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# Developments in U.S. Sanctions Against Iran, Russia, and Venezuela

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# 1. Iran

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# Overview of the Joint Comprehensive Plan of Action (JCPOA)

- On July 14, 2015, the P5+1 powers (the U.S., UK, China, France, Russia, and Germany) and Iran reached an agreement, the JCPOA, easing sanctions on Iran in return for restrictions on Iran’s nuclear program.
- Sanctions relief took effect on “Implementation Day,” January 16, 2016.
- A majority of European Union and United Nations sanctions against Iran were suspended.
  - Human rights-related sanctions remain
- Direct U.S. sanctions prohibiting transactions with Iran within U.S. jurisdiction effectively continue unchanged.
  - A new general license, General License H, nominally restores the 2011 status quo with respect to foreign subsidiaries of U.S. countries.
- While most U.S. secondary sanctions against Iran were suspended, a limited but significant amount targeting specific Iranian actors and activities remain.
- Both the U.S. and the EU threatened “snap-back,” or immediate re-imposition of pre-existing sanctions, should the JCPOA be breached.

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# Remaining U.S. Sanctions

- As noted, **direct sanctions remain in place**, meaning that substantially all transactions within U.S. jurisdiction involving Iran remain prohibited absent a license.
  - U.S. persons must not deal with Iran, and non-U.S. persons must continue to avoid any dealings relating to Iran or any Iranian government-controlled entity involving U.S. jurisdictional elements.
  - Jurisdictional elements include:
    - Direct or indirect participation of U.S. citizens, legal entities, or “green card” holders.
    - Any activity within the United States.
    - Direct or indirect exportation of U.S.-origin goods or services to support transactions involving Iranian interests.
    - U.S. dollar clearing transactions relating to Iran remain prohibited.

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# Remaining U.S. Sanctions

- The U.S. also retains a number of important **secondary sanctions**, pursuant to which persons engaged in the targeted activities may themselves be placed on U.S. sanctions lists whether or not those activities fall within U.S. jurisdiction:
- Transactions with Iranian persons on OFAC’s **SDN List** (though many Iranian entities have been removed from the list as a result of the JCPOA);
  - “**Deceptive transactions**,” which are transactions involving U.S.-sanctioned Iranian (or Syrian) persons in which the interest of the sanctioned person is not transparent to all relevant participants and regulators);
  - Transactions supporting **human rights abuses** (including the provision of goods and services that can be used for surveillance or the monitoring and disruption of communications);
  - Transactions directly related to Iran’s **development of WMD, ballistic missiles, or advanced conventional weapons**; and
  - Transactions related to Iran’s support of **terrorism**.

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# Developments Post-JCPOA

## — **Vigorous enforcement** of Iranian sanctions continues

- For example, Chinese telecom equipment manufacturer ZTE was fined a total of \$892 million in March for US-linked sales to Iran both before and after implementation of the JCPOA
- Other enforcement actions for violations of direct sanctions and designations of Iranian targets for terror-related and other non-nuclear activities continue

## — **Decertification of the JCPOA**

- On October 13, 2017, President Trump stated that he would no longer certify Iran's compliance with the JCPOA.
- Under the Iran Nuclear Agreement Review Act (INARA) of 2015, the failure to submit such a certification every 90 days triggers a 60-day period for Congress to consider a re-imposition of sanctions under expedited procedures. It has no other effect.
- Congress took no action, and neither did President Trump (who also has the authority to re-impose sanctions).
- Critically, there is no European support for the re-imposition of sanctions

## — **CAATSA**

- Additional sanctions against Iranian ballistic missile activities and the IRGC
- Largely symbolic

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# General License H

- In theory, General License H permits entities majority-owned or controlled by U.S. persons to do business in Iran
- However, it is important to realize that GL H only unwinds the explicit 2012 extension of U.S. sanctions to entities controlled by U.S. persons, and substantial obstacles remain
  - Prohibitions against U.S. persons (including the parent) participating in or facilitating Iranian business remain in place
    - Only exception is altering corporate policies and procedures
  - The U.S. subsidiary cannot source goods or services from the United States specifically for Iran (or otherwise act within U.S. jurisdiction)
  - GL H is also conditioned upon not dealing with the following:
    - SDNs
    - Military, paramilitary, intelligence or law enforcement entities of the Government of Iran or associated officials, agents or affiliates
    - Supply of any goods subject to U.S. export controls, regardless of where and when procured

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# Other Commercially Important General Licenses/Licensing Policies

## — General licenses (updated 2014):

- Agricultural commodities, medicine, and basic medical devices
  - No military or law enforcement
  - Dollar transactions for non-U.S. items sold by non-U.S. persons not covered
- Hardware and software for personal communications
  - Restrictions on provision to Government of Iran

## — Favorable licensing policy: commercial aircraft, parts, and services (part of JCPOA)

- Processing time an issue
- Can be difficult to manage payment, shipment, and other ancillary services

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# Reaction Outside the United States

- **Early movers.** Iran is strongly encouraging foreign companies to act now to re-enter the Iranian market.
- **Significant commercial interest.** We have seen the most activity in the Iranian energy sector, but there is a broader range of potential opportunity to satisfy pent-up demand.
- **Significant political risk.** The combination of political uncertainty and severe difficulties in conducting adequate due diligence in the Iranian market has nevertheless led many foreign companies to conclude that the reputational and compliance risks (including corruption as well as sanctions) are too great.
- **Force majeure/sanctions clauses.** Companies are including *force majeure* and sanctions clauses (including who determines whether there is a sanctions risk) in contracts with Iranian entities.
- **Continuing financial isolation.** Many major international financial institutions are still unwilling to do business in Iran in light of sanctions and AML risks, even under pressure from their home governments.
- **Uncertain prospects:** Estimates of the level of Iranian demand (and funds) vary wildly, and the future political and commercial environment (particularly the role of the IRGC) remain unclear.

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## 2. Russia

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# Recent Developments: CAATSA

- On August 2, 2017, Congress passed the **Countering America's Adversaries Through Sanctions Act (CAATSA)**
- CAATSA made permanent existing U.S. sanctions against Russia, unless Congress approves repealing them, and tightened sectoral sanctions
- CAATSA also significantly expanded secondary sanctions involving Russia
  - The secondary sanctions section of CAATSA is also sometimes called CRIIEEA, after the title of that subsection
- Some secondary sanctions previously existed, but the Obama Administration stated that the United States had no current intention of enforcing them
- Secondary sanctions are now in many cases technically “mandatory,” though in practice that has little meaning
  - Secondary sanctions do not take effect without an affirmative designation by the U.S. Administration
  - There is no enforcement mechanism to force such a designation to be made
- Secondary sanctions may also be imposed against Russian persons

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# Recent Developments: CAATSA

— **Sectoral sanctions** tightened in a number of respects

- **Directive 1:** Specified Russian **financial institutions**
  - Maximum maturity of debt reduced to **14 days**
- **Directive 2:** Specified Russian **energy companies**
  - Maximum maturity of debt reduced to **60 days**
- **Directive 4:** Specified Russian **energy companies**
  - As of January 29, 2018, extends to any **shale, deepwater, or Arctic offshore** project in which a Directive 4 SSI or deemed SSI owns **33% or more of equity rights or a majority of voting rights, anywhere in the world**

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# Recent Developments: CAATSA

## — Secondary sanctions now target a wide range of activities

- **Knowingly facilitating any significant transaction on behalf of any person subject to U.S. Russia-related sanctions**, including but not limited to a “deceptive” or “structured” transaction, or on behalf of a child, parent, spouse, or sibling of a sanctioned person
  - “Knowingly” means “knew or should have known”; “facilitating” is a very broad concept
  - “Deceptive” transactions conceal the interest of a sanctioned person from any participant or regulator
  - “Structured” transactions are broken down into small amounts to avoid anti-money laundering (AML) controls
  - **Any** significant transaction (a qualitative assessment) is sanctionable, but deceptive and structured transactions are higher risk
  - Transactions permissible for U.S. persons are not deemed significant – This provision thus does apply to entities under sectoral sanctions, but does apply to transactions that are actually prohibited by U.S. law (e.g., new debt or equity issuances)
  - Includes entities sanctioned pursuant to the 50% rule
- **Knowingly violating U.S. Russia-related sanctions** in any material respect

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# Recent Developments: CAATSA

## — Secondary sanctions, cont'd

- Knowingly **engaging in any significant transaction with** a person that is part of, or operates for or on behalf of, specified entities in **the defense or intelligence sectors** of the Russian Federation
  - “Significant transaction” is a qualitative measure
  - The U.S. State Department has released a list of entities affected by this provision; the **50% rule does not apply** to this list
- Knowingly investing more than \$10 million, individually or in an aggregate of transactions of at least \$1 million each in any 12-month period, or facilitating such an investment, if it “directly and significantly contributes to the ability of the Russian Federation to **privatize state-owned assets in a manner that unjustly benefits**” **Russian officials or their family members or close associates**
  - “Investment” is extremely broad and explicitly includes the purchase of government debt and other forms of lending
  - “Unjustly benefits” is equally broad and includes any direct or indirect advantage, value, or gain, whether tangible or intangible
  - “Family members or close associates” includes anyone widely known or known by the person in question to maintain a “close relationship” with an official as well as relatives out to first cousins

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# Recent Developments: CAATSA

## — Secondary sanctions, cont'd

- Knowingly investing in, or providing goods, services, or technology for, any **Russian energy export pipelines** in an amount exceeding \$1 million in any transaction or \$5 million over any 12-month period
  - Explicitly requires “coordination with allies of the United States”
- Engaging in, directing, or being complicit in **serious human rights abuses** in territory controlled by the Russian Federation, or materially assisting, sponsoring, or providing material, financial, or technological support for, or goods or services to, such a person
- Knowingly engaging in significant **activities undermining cybersecurity** against any person, including any government or democratic institution, on behalf of the Government of the Russian Federation, or knowingly materially assisting, sponsoring, or providing financial, material, or technological support for, or goods or services in support of, such activities

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# Recent Developments: CAATSA

## — Secondary sanctions, cont'd

- Knowingly providing to **Syria** significant financial, material, or technical support that contributes materially to Syria's ability to acquire or develop significant weaponry, particularly weapons of mass destruction
- Making a "significant investment" in **Arctic offshore, shale, or deepwater projects** with the potential to produce oil in the territory or exclusive economic zone of the Russian Federation
- For **financial institutions**, knowingly engaging in or **facilitating significant transactions** relating to any of the following:
  - The sale of **weapons to Syria**
  - Investment in **Arctic offshore, shale, or deepwater projects** in the Russian Federation with the potential to produce oil
  - Financial transactions for any person or entity designated as an **SDN** under Russia/Ukraine-related sanctions
  - These provisions are somewhat duplicative but specifically threaten loss of access to U.S. dollar clearing

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# Recent Developments: Policy and Enforcement

## — Policy under Obama

- Informal pressure to avoid transactions relating to the Russian Federation that were legal under existing sanctions
  - Russian Federation Eurobonds
  - Rosneft privatization

## — Policy under Trump

- Implementation of first wave of CAATSA sanctions was delayed, but delay appears to have been simply a matter of workload
- Congressional scrutiny/pressure remains strong
- Enforcement continues
  - Focus on dealing with SDNs (ExxonMobil); also important for Venezuela
  - Focus on foreign entities dealing with U.S.-sanctioned parties, especially for Iran (ZTE) and North Korea (IPC)

## — Policy under Putin

- Crimea blocking statute
  - Difficulties in managing Russian distribution networks

## — Policy under Merkel

- Little ongoing discussion of terminating EU sanctions
- Little appetite for tightening them

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# What Happens Next?

## — Impact of secondary sanctions

- Little apparent appetite for enforcement in the Trump Administration
- Both the statute itself (energy pipelines) and Administration guidance (expansion of sectoral sanctions) have emphasized the importance of maintaining coordination with allies, especially the EU
- Historical experience with the Iran sanctions indicates that Western multinationals tend to be extremely risk-averse in avoiding activities within the scope of secondary sanctions, even when there is a very limited track record of sanctions actually being imposed
- We are already seeing evidence of this in our practice

## — Additional financial institution focus on beneficial ownership and the 50% rule

- Tied in part to AML regulatory focus

## — Continued enforcement emphasis on violations of direct sanctions by non-U.S. companies

- Particular focus on U.S. dollar transactions
- Regulators will continue to do their jobs

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# What Happens Next?

## — Future Trump Administration policy

- No indication Trump is likely to expand sanctions, use secondary sanctions, or ramp up enforcement; Trump is downplaying existence of conflict
- BUT domestic political developments could lead Administration to order aggressive action against Russian interests to demonstrate toughness, particularly if negative evidence emerges from the ongoing investigations

## — Future congressional policy

- Cannot rule out additional action, though unlikely in the short term
- CAATSA calls for a series of reports on the following topics, addressing (among other things) whether additional sanctions are appropriate. Based on historical experience, these reports may or may not lead to real proposals
  - The effects of expanding sanctions to target sovereign debt and derivative products
  - Russian oligarchs and parastatal entities of the Russian Federation
  - Illicit financial flows in and out of Russia, and Russian influence on European or Eurasian elections
  - Media organizations controlled and funded by the Russian government
- Domestic political events and progress of the ongoing U.S. investigations may also have a strong impact on Congress's priorities

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## 3. Venezuela

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# Venezuela: Sanctions on the Government

- In August 2017, President Trump issued an Executive Order restricting certain funding transactions by the Government of Venezuela, including PdVSA, the Central Bank, and all other state-owned or -controlled entities.
- The Executive Order prohibits dealing in five categories of debt and equity:
  - Debt of the Government of Venezuela (other than PdVSA and its subsidiaries) issued on or after August 25, 2017, with a duration of longer than 30 days
  - Debt of PdVSA or its subsidiaries issued on or after August 25, 2017, with a duration of longer than 90 days
  - Pre-existing bonds of the Government of Venezuela (unless on a “white list” contained in a general license)
  - New equity of the Government of Venezuela;
  - Securities of any kind (including non-sanctioned issuers and debt covered by the general license) purchased from a Government of Venezuela entity

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## Venezuela: Sanctions on the Government (cont'd)

- The prohibition extends to processing coupon payments or transfers relating to prohibited debt
- Distributions by a Government of Venezuela entity to an upstream Government of Venezuela entity are prohibited. Coupon payments on permitted debt, and non-investment payments such as taxes and license fees, are permitted
- OFAC's view of debt is quite broad: "debt" includes repo agreements, term deposits, and extended payment terms – virtually any credit exposure can count, and substance takes precedence over form.
  - Amendments to economic terms of existing debt will likely be considered "new debt"
  - The prohibition on extended payment terms is problematic where Venezuela is erratic in paying debt and may offer partial payments at unpredictable times
- Complex and ambiguous transactions beginning to appear
  - Payments in kind in securities by the Government of Venezuela
  - Mandatory foreign exchange transactions with the Central Bank of Venezuela
  - Funds transfers on behalf of Government of Venezuela entities from odd sources
- Potential execution on securities collateral (e.g., PDV Holding's interest in CITGO Holdings' shares) and subsequent sale may also need a license. OFAC position is unclear

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# Venezuela: Sanctions against Individuals

- On July 31, OFAC designated President Nicolas Maduro Moros as an SDN, blocking all of his assets and prohibiting any transaction in which he has an interest within U.S. jurisdiction.
- A number of senior officials who are members of the President's Restructuring Committee have also been designated as SDNs, including Vice-president Tareck El Aissami (head of the Presidential Commission) and Simón Zerpa (the Minister of Oil).
- Persons acting within U.S. jurisdiction may not deal with sanctioned officials, even in their official capacities, including by negotiating with them or providing or receiving advice or other services to or from them. To the extent conversations relate to transactions or business opportunities, parties acting within U.S. jurisdiction are at risk.
- U.S. guidance appears to permit general discussions of outstanding debt if negotiating/executing specific replacement debt is excluded.

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# Impact of Sanctions

- An exchange offer involving an issuance of new U.S. dollar bonds by the Republic of Venezuela or PDVSA would be prohibited, as would participation by U.S. persons in any offer in any currency
  - Prohibition extends to acting as agent or otherwise facilitating any new issuance.
- A re-profiling or other restructuring involving an extension of or amendment of payment terms would also fall under the sanctions' scope; amended debt = new debt.
- The extent to which any potential restructuring can be discussed at all within U.S. jurisdiction is unclear
  - “Negotiation” is likely a step too far
  - Discussion of payments, etc. on existing debt likely permissible to the extent new discussed
- Ability of experienced legal and financial advisors to engage with Venezuela/PdVSA is also impaired; U.S. licenses required to support any restructuring (other than advising on permissibility under sanctions).
- U.S. government more likely to approve a restructuring if a democratically elected National Assembly is involved

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### Specialization

- Application of U.S. sanctions and AML legislation
- Anticorruption matters under the FCPA and UK Bribery Act
- Reviews by the Committee on Foreign Investment in the United States (CFIUS)

### Education

- Yale Law School, J.D.
- Yale University, M.A., International Relations
- University of Michigan, B.A., Highest Distinction, Phi Beta Kappa

Recognized as a leading economic sanctions, CFIUS, and corporate/M&A and private equity lawyer by *Chambers USA* and *Chambers Global*. Regularly advises sophisticated international clients regarding the application of U.S. sanctions, including those administered by OFAC and the U.S. Department of State.

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### Selected Experience

- BNP Paribas and Clearstream Banking in U.S. sanctions investigations, as well as compliance and licensing matters
- A European financial institution in connection with ongoing OFAC investigations
- Numerous entities with respect to the sanctions imposed in response to the situation in Ukraine, including leading Russian institutions subject to sectoral sanctions, as well as global financial institutions and corporations
- PETRONAS, Sony, Vale, and others in compliance and licensing matters
- Numerous Asian, European and other energy companies and financial institutions in connection with U.S. sanctions against Iran
- Prudential UK in reviewing and revising its group economic sanctions policies and in U.S. disclosure issues relating to its activities involving U.S.-sanctioned parties
- A major European financial institution with respect to U.S. sanctions issues raised by transactions with the Asian Reinsurance Corporation, a multinational reinsurer partially owned by the Government of Iran
- TPG Capital in numerous acquisitions and internal compliance programs
- Woori Bank and IBK in analysis and disclosure of Iran oil purchase programs
- Numerous other major international financial institutions in financing, compliance and disclosure, including Citigroup, JPMorgan Chase, HSBC, Clearstream, BMO Group, Meezan Bank, UBAF and Sberbank
- A multinational advertising agency, Brazilian medical device manufacturer, French security products company, Russian oil company, Russian pharmaceutical company, and others in anticorruption internal investigations, remediation, and enforcement actions before U.S., UK, and World Bank authorities.



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