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Biden May Have Difficulty Shifting Course On Iran Sanctions

By **Jason Wilcox** (December 11, 2020, 5:21 PM EST)

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Since the U.S. pulled out of the Joint Comprehensive Plan of Action, President Donald Trump's strategy vis-à-vis Iran has been to apply maximum pressure on the regime and force Iran's leaders to accept a new agreement that not only addresses its nuclear ambitions, but also its ballistic missiles program, assistance to terror organizations, human rights violations and other malign activities.

A key component of this campaign has been the imposition — and reimposition — of economic sanctions against Iran, which target virtually every aspect of its economy. While these sanctions unquestionably have devastated Iranian economic growth, they have done little to date to convince Iran's leaders to return to the negotiating table.

As President-elect Joe Biden assumes power, it is expected that the posture of the U.S. with Iran will change course.

In fact, Biden's choice for national security adviser, Jake Sullivan, recently said that the president-elect is ready to honor the terms of the JCPOA if Iran returns to compliance, using that step as a jumping off point for a follow-on accord addressing broader issues.

However, making such a sharp break from the maximum-pressure campaign might not be an easy task.

This article will discuss Trump's use of economic sanctions against Iran, as well as explore how we could expect the U.S. Iran sanctions program to change under the Biden administration and what constraints there might be to effectuate such change.

Trump and Economic Sanctions

Economic sanctions have been a top U.S. foreign policy tool for the Trump administration. According to a Wall Street Journal analysis of data compiled by Dow Jones Risk & Compliance, the Trump administration on average has imposed sanctions on more than 900 persons or entities annually since 2017. This is a nearly 80% increase in the number of designations imposed by the Obama administration each year during President Barack Obama's two terms. So far in 2020, over 700 persons or entities have been added to the specially designated nationals and blocked persons list, administered by the U.S. Department of the Treasury's Office of Foreign Assets Control.[1]

Placement on the specially designated nationals and blocked persons list results in the blocking of property and property interests of the targeted individual or entity that are, or come within, the U.S. or the possession or control of any U.S. person. This effectively prohibits U.S. persons, including U.S. financial institutions, from directly or indirectly engaging in any transaction or dealing with a designated party.

Additionally, non-U.S. persons can face sanctions exposure for engaging in significant dealings or otherwise providing material assistance or support with such designated individuals or entities. This is a large part of what is commonly known as OFAC's secondary sanctions program.

These secondary sanctions aim to deter non-U.S. companies not otherwise under U.S. jurisdiction from acting against U.S. foreign policy and national security interests by threatening, and in certain instances imposing, an array of sanctions on the non-U.S. companies for engaging in such conduct. The type of sanctions can range anywhere from prohibitions on export assistance from the U.S. Export-Import Bank up to and including specially designated national designation.

Trump's Maximum Pressure Against Iran

The promulgation and threat of secondary sanctions has been a key part of the Trump administration's maximum-pressure campaign against Iran.

On May 8, 2018, Trump announced his decision to cease U.S. participation in the JCPOA following a wind-down period, and to begin reimposing the U.S. nuclear-related sanctions that were lifted to effectuate the JCPOA sanctions relief. On Aug. 6, 2018, the president issued Executive Order No. 13846, which reimposed U.S. sanctions on Iran that had been revoked or amended as part of the U.S. commitments to the JCPOA.

The reimposition of these sanctions implemented various statutory provisions that form the core of the U.S. secondary-sanctions program against Iran. In large part, this program has attempted to constrain the government of Iran's ability to generate revenues from petroleum, petroleum products and petrochemicals, which have been used for illicit purposes, by imposing sanctions on non-U.S. individuals and entities that provide investment (including participation in joint ventures), goods, services, information, technology or technical expertise, and support for Iran's oil, gas and petrochemical sectors.

Beyond these energy-related sanctions, the U.S. also maintains secondary sanctions that target, among other activities:

- Transactions involving the Iranian automotive sector;
- Trading in Iranian gold or precious metals;
- The sale, supply or transfer of graphite, or raw or semifinished metals, such as aluminum and steel, coal, and certain software;
- Significant transactions related to the purchase or sale of Iranian rials;
- The purchase, subscription to or facilitation of the issuance of Iranian sovereign debt; and
- Transactions involving the purchase or acquisition of U.S. dollar banknotes by the Government of Iran.

Maximum Pressure Against Iran in 2020

The Trump administration's promulgation and imposition of secondary sanctions to increase so-called maximum pressure against Iran has only magnified in 2020.

On Jan. 10, Trump issued Executive Order No. 13902, which, in relevant part, authorizes the secretary of the Treasury, in consultation with the secretary of the U.S. Department of State, to designate on the specially designated nationals and blocked persons list any person operating in or transacting with certain sectors of the Iranian economy, including construction, mining, manufacturing and textiles.

The executive order coincides with prior executive orders that target other sectors of the Iranian economy through the imposition of blocking sanctions, including energy, shipping and shipbuilding under Executive Order No. 13846, as well as iron, steel, aluminum or copper under Executive Order No. 13871.

Each of these orders also authorizes the Treasury secretary (and, by extension, OFAC) to block the property and property interests of any non-U.S. person or entity that knowingly engages in a significant transaction with, or provides material support to, any person or entity designated under any of these authorities.

Importantly, Executive Order No. 13902 also authorizes the Treasury secretary, in consultation with the secretary of State, to identify entities in "any other sector of the Iranian economy" that should be subject to sanctions.

On Oct. 8, Secretary of the Treasury Steven Mnuchin made use of this authority by identifying the financial sector of the Iranian economy pursuant to Executive Order No. 13902 as an additional avenue that funds the Iranian government's malign activities and, concurrent with this determination, OFAC sanctioned 16 Iranian banks for operating in Iran's financial sector.

These Iran-related executive orders do not define what constitutes a significant transaction or material support for purposes of imposing secondary sanctions. In other sanctions authorities, OFAC has indicated that it will consider the totality of the facts and circumstances when determining whether transactions are significant against seven broad factors.

These include:

- The size, number and frequency of the transaction(s);
- The nature of the transaction(s);
- The level of awareness of management and whether the transaction(s) are part of a pattern of conduct;
- The nexus between the transaction(s) and a blocked person;
- The impact of the transaction(s) on statutory objectives;
- Whether the transaction(s) involve deceptive practices; and
- Such other factors that the secretary of the Treasury deems relevant on a case-by-case basis.

OFAC has not given explicit guidance regarding what constitutes material support, but it is possible that OFAC would use criteria like those it uses when assessing whether a transaction is significant in order to determine if a transaction is material.

Thus, interpretation of what is significant or material in relation to a subject transaction remains entirely within OFAC's discretion, and it is extremely difficult to predict how OFAC would apply these criteria to a given transaction. In fact, it is precisely this lack of clarity, coupled with the enormity of the repercussions of being placed on the specially designated nationals list, that give these secondary-sanctions executive orders a real deterrent effect.

Maximum Pressure and the Presidential Election

Since the before the election, it appears that Trump has become more motivated to solidify his maximum-pressure campaign against any future effort by a Biden administration to unwind it than to try to force Tehran into signing a new nuclear and security deal.

A core part of this strategy appears to be blocking Iranian persons and entities, including those that are already on the specially designated nationals list under counterterrorism authorities in Executive Order No. 13224. This order was issued in the aftermath of the 9/11 attacks, and amended by Trump last year to provide additional authorities for designation of non-U.S. persons and entities as specially designated global terrorists.

Why do this? Because designation under this executive order would make it much more difficult for the future Biden administration to reverse the action. Since OFAC provides a detailed explanation for why such sanctions are issued, officials seeking to remove such sanctions will have to provide an equally justified rationale for their delisting. This could be an extremely painful exercise politically.

Notably, on Oct. 26, OFAC designated the Iranian Ministry of Petroleum, the National Iranian Oil Company and the National Iranian Tanker Company, as well as multiple front companies, subsidiaries and senior executives, pursuant to Executive Order No. 13224, for their financial support to Iran's Islamic Revolutionary Guard Corps — Qods Force, or IRGC-QF, which already was designated under the executive order.

In announcing the measure, Mnuchin emphasized:

> The regime in Iran uses the petroleum sector to fund the destabilizing activities of the IRGC-QF [and] continues to prioritize its support for terrorist entities and its nuclear program over the needs of the Iranian people.

The administration has similarly called out the petrochemical and metals industries as critical to financing Iran's terror-linked activities. Thus, it is possible that additional designations under Executive Order No. 13224 may be levied against Iranian entities in these sectors, among others, between now and Inauguration Day.

Iran Sanctions Under the Biden Administration

Moving forward into 2021 and beyond, how could the U.S. Iran sanctions program change under the Biden administration?

During the campaign, Biden said that he favors returning to the JCPOA, on the condition that Tehran abides by the agreement as well. In an op-ed published in September, Biden said:

> I will offer Tehran a credible path back to diplomacy. If Iran returns to strict compliance with the nuclear deal, the United States would rejoin the agreement as a starting point for follow-on negotiations. With our allies, we will work to strengthen and extend the nuclear deal's provisions, while also addressing other issues of concern.

This suggests that Biden will try to use the return to the JCPOA by the U.S. as an entry point for negotiating a subsequent accord covering Iran's ballistic missiles and other regional activities, which was recently confirmed by his national security adviser pick, Sullivan.

But even a mere U.S. return to the JCPOA does not seem to be an easy task, as sanctions-related complexities appear to stand in the way.

First, an Iranian government spokesperson recently said;

> Aside from returning to the deal, the next U.S administration should compensate Tehran for the damages during the withdrawal ... and of course make commitments to ensure that such violations are not repeated.

Thus, without the U.S. acceding to Iranian demands for compensation for damages that it suffered following the Trump administration's restoration of U.S. nuclear-related sanctions, any return to the negotiating table may be a nonstarter.

Second, it is quite likely that Tehran will also demand the removal of other, nonnuclear U.S. sanctions imposed since the U.S. withdrew from the JCPOA — including any sanctions that the Trump administration may impose between now and Jan. 20. As noted above, doing so may be politically unpalatable for the new Biden administration.

Thus, while it is expected that the Biden administration will roll back some of Trump's policies on Iran, just how far the next administration will go, and how long it takes, will depend significantly on how the administration navigates these constraints.

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[1] https://www.wsj.com/articles/use-of-sanctions-as-u-s-foreign-policy-tool-would-likely-continue-under-biden-11604050201.
