the Department of Commerce's Bureau of Industry and Security ("BIS") have issued a [series of amendments](#) to the Cuban Assets Control Regulations, 31 C.F.R. Part 515, and the Export Administration Regulations, 15 C.F.R. §§ 730-774. These changes have significantly expanded the amount of authorized trade between the United States and Cuba. As a result, even though the embargo remains in place, U.S. persons can now more freely travel to Cuba under certain circumstances, engage in certain business activities, and provide certain services to Cuba and Cuban nationals. For example, in August 2016, commercial airlines began providing direct flights between the United States and Cuba. Eight air carriers plan to provide such services, with the potential for approximately 100 daily flights between the countries.

President Trump has recently stated that he [intends to talk with the Cuban government](#) to get a "better deal for the Cuban people, the Cuban/American people and the U.S. as a whole" and that if these talks are not successful, he would "terminate [the] deal." Of note, unlike the JCPOA with Iran, there is not one main agreement with Cuba in place. At a campaign event in September 2016, President Trump stated, "[a]ll of the concessions Barack Obama has granted the Castro regime were done through executive order, which

means the next president can reverse them, and I will do that unless the Castro regime meets our demands.” On November 4, 2016, just a few days before the election, Vice President Pence tweeted that then-President-elect Trump would “repeal Obama’s Executive Orders on Cuba & continue the embargo until there is real political and religious freedom.” Since the election, some lawmakers, including Florida Senator Marco Rubio, have called on President Trump to reinstate the restrictions that were rolled back under President Obama.

As President Trump noted, the Obama Administration’s changes to the Cuba sanctions were made by executive orders. As a result, President Trump could issue new executive orders that revoke the current orders. The Departments of Commerce and the Treasury would then need to issue revised regulations to implement any such changes, as laid out in any executive orders issued by President Trump. Alternatively, the Trump Administration could choose to revoke only certain of the changes made by the Obama Administration, such as reinstating restrictions on cultural or business travel to Cuba.

President Trump’s public policy statements have not detailed what demands Cuba would have to meet for President Obama’s executive orders to remain in place. U.S. persons and companies that have entered, or are looking to enter, the Cuban market as a result of the authorizations issued during the past two years should be prepared for the contingency that those authorizations may be revoked. While such revocations, if they do occur, could include a grandfather clause that would allow pre-existing transactions or business to continue, it is possible that any wind-down period may be short, if offered at all. In such a situation, U.S. companies and persons would have to extract themselves quickly from business and could be at risk of losing investments made in establishing such business.

Activities-Specific Sanctions/Specially Designated Nationals

An area of sanctions that did not receive much attention during the campaign is the framework of sanctions that the United States has imposed on individuals and entities determined to be engaging in activities that threaten the United States. These include sanctions programs designed to target individuals or entities involved in global terrorism, malicious cybersecurity activities, and narcotics trafficking. In contrast to designating a country or region, these sanctions identify entities and individuals who are placed on OFAC’s [List of Specially Designated](#)

[Nationals and Blocked Persons](#) (“SDN List”), which severely limits or precludes their ability to engage in U.S.-related and international transactions.

While the use of SDN designations has not been a focus of President Trump’s platform, many of his stated goals point to the possibility of increased use of these types of sanctions. President Trump has identified fighting terrorism and cybersecurity as major parts of his proposed agenda, and these targeted sanctions could provide a tool in that effort. Further, he has emphasized that the government will focus on identifying what he has described as [criminal elements seeking to immigrate](#) to the United States from neighboring countries. The counter-narcotics sanctions programs are set up to identify and isolate entities and individuals engaged in criminal behavior, and most of the programs have focused to date on the Central and South American regions. These enforcement parameters appear to be in line with priorities identified by President Trump. Many of these targeted sanctions programs have already seen an increase in activity in recent years.

EXPORT CONTROLS AND FOREIGN MILITARY SALES

Export control was not an issue that received significant attention during the recent election, and President Trump has not provided details regarding his plans in this area. That being said, his comments and priorities give some clues regarding potential future developments. How President Trump staffs the positions within the Department of State and Department of Commerce will further show his priorities in these areas. Important positions within these Departments include the Under Secretary of Commerce for Industry and Security and the Under Secretary of State for Arms Control and International Security Affairs.

President Trump made numerous statements during his campaign regarding [prioritizing national security and protecting national secrets](#). In addition, his campaign has stressed that one of his main priorities will be to [reduce regulations affecting business](#), especially those that can be construed as constraining the ability of U.S. businesses to compete globally.

Given its stated priorities, the Trump Administration may favor the efforts made during the ongoing Export Control Reform (“ECR”). One of the overarching goals of ECR has been to

reduce the controls governing potentially sensitive items to focus on those items that represent more of a threat. Many proponents of ECR have described this as a necessary step to improve the ability of U.S. companies that produce controlled materials to compete on a global scale. Moreover, ECR has progressed to the point that it is “[baked into](#)” the system, and industry has already adjusted to many of the reforms.

One set of issues related to export controls that could see attention is that of improving the ability of U.S. companies to sell military and dual-use items to U.S. allies. [Momentum](#) has already been building for changes to the Foreign Military Sales (“FMS”) program to make it more efficient. President Trump has also repeatedly stressed that he [expects U.S. allies to take a more active military role](#) in joint initiatives. This could signal a willingness to ease FMS restrictions, allow more exports through Direct Commercial Sales, and generally adopt policies at licensing agencies to ease the issuance of licenses for military and related equipment allowing sales to certain U.S. allies.

The Trump Administration may seek to change how export controls regulate firearms. Loosening export control restrictions and removing certain types of firearms and ammunition from the International Traffic in Arms Regulations, 22 C.F.R. §§ 120-130 (“ITAR”), has been a [goal of several Second Amendment advocates](#), including some members of Congress. While regulators are currently examining the classifications relevant to firearms under ITAR as part of ECR, they have declined to make final adjustments. President Trump vowed to take action in [support of Second Amendment causes](#) during his candidacy, and this could lead to easing controls on those who manufacture, possess, and sell firearms and ammunition.

On the flip side of easing controls, however, President Trump has signaled that he will seek to [strengthen cybersecurity and other information security controls](#). His stated goals include increasing cybersecurity protections, which could affect the level of export controls on related items and technology.

Additional information relating to President Trump’s policies regarding U.S. sanctions and export controls can be found [here](#), [here](#), and [here](#).

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Jones Day will monitor significant developments in each of these areas as the policies, priorities, and initiatives of the incoming Trump Administration take shape. For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com/contactus/](#).

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