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PARTIALLY UNWINDING SANCTIONS: THE PROBLEMATIC CONSTRUCT OF SANCTIONS RELIEF IN THE JCPOA

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By partially unwinding the sanctions regime against Iran, the United States has sought to achieve two goals: provide Iran some meaningful level of economic relief such that it carries through with its commitment to scale back its nuclear program, while preserving the U.S.'s architecture of sanctions that target Iran for non-nuclear reasons. Barring any additional actions by policymakers, this paper argues that the United States has unwound sanctions based on legal distinctions that make it unlikely that it can achieve these goals. The paper concludes by sketching possible solutions for U.S. policymakers.

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I. INTRODUCTION

On July 14, 2015, the United States and Iran reached a Joint Comprehensive Plan of Action (“JCPOA”) in which the United States for the first time agreed to lift sanctions on Iran in exchange for constraints on Iran’s nuclear program. Unlike prior instances in which the United States has unwound large-scale sanctions regimes, the United States only committed to lift a limited set of sanctions and pledged to enforce the vast complex of Iran sanctions not within the scope of the JCPOA.¹

By partially unwinding sanctions, the U.S. sought to achieve two goals: provide Iran some meaningful level of economic relief such that it carries through with its commitment to scale back its nuclear program, while preserving its architecture of sanctions that target Iran for non-nuclear reasons. To what extent does the structure of the United States’ sanctions commitment under the

¹ The United States has not unwound any other sanctions regime on a similarly piecemeal basis. The United States maintained sanctions on Vietnam for three decades, but when it finally removed those sanctions in 1994, it did so by lifting them in their entirety. Similarly, the United States comprehensively dismantled the sanctions regime against Libya following the normalization of relations with the country in 2004. The Iraq sanctions regime was ended a few months after the invasion of Iraq in 2003. Starting in 2012, the U.S. scaled back its limited sanctions against Burma by issuing general licenses that authorized transactions with Burmese entities, rather than unwinding certain sets of sanctions while retaining others. Finally, with respect to Cuba, the United States has only softened regulations limiting travel and the ability of nonimmigrant Cubans to legally earn salaries in the United States. Although President Obama called on Congress to lift the Cuban trade embargo in 2016, the embargo remains in place and none of the sanctions targeting commercial activity have been lifted.

JCPOA make this possible? While many have analyzed the impact of the deal on the Iran sanctions regime, few have even touched on the question.² This paper aims to address it head-on. Barring any additional actions by policymakers, this paper argues that the United States has unwound sanctions on the basis of legal distinctions that make it highly difficult for it to simultaneously provide Iran the economic relief it expects under the JCPOA while leaving the rest of the U.S. sanctions architecture unaffected.

Understanding the structural problems that underlie the United States' sanctions relief package is important not only for what those problems may say about the viability of the JCPOA, but also because of their implications for sanctions policy in general. Future targets of sanctions may differ from Iran in substantial ways, but insofar as future adversaries pose a multiplicity of threats and policymakers intend to deploy sanctions to counter those threats, policymakers will have to be able to effectively disentangle sanctions that address issues that have been worked out without undermining the rest of the sanctions architecture.

Section I provides an overview of the U.S. sanctions regime against Iran and summarizes the key terms of the JCPOA, including the legal distinctions underlying the United States' provision of sanctions relief. These are distinctions based on the *target* of sanctions ("secondary" sanctions against non-U.S. persons which the United States has dismantled and "primary" sanctions against U.S. persons which the U.S. plans to continue to enforce) and the *rationale* of sanctions ("nuclear"-related sanctions with which the JCPOA does away and "non-nuclear" sanctions which are to remain in place). Altogether, the U.S. removes only those sanctions which were imposed as a

² Commentators have mostly focused on the implications of the United States' removal of a particular set of sanctions, or the continued application of a particular limitation on business activity with Iran (such as the prohibition on dollar-clearing transactions has garnered substantial attention). See Omar Bashir and Eric Lorber, *Unfreezing Iran After the Moderate Win*, *Foreign Affairs* (Mar. 1, 2016), <https://www.foreignaffairs.com/articles/iran/2016-03-01/unfreezing-iran>; Aaron Arnold, *The Real Threat to the Iran Deal: Tehran's Banking System*, *The Diplomat* (Mar. 22, 2016), <http://thediplomat.com/2016/03/the-real-threat-to-the-iran-deal-tehrans-banking-system/>. Those who have more holistically analyzed the impact of sanctions relief have tended to come from a more partisan perspective, with critics of the deal stressing that the JCPOA provides too much sanctions relief and deal supporters expressing concern that the United States is not doing enough to give Iran the sanctions relief to which it is entitled. See Jonathan Schanzer and Mark Dubowitz, *It Just Got Easier for Iran to Fund Terrorism*, *Foreign Policy* (July 17, 2015), https://foreignpolicy.com/2015/07/17/it-just-got-easier-for-iran-to-fund-terrorism-swift-bank/?utm_content=buffer9cd0b&utm_medium; Tyler Cullis, *Obama Administration Puttering on Sanctions Relief Risks Derailing Iran Accord*, *The Huffington Post* (Mar. 31, 2016), http://www.huffingtonpost.com/tyler-cullis/obama-administration-putt_b_9583002.html. Neither critics nor proponents of the JCPOA have dealt substantially with how the United States has structured its commitment to partially unwind sanctions.

result of Iran's pursuit of nuclear weapons and which discourage non-U.S. companies from engaging in business with Iran. Sanctions targeting U.S. companies as well as non-nuclear sanctions are to continue in full force.

Section II examines how each of these distinctions problematize the process of unwinding sanctions. By only unwinding secondary sanctions, the JCPOA disregards the extent to which the reluctance of non-U.S. companies to transact with Iran arises from primary sanctions and other non-“secondary” measures. In doing so, the JCPOA gives rise to two alternative, but equally problematic outcomes—(1) one in which these measures continue to dissuade foreign companies from engaging in business in Iran, thereby eliminating the possibility of meaningful economic relief for Iran, and (2) another where non-U.S. companies reenter the Iranian market despite these measures and in so doing render the surviving U.S. sanctions against Iran less forceful and effective. In addition, the distinction between nuclear and non-nuclear sanctions falls short as an organizing principle for lifting sanctions. Among the legal authorities under which the U.S. has enacted sanctions against Iran, none within the purview of the JCPOA exclusively reference Iran's nuclear program as a rationale. As a result, the United States provides sanctions relief that is inherently overinclusive.

Section III discusses the path forward. In the short- to medium-term, this section argues that the United States should propose a financial remediation program whereby Iranian banks are given the opportunity to verifiably demonstrate the integrity of their businesses through a system of international inspections. By offering such a program, the United States can start shifting the conversation around the JCPOA's commitment to economic normalization from one focused on whether the U.S. has given enough sanctions relief to one where economic relief is understood to be contingent on Iran proving the integrity of its financial sector to the international banking community. Iran, not the United States, must assume the burden of proof. This section also discusses what the JCPOA can teach policymakers about devising sanctions regimes that are easier to unwind on a piecemeal basis. As a starting point, policymakers can rationalize sanctions by predicating them in terms of precisely defined policy grounds that focus on specific categories of business activity.

II. OVERVIEW OF IRAN SANCTIONS REGIME AND THE JCPOA

A. *Legal Background*

The United States government has sanctioned Iran primarily through three legal mechanisms—congressional statutes, executive orders, and OFAC regulations and designations.³

Congressional statutes call on the President to impose specific types of sanctions or, more frequently, list a “menu” of possible sanctions from which the President can pick and choose. Statutory sanctions take the form of stand-alone statutes specifically aimed at Iran, like the Iran Freedom Support Act (“IFCA”) and Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (“CISADA”), while others are included as part of the annual defense budget through the National Defense Authorization Act and defense appropriations bills. To permanently unwind these sanctions, Congress must generally take affirmative action. However, sanctions under some statutes, like CISADA, cease to be effective when the President removes Iran’s designation as a state sponsor of terror (discussed below). Almost all statutory sanctions provide the President authority to temporarily waive sanctions under certain conditions, which typically include a determination by the President that such a waiver is in the “national interest.”

The President has also imposed sanctions through executive orders. The President has issued these executive orders based on specific statutory authorities empowering the President to sanction Iran and two general statutory authorities, the International Emergency Economic Powers Act (“IEEPA”) and National Emergencies Act (“NEA”), both of which authorize the President to impose sanctions in the event of “national emergencies.”⁴ The orders define the characteristics for designation of the targets of the economic sanctions and delegate authority for their implementation. In most cases, this administrative and enforcement authority has been delegated to the Secretary of the Treasury, acting in consultation with the Secretary of State and other specified cabinet officials.⁵

³ 40 states—including New York and California—have enacted Iran divestment statutes that preclude government and public entities from transacting with companies that do business in Iran. In light of the limited scope of these sanctions and federal courts’ relatively consistent track record in striking down state sanctions that contravene federal foreign policy objectives, this paper does not analyze these statutes in depth. See Tyler Cullis, *Assessing the Fate of State Sanctions on Iran*, SanctionLaw (Sept. 4, 2015), <http://sanctionlaw.com/assessing-the-fate-of-state-sanctions-on-iran/>; see also *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

⁴ Kay C. Georgi and Paul M. Lalonde, *Handbook of Export Controls and Economic Sanctions* 5 (2013).

⁵ *Ibid.*

The Secretary of the Treasury has generally delegated administrative and enforcement authority to the Office of Foreign Assets Control (“OFAC”) within the Treasury Department.⁶ OFAC administers Iran sanctions through two sets of implementing regulations—the Iranian Transactions and Sanctions Regulations (“ITSR”) and the Iranian Financial Sanctions Regulations (“IFSR”).⁷ The ITSR implements the trade and transaction sanctions and prohibitions concerning Iran and its government, while the IFSR imposes restriction on certain activities by U.S. financial institutions’ non-U.S. subsidiaries and implements secondary economic sanctions against non-U.S. financial institutions.⁸ OFAC has also identified and added economic sanctions targets to the Specially Designated Nationals and Blocked Persons List (“SDN List”). OFAC prohibits U.S. persons from taking part in most commercial transactions with SDNs. The SDN list also serves as notice to U.S. persons of their obligation to block any property or interests in property belonging to blocked persons that may come into their possession. Violations can result in both civil and criminal penalties.

Unlike statutory sanctions, the President can usually unilaterally revoke, modify, or supersede his own executive orders or those issued by a predecessor at any time and without explanation.⁹ This power also applies to any authority delegated by the President to the Secretary of Treasury or other cabinet officials. However, Congress can curtail the President’s authority to unwind executive orders. For instance, Congress can codify sanctions previously imposed under executive orders and attach waiver conditions. In addition, to the extent that the President has issued executive orders to implement sanctions mandated by statutes specifically targeting Iran, any actions by the President to cease applying those sanctions (including altering executive orders) will have to comply with waiver conditions delineated by the underlying statutes. This same hurdle is absent in cases where the President has imposed sanctions exclusively under the authority of IEEPA and NEA as both statutes empower the President to revoke or modify executive orders based on their authority.¹⁰

The U.S. government has sanctioned Iran in two other ways that do not neatly fit into the abovementioned categories, but are still worth addressing. First, the Secretary of State, pursuant to his authorities and responsibilities under Section 6(j) of the Export Administration Act of 1979, has designated Iran as a state sponsor of acts of international terrorism. Based off of this designation, various

⁶ *Ibid.*

⁷ *Ibid.*, 246.

⁸ *Ibid.*

⁹ Dianne E. Rennack, *Iran: U.S. Economic Sanctions and the Authority to Lift Restrictions*, Congressional Research Service, 7 (Jan. 22, 2016), <https://fas.org/sgp/crs/mideast/R43311.pdf>.

¹⁰ *Ibid.*

statutes prohibit foreign aid, financing, and trade to Iran.¹¹ Generally speaking, the President can remove Iran's designation by certifying to Congress that Iran no longer supports acts of terrorism.¹²

Second, the Financial Crimes Enforcement Network ("FinCEN"), housed within the Treasury Department, has designated Iran as a jurisdiction of primary money laundering concern. FinCEN has made this declaration based on authority delegated to it by the Secretary of the Treasury under section 5318A of the Patriot Act.¹³ Pursuant to this section, FinCEN has required domestic financial institutions and financial agencies to take certain special measures to guard against the possibility of facilitating business activity involving Iran. While FinCEN emphasizes that it will consider removing an entity's designation as a primary laundering concern in the event that it sufficiently rehabilitates its practices, Congress has codified Iran's designation for purposes of section 5318A in the National Defense Authorization Act in 2012.¹⁴

B. *Evolution of the Iran Sanctions Regime*

How these various sanctions against Iran relate to one another can be best understood in light of the context in which they were imposed.

1979 TO 2005

¹¹ *Ibid.*

¹² The President has authority to remove Iran's designation under three laws, which form the "terrorist list"—§ 620A, Foreign Assistance Act of 1961, § 40, Arms Export Control Act, and § Export Administration Act of 1979. 22 U.S.C. 2371, 22 U.S.C. 2780, 50 U.S.C. app. 2405(j). While these laws lay out somewhat different procedures for delisting, they generally require the President to certify that Iran no longer supports acts of terrorism. Rennack, *Iran: U.S. Economic Sanctions*, 6. Alternatively, the President can rescind Iran's terrorism designation for short periods of time under more flexible conditions. *Ibid.* The President can rescind the designation for 45 days if the President certifies that Iran has not supported acts of terrorism in the preceding six months and that Iran has assured the U.S. that it will not support terrorism in the future; in the case of foreign aid, the President is also authorized to provide aid despite the terrorism designation if he finds that "national security interests or humanitarian reasons justify" doing so and notifies Congress 15 days in advance. *Ibid.*

¹³ Press Release, U.S. Dep't of Treasury, Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern (Nov. 25, 2011), <https://www.treasury.gov/press-center/press-releases/Documents/Iran311Finding.pdf>.

¹⁴ That being said, Section 5318A of the Patriot Act simply authorizes the Treasury Department to take special measures in light of a determination that an entity is a primary money laundering concern; accordingly, Congress's codification of this designation does not alter FinCEN's discretion to cease applying special measures. 31 U.S.C. § 5318A

The U.S. government first imposed sanctions against Iran following the 1979 Islamic revolution.¹⁵ In response to the takeover of the U.S. Embassy in Tehran, President Carter imposed a ban on Iranian oil imports, followed by Executive Order 12170, in which the President declared a “national emergency” and blocked all \$12 billion in Iranian government assets in the United States.¹⁶ President Reagan renewed the sanctions effort in 1984 when he designated Iran as a state sponsor of terror after Iran-sponsored Hezbollah killed 241 U.S. marines in Beirut, Lebanon.¹⁷ Three years later, President Reagan banned all U.S. imports from Iran, including oil, following altercations between U.S. and Iranian vessels in the Persian Gulf.¹⁸

The 1990s saw an escalation in sanctions in light of continued anxiety about Iran’s support of terrorism along with new concerns regarding Iran’s pursuit of weapons of mass destruction.¹⁹ In October 1992, Congress passed the Iran-Iraq Arms Non-Proliferation Act, which prohibited the transfer of goods or technology related to WMDs and certain types of advanced conventional weapons. And in 1994, President Clinton issued Executive Order 12938, which imposed export controls on sensitive WMD technology. A year later, President Clinton further ratcheted up sanctions, barring all trade and investment with Iran under Executive Orders 12957, 12959, and 13059.²⁰

In 1996, Congress passed the Iran and Libya Sanctions Act, later retitled the Iran Sanctions Act (“ISA”).²¹ The ISA imposed sanctions on any firm that invested in Iran’s energy sector above a certain monetary threshold, marking the first instance in which the United States imposed secondary sanctions against Iran. If companies chose to do business with Iran’s energy sector, they

¹⁵ Patrick Clawson, *U.S. Sanctions*, United States Institute of Peace: The Iran Primer, 2 (Aug. 2015), http://iranprimer.usip.org/sites/iranprimer.usip.org/files/PDF%20Sanctions_Clawson_US.pdf

¹⁶ In April 1980, President Carter issued Executive Orders 12205 and 12211, which imposed an embargo on U.S. trade with Iran and on travel to Iran. *See* Exec. Order No. 12,170; Exec. Order No. 12,205; Exec. Order No. 12,211. As part of the January 1981 Algiers Accords between the United States and Iran, the President revoked Executive Orders 12205 and 12211 and released Iranian assets frozen pursuant to Executive Order 12170. Clawson, *U.S. Sanctions*, 2.

¹⁷ *Ibid.*

¹⁸ Clawson, *U.S. Sanctions*, 2 (Aug. 2015); Exec. Order No. 12,613.

¹⁹ *Sanctions Against Iran*, 3.

²⁰ In March, President Clinton prohibited all U.S. participation in Iranian petroleum development under Executive Order 12957. President Clinton then broadened the scope of sanctions in May, announcing Executive Order 12959, which imposed a complete trade and investment embargo on Iran. In 1997, President Clinton issued Executive Order 13059 to further “clarify the steps” taken in these orders.

²¹ Iran and Libya Sanctions Act of 1996, Pub. L. No. 104–172, 110 Stat. 1541.

could not also do business with the United States.²² Congress also enacted sanctions against Iran in the early 2000s, passing the Iran Nonproliferation Act (“INA”) in 2000 and the Iran Nuclear Proliferation Prevention Act (“INPPA”) in 2002. The INA authorized the President to impose sanctions on foreign persons who had engaged in transactions involving Iran’s WMD programs.²³ The INPPA required the U.S. representative to the International Atomic Energy Agency (“IAEA”) to oppose programs that were “inconsistent with nuclear nonproliferation and safety goals of the United States.”²⁴

2006 TO 2008

Sanctions intensified starting in 2006, when nuclear negotiations collapsed and the IAEA formally found Iran to be in noncompliance with its obligations and referred Iran to the UN Security Council.²⁵ Along with the United Nations and European Union, which began imposing sanctions of their own, Congress passed the Iran Freedom Support Act (“IFSA”) that September. The IFSA codified the trade and investment embargo imposed under President Clinton’s Executive Orders 12957, 12959, and 13059.²⁶ In addition, President Bush issued Executive Order 13438 in July 2007, which blocked the property of Iranian individuals and entities determined to have threatened stabilization efforts in Iraq.²⁷

At the same time, the U.S. government—with the Treasury Department at the forefront—mounted a campaign aimed specifically at Iran’s financial services sector. Starting in 2006, Treasury officials directly reached out to banks across the world in a concerted effort to persuade them to cut off ties with Iranian banks.²⁸ The Treasury’s argument boiled down to making clear to banks the “core risk” of doing business in Iran—in the words of Treasury official Danny Glaser, that in any business involving Iran “you cannot be certain that the party with whom you are dealing is not connected to some form of illicit activity.”²⁹

²² European countries, however, viewed these sanctions as “extraterritorial,” and the European Union threatened to mount a challenge in the World Trade Organization. The U.S. government relented and waived the energy sanctions in exchange for European commitments to cooperate more vigorously in countering Iran’s development of WMDs. *Sanctions Against Iran*, 3. In the late 2000s, the United States started re-enforcing (and further strengthening) secondary sanctions under the ISA following the collapse of nuclear negotiations with Iran.

²³ Rennack, *Iran: U.S. Economic Sanctions*, 6.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Iran Freedom Support Act of 2006, Pub. L. No. 109–293, 120 Stat. 1344.

²⁷ Exec. Order No. 13,438.

²⁸ Juan Zarate, *Treasury’s War: The Unleashing of a New Era of Financial Warfare* 298 (2013).

²⁹ *Between Feckless and Reckless: U.S. Policy Options to Prevent a Nuclear Iran: Joint Hearing Before the Subcomm on the Middle East and South Asia, and the Subcomm. on*

To the extent that the “core risk” of doing Iranian business materialized, foreign financial institutions would find themselves wrapped up in a sanctioned transaction that would subject them to hefty U.S. regulatory penalties and reputational harm in the international financial marketplace.³⁰ The Treasury Department paired private sector outreach with more aggressive use of its authority under Executive Order 13224 (passed following the attacks of 9/11) to designate terrorist financiers. From 2006 to 2008, the Treasury Department designated 13 Iranian banks and two non-Iranian banks that it determined had facilitated Iran’s proliferation activities.

Finally, in November 2008, the Treasury department revoked authorization for U-turn transfers involving Iran. With this authority, U.S. banks had been able to process dollar transactions for Iranian entities simply for the purposes of clearing those transactions; without it, foreign banks doing business with Iran were effectively unable to facilitate any Iran-related transactions in dollars.³¹

By the end of 2008, over eighty banks around the world had curtailed their Iran businesses.³² What is important to note regarding Treasury’s financial campaign is that it not only utilized the legal authority of designations and the threat of regulatory penalties to dissuade foreign banks from transacting with Iranian banks; Treasury also elevated the risk assessment of foreign financial institutions looking to do business in Iran by identifying specific risks underlying Iranian transactions that could compromise the integrity of banks’ financial controls. This is a point to which this paper will return in Sections II and III.

In addition, as Treasury’s campaign against Iran’s financial services sector escalated, other government actors entered the fray. Various U.S. authorities began aggressively pursuing foreign banks that had violated sanctions, imposing nine-figure fines and in certain instances limiting banks’ access to U.S. markets. Frequently, these punishments were imposed as part of deferred prosecution agreements, characterized by one commentator as agreements pursuant to which “corporate defendants pay fines, don’t dispute what they’ve done wrong, and promise to reform—all with the threat looming of a potential future criminal indictment” if they don’t follow through on their promise to reform.³³

Terrorism, Nonproliferation and Trade of the H. Comm. on Foreign Affairs, 110th Cong. 24 (2008) (statement of Daniel Glaser, Deputy Assistant Secretary for Terrorist Financing and Financial Crimes, U.S. Dep’t of Treasury), <http://archives.republicans.foreignaffairs.gov/110/41849.pdf>.

³⁰ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* 104 (2016).

³¹ Zarate, *Treasury’s War*, 308.

³² Robin Wright, *Stuart Levey’s War*, N.Y. Times (Oct. 31, 2008)

³³ Paul M. Barrett, *Can Banks Be Held Liable for Terrorism?*, Bloomberg Businessweek (Mar. 18, 2015)

The Treasury Department also applied the principles of its “campaign of financial isolation” to other sectors of Iran’s economy.³⁴ In late 2008, Treasury designated Iran’s main shipping line and Iran’s national oil company, the Islamic Republic of Iran Shipping Lines and National Iranian Oil Company (“NIOC”), under Executive Order 13382.³⁵ Another post-9/11 Executive Order, Executive Order 13382 empowers the Treasury Department to block the property of WMD proliferators and supporters.³⁶ Treasury officials also directly reached out to insurance companies, “highlighting the need for insurance executives to be suspicious of what was being insured for Iran as well as the importance of applying additional due diligence.”³⁷

While not as active as the Treasury Department, the State Department also began to use its authority under Executive Order 13382 to designate several significant Iranian entities. In March 2007, the State Department designated the Defense Industries Organization of Iran as part of the United States’ implementation of United Nations Security Council Resolution 1737.³⁸ In October 2007, State designated the Islamic Revolutionary Guard Corps (“IRGC”), Iran’s most powerful military organization and a major player in Iran’s economy.³⁹

2009 TO 2012

The sanctions effort went through a short hiatus in 2009 when the new Presidential administration of Barack Obama tried to renew negotiations with Iran regarding its nuclear program.⁴⁰ When these overtures failed, the effort re-intensified. The Treasury Department stepped up its financial campaign against Iran, designating additional Iranian banks in 2010.⁴¹ A year later, Treasury designated the Central Bank of Iran along with the entire Iranian banking sector as a primary money laundering concern under Section 311 of the Patriot Act.⁴²

³⁴ Zarate, *Treasury’s War*, 312.

³⁵ Press Release, U.S. Dep’t of Treasury, Major Iranian Shipping Company Designated for Proliferation Activity (Sept. 10, 2008), <https://www.treasury.gov/press-center/press-releases/Pages/hp1130.aspx>.

³⁶ Exec. Order No. 13,382.

³⁷ Zarate, *Treasury’s War* 306.

³⁸ *Ibid.*

³⁹ Press Release, U.S. Dep’t of State, Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism (Oct. 25, 2007), <http://2001-2009.state.gov/r/pa/prs/ps/2007/oct/94193.htm>

⁴⁰ Zarate, *Treasury’s War* 324.

⁴¹ *Ibid.*, 332.

⁴² Press Release, U.S. Dep’t of Treasury, Finding that the Islamic Republic of Iran is a Jurisdiction.

The Department of Justice and state regulators also escalated the campaign of enforcement actions against foreign banks with business operations involving Iran. Among the most notable cases were London-based Standard Chartered's \$340 million settlement with the New York Department of Financial Services in 2012 (plus an additional \$300 million penalty and restrictions on its U.S. business operations for not remediating "anti-money laundering compliance problems" in 2013) and the French banking giant BNP Paribas's \$8.97 billion settlement with the U.S. government, along with the suspensions of the bank's New York dollar-clearing operations for one year.

Congress also played a more active role. From 2010 to 2012, Congress passed four statutes mandating the imposition of sanctions against Iran and entities transacting with Iran, which the President implemented in a series of Executive Orders. Collectively, these statutes expanded the scope of secondary sanctions against Iran and codified Executive Branch designations of Iranian entities.

Starting with the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA"), Congress toughened up ISA sanctions, imposed secondary sanctions on foreign banks who transacted with the IRGC and facilitated WMD or terrorism-related transactions involving designated Iranian banks, and sanctioned Iranian individuals involved in the crackdown surrounding the 2009 Presidential election.⁴³ In December 2011, Congress included Iran sanctions in the National Defense Authorization Act for the Fiscal Year 2012 ("NDAA 2012"). The statute codified the designation of Iran as a country of primary money laundering concern and imposed outright secondary sanctions on foreign banks engaged in any type of business with the Central Bank of Iran or other designated Iranian financial institution.⁴⁴ The next month, Congress passed the Iran Threat Reduction and Syria Human Rights Act ("ITRSHRA"), which further ratcheted up ISA sanctions and imposed secondary sanctions on foreign companies who provided shipping services to transport goods related to proliferation and terrorism or supplied underwriting services to NIOC or the National Iranian Tanker Company ("NITC").⁴⁵ In addition, the ITRSHRA imposed liability on U.S. parent companies for the actions of their foreign subsidiaries and called on the Treasury Department to determine whether NIOC and NITC were IRGC affiliates (and thus subject to CISADA's sanctions on the IRGC). In September 2012, the Treasury submitted a report to Congress in which it

⁴³ Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, 124 Stat. 1312.

⁴⁴ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298.

⁴⁵ Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214.

determined that NIOC and NITC were in fact IRGC affiliates.⁴⁶ Finally, in December 2012, Congress passed the Iran Freedom and Counter-Proliferation Act of 2012 (“IFCA”) as a subtitle to that year’s National Defense Authorization Act. The IFCA markedly expanded the breath of secondary sanctions to include all business activities involving Iran’s energy, shipping, and shipbuilding sectors, sales of industrial materials from Iran, and the provision of underwriting services to Iranian entities already sanctioned under other legal authorities.⁴⁷

The U.S. was not alone in imposing new, tougher sanctions on Iran. In June 2010, the United Nations Security Council approved Resolution 1929, which built on the three Iran sanctions resolutions passed during the Bush administration.⁴⁸ The European Union also put in place aggressive measures, banning all Iranian oil imports in 2011 and designating over one hundred entities for their involvement in Iranian proliferation activities.⁴⁹ Even governments that were usually not amenable to Western financial pressure began to bar transactions involving Iran in light of the difficulties U.S. and European sanctions created for businesses within their jurisdiction to reliably transact with Iranian entities. For example, in January 2011, India’s central bank prohibited local companies from doing business with the Tehran-based Asian Clearing Union, an exporter of Iranian oil, “[i]n view of the difficulties being experienced by importers/exporters in payments to/receipts from Iran.”⁵⁰

C. *The JCPOA*

BACKGROUND

In March 2013, the United States and Iran began a series of secret bilateral talks regarding Iran’s nuclear program. Full-scale negotiations restarted after the election of President Hassan Rouhani in June 2013, which included Iran and the U.N.’s five permanent members (China, France, Russia, the United States, and the United Kingdom) plus Germany (the “P5+1”). On November 24, 2013, the parties agreed to an interim agreement, followed by a framework agreement in April 2015. The parties struck a final agreement on July 15, 2015. Pursuant to the JCPOA, Iran agreed to restrictions on its nuclear program in exchange for sanctions relief from the P5+1.

⁴⁶ Press Release, U.S. Dep’t of Treasury, Treasury Submits Report To Congress On NIOC And NITC (Sept. 24, 2012), <https://www.treasury.gov/press-center/press-releases/Pages/tg1718.aspx>.

⁴⁷ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112–239, 126 Stat. 1632.

⁴⁸ Zarate, *Treasury’s War* 311.

⁴⁹ *Ibid.*

⁵⁰ Ladane Nasser, *Iran Exchange to Start Fuel-Oil Trading in April, Official Says*, Bloomberg (Apr. 1, 2011), <http://www.bloomberg.com/news/articles/2011-04-01/iran-exchange-to-start-fuel-oil-trading-in-april-official-says>.

SANCTIONS COMMITMENTS OF THE P5+1

In general, the P5+1 committed to lift all United Nations Security Council sanctions as well as all multilateral and national sanctions related to Iran's nuclear program.⁵¹ With the exception of the United States, this amounted to an unwinding of most of the Iran sanctions put in place by the members of the P5+1. The seven United Nations Security Council resolutions lifted by the JCPOA represent all of the U.N. resolutions imposing sanctions against Iran. Accordingly, China and Russia completely dismantled their Iran sanctions regimes as they had only implemented those sanctions that were mandated by the U.N. Security Council. Most of the European Union's sanctions against Iran also piggybacked off of U.N. Security Council resolutions. As a result, the few Iran sanctions retained by the E.U. following the implementation of the JCPOA—the embargo on sales to Iran of arms, missile technology, other proliferation-sensitive items, and gear for internal repression—are largely insignificant from a commercial standpoint.⁵²

The United States took on a more limited approach to sanctions unwinding based on two distinctions. First, the United States promised to only lift secondary sanctions—that is, sanctions that seek to discourage non-U.S. parties from doing business with Iran under threat of being denied access to the United States market—as opposed to primary sanctions prohibiting economic activity involving U.S. persons or goods.⁵³ This means that all sanctions lifted by the JCPOA continue to apply in full force to U.S. persons, with the exception of three narrow categories of business activity.⁵⁴ In other words, the general trade and investment embargo imposed under E.O. 12959 and codified in the IFSA continues to prohibit U.S. persons from transacting with Iranian entities.

Second, the United States committed to only lift “nuclear-related” sanctions on non-U.S. persons. Rather than refer to the legal rationale underlying a particular set of sanctions (a subject discussed later in this paper), these sanctions primarily encompass measures taken by the U.S. government

⁵¹ Joint Comprehensive Plan of Action, Preface, Jul. 14, 2015.

⁵² Kenneth Katzman, *Iran Sanctions*, Congressional Research Service, 41 (Mar. 23, 2016), <https://www.fas.org/sgp/crs/mideast/RS20871.pdf>

⁵³ Joint Comprehensive Plan of Action, Ann. II, art. B, n.6.

⁵⁴ The U.S. government has committed to license three narrow categories of transactions between the U.S. and Iran. These are the sale of commercial passenger aircraft and related parts and services to Iran, the importation into the United States of Iranian-origin carpets and foodstuffs, including pistachios and caviar, and activities that are consistent with the JCPOA by non-U.S. entities that are owned or controlled by a U.S. person. *See Ibid.*, Ann. II, art. B, sec. 12-13; *see also* Guidance Relating to the Lifting of Certain U.S. Sanctions Pursuant to the Joint Comprehensive Plan of Action on Implementation Day, U.S. Dep't of Treasury and U.S. Dep't of State, 2 (Jan. 16, 2016), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/implement_guide_jcpoa.pdf

following the collapse of nuclear talks with Iran in the mid-2000s. Accordingly, the U.S. has removed 385 Iranian individuals and entities from the SDN list, decreasing the number of Iranian SDNs by approximately two-thirds.⁵⁵ This includes 13 Iranian financial institutions, such as the Central Bank of Iran and Bank Melli, as well as NIOC, NITC, and IRISL. In addition, the U.S. government committed to cease applying the broad secondary sanctions mandated under the IFCA, ITRSHRA, NDAA 2012, and section 5 of the ISA (which includes the amendments to the statute under the ITRSHRA and CISADA). On January 16, 2016, the President implemented this step by exercising his waiver authority under these statutes (which allow him to waive sanctions when doing so in the “national interest”) and revoking the executive orders implementing sanctions.

In summary, to the extent that they do not transact with the entities designated in the SDN list (a much shorter list post-JCPOA) foreign companies are no longer prohibited from engaging in most types of business activities involving Iran. These include transactions with Iranian banks and the Central Bank of Iran, such as the use of financial messaging services by Iranian entities; the provision of underwriting services and insurance; transactions involving Iran’s energy sector; transactions with Iran’s shipping and shipbuilding sectors and port operators; trade in gold and other precious metals; trade in graphite, raw or semi-finished metals and software for integrating industrial processes; sale of goods and services used in Iran’s automotive sector; and the acquisition of nuclear-related commodities and services for nuclear activities contemplated in the JCPOA.⁵⁶

III. THE JCPOA’S PROBLEMATIC CONSTRUCT OF SANCTIONS RELIEF

A. *Assessing How Successfully the U.S. Has Unwound Sanctions*

To determine how successfully the U.S. has unwound sanctions, we must first define what we mean by success. One component of success is enabling Iran to enjoy some meaningful level of economic relief such that it would be incentivized to carry through with its obligations under the JCPOA. Various factors drove Iran to agree to a deal, but it is generally accepted that the possibility of relief from the “crippling sanctions” of the 2000s (using the words of a former adviser to Iran’s nuclear negotiating team) played the decisive role in bringing Iran to the negotiating table.⁵⁷ Although studies definitively showing a causal relationship between sanctions and Iranian

⁵⁵ *Ibid.*, Ann. II, attach. 3.

⁵⁶ Guidance Relating to the Lifting of Certain U.S. Sanctions Pursuant to the Joint Comprehensive Plan of Action on Implementation Day, U.S. Dep’t of Treasury and U.S. Dep’t of State, 2.

⁵⁷ Nader Entessar and Kaveh L. Afrasiabi, *Iran Nuclear Negotiations: Accord and Détente Since the Geneva Agreement of 2013* 85 (2015).

economic activity are hard to find, the few that exist show that, by the early 2010s, sanctions had effectively isolated Iran from international markets. From 2011 to 2013, Iran's crude oil exports fell from about 2.5 million barrels per day to about 1.1 million barrels, an approximately 60% decrease.⁵⁸ Iran's economy also shrank by 9% from 2012 to 2014, before stabilizing in 2015 as a result of modest sanctions relief under the interim nuclear agreement that went into effect on January 20, 2014.⁵⁹

Iranians particularly wanted relief from the aggressive financial sector sanctions that disconnected Iran's banking sector from the international financial system. By the end of 2008, over eighty banks around the world had shut down their Iran businesses. Four years later, sanctions had made inaccessible about \$120 billion in Iranian reserves held in banks abroad and the central bank's reserves were depleted, having declined to the tune of \$110 billion.⁶⁰ Iran's currency, the rial, also suffered in the face of greater restrictions on banking transactions with Iran, falling by about 80% from 2010 to the summer of 2012.⁶¹ Iranian leaders, often prone to downplaying the effects of sanctions in the media, publicly acknowledged the devastating impact of sanctions on Iranian banks, with President Ahmadinejad noting at one point that "[o]ur banks cannot make international transactions anymore."⁶²

That the Iranians signed onto the JCPOA with the expectation that sanctions relief would translate into meaningful economic relief is underscored by paragraphs 29 and viii of the JCPOA. While the U.S. government has specifically identified the sanctions that it has committed to remove under the JCPOA, paragraph 29 of the JCPOA also states:

The EU and its Member States and the United States, consistent with their respective laws, will refrain from any policy specifically intended to directly and adversely affect the normalisation of trade and economic relations with Iran inconsistent with their commitments not to undermine the successful implementation of this JCPOA.⁶³

In addition, paragraph viii of the Preamble notes:

The [P5+1] and Iran commit to implement this JCPOA in good faith and in a constructive atmosphere, based on mutual respect, and to

⁵⁸ Katzman, *Iran Sanctions*, 2.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Iran's rial hits an all-time-low against the US dollar*, BBC News (Oct. 1, 2012), <http://www.bbc.com/news/business-19786662>

⁶³ Joint Comprehensive Plan of Action, Preamble, para. 29.

refrain from any action inconsistent with the letter, spirit and intent of this JCPOA that would undermine its successful implementation.⁶⁴

How broadly or narrowly one should read these commitments is an open question, but the presence of this general language at a minimum demonstrates that Iran does not see the United States' end of the bargain as simply limited to dismantling specific legal authorities under which sanctions have been promulgated. Instead, sanctions relief is intended to provide a baseline level of economic normalization that the United States is prohibited from undercutting by engaging in actions that violate the "spirit and intent" of the JCPOA.⁶⁵

At the same time, the U.S. government intends to continue vigorously enforcing sanctions that are not covered by the JCPOA. Over the past four decades, the United States has put in place a wide-ranging number of sanctions against Iran, many of which have been imposed for reasons unrelated to Iran's nuclear program. Accordingly, one must also assess the success of the United States' sanctions commitment by evaluating the extent to which that commitment does not detract from the efficacy of the rest of the United States' Iran sanctions regime. Indeed, the White House has pitched the JCPOA to lawmakers and the public by stressing the partial nature of sanctions relief,

⁶⁴ *Ibid.*, Preamble, para. viii.

⁶⁵ To be sure, it would not seem sensible to give the limitations in these paragraphs their full breadth. Any U.S. sanction against Iran can arguably be characterized as having an adverse impact with the potential of undermining the success of the JCPOA and all parties know that the U.S. will continue to maintain and enforce primary sanctions against Iran, which will prevent full economic normalization. Indeed, the JCPOA specifically refers to measures that have an adverse impact on normalization in a manner inconsistent with the parties' "commitments not to undermine the successful implementation of this JCPOA," which suggests that only measures that go against P5+1's specifically delineated sanctions commitments are prohibited. Thus, in January this year, Treasury designated 11 entities for their involvement in Iran's ballistic missiles program without scuttling the implementation of the JCPOA. Press Release, U.S. Dep't of Treasury, Treasury Sanctions Those Involved in Ballistic Missile Procurement for Iran (Jan. 17, 2016), <https://www.treasury.gov/press-center/press-releases/Pages/jl0322.aspx>. At the same time, an excessively narrow reading—for example, that the P5+1 has committed only to avoid re-imposing sanctions specifically dismantled under the JCPOA—is difficult to swallow given that the JCPOA explicitly brings to bear the broader concepts of "normalization of trade and economic relations" and the "spirit of this JCPOA" as opposed to employing narrower language (for example, that the P5+1 has committed to not re-impose the sanctions specifically identified as inapplicable under the JCPOA.) Furthermore, it would be hard to imagine what incentive Iran would have to comply with its nuclear-related obligations under the JCPOA were the United States or its allies to initiate a new wave of sanctions devastating Iran's economy, even if those sanctions had nothing to do with Iran's nuclear program. Thus, while it is unreasonable to read the JCPOA as prohibiting the United States from continuing already-existing sanctions against Iran or imposing new sanctions against Iran, the parties' commitment regarding the normalization of economic relations suggests that the United States has at least agreed to a minimum level of restraint and that the parties assume some basic amount of economic normalization coming out of the JCPOA.

highlighting how it has gone about differentiating between the sanctions it has unwound and those that it has preserved. Thus, an unnamed administration official began the first conference call with reporters regarding the JCPOA by emphasizing that the U.S. would continue to enforce primary sanctions. “Let me be clear about what we will not be relieving,” the official stressed, “[w]e are not removing our trade embargo on Iran. U.S. persons and banks will still be generally prohibited from all dealings with Iranian companies, including investing in Iran, facilitating cleared country trade with Iran.”⁶⁶ Similarly, the White House, in a memorandum on the JCPOA published the day after the signing of the deal, insisted from the outset that “we will offer relief only from nuclear-related sanctions” and that “we will be keeping in place other unilateral sanctions that relate to non-nuclear issues, such as support for terrorism and human rights abuses.”⁶⁷ In light of these assurances, the United States can only succeed in effectuating sanctions relief under the JCPOA if it does not compromise the effectiveness of its other sanctions against Iran.

B. *The Problematic Construct of Secondary Sanctions Relief*

Under this rubric of success, the United States’ differentiation between primary and secondary sanctions falls short. For this distinction to work as an organizing principle for lifting sanctions, non-U.S. companies will have to renew their commercial ties with Iran on some material level (thereby providing the Iranians the economic relief they anticipate) without detracting from the rest of the U.S. sanctions regime. These outcomes are unlikely to occur simultaneously. This can be illustrated most simplistically as a conceptual matter: if Iran manages to renew commercial relationships with foreign businesses, it will by definition have less incentive and need to develop commercial relations with the United States, thereby taking away from the bite of U.S. primary sanctions.

More fundamentally, however, the JCPOA misses two things. First, in assuming that secondary sanctions relief will push foreign businesses to reenter the Iranian market and that the primary sanctions regime will remain unaffected, the United States does not take into account the fact that primary sanctions also target the U.S. operations of foreign-based entities and that much of their efficacy derives from this scope. Indeed, the JCPOA disregards the extent to which non-U.S. companies have stopped transacting with Iranian entities due to the U.S.’s prohibition on dollar-clearing transactions and regulatory enforcement actions, both of which are part of the U.S. primary sanctions regime and continue to be in full force following the signing of the

⁶⁶ Transcript of Background Conference Call on Iran, The White House (Jul. 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/background-conference-call-iran>.

⁶⁷ *The Iran Nuclear Deal: What You Need to Know About the JCPOA*, The White House, 8, 22 (2015), https://www.whitehouse.gov/sites/default/files/docs/jcpoa_what_you_need_to_know.pdf.

JCPOA. Thus, foreign businesses will either continue to remain on the sidelines, thereby foreclosing the possibility of meaningful economic relief, or re-renter the Iranian market despite these measures, making them by definition less effective measures by which to influence international business activity. Furthermore, to make such a move in Iranian markets, rational business actors seeking to re-enter the Iranian market will likely try to find ways to decrease their vulnerability to U.S. primary sanctions, including decreasing their exposure to the U.S. financial system. This would not only take away from the dissuasive force of the dollar-clearing ban and regulatory enforcement actions; it would also undermine the primary sanctions regime as a whole.

Secondly, the JCPOA does not deal with the U.S. Treasury's campaign to "convince" international actors to stop doing business with Iran by highlighting the underlying riskiness of such activity. This likely means that foreign banks will either continue to avoid the Iranian market (again decreasing the likelihood that the Iranians will get the economic relief they expect) or enter the Iranian market in spite of Treasury's arguments, which would involve them discounting those arguments and thus undermine the credibility of Treasury officials in applying the same type of financial suasion in the future.

THE SECONDARY SANCTIONS LIFTED BY THE JCPOA

Under the JCPOA, the United States has lifted sanctions as to non-U.S. persons by de-listing entities from the SDN list and dismantling legal authorities prohibiting certain types of business activities involving Iran. Since the de-listing of an entity simply means that a foreign business is no longer completely barred from transacting with that entity, what really gives meaning to the United States' sanctions commitment are the withdrawal of the legal authorities that limited the scope of permissible business activities with un-designated entities.⁶⁸

⁶⁸ To be sure, insofar as foreign businesses blocked Iranian transactions as a result of U.S. designations, the removal of those designations will allow foreign businesses to immediately process those transactions, unfreezing assets and resulting in an uptick in foreign business activity involving Iran. However, the significance of this uptick is questionable. For one, it is unclear exactly how much in previously unfrozen assets the JCPOA has released. While some media outlets have reported that the JCPOA would free up to \$100 billion in previously unfrozen assets, reports fully explaining where all of these assets are located and when they were frozen are hard to find. In fact, one economist has argued that the JCPOA would unfreeze only \$30 billion in assets, concluding that larger estimates include Iranian funds that have been frozen in foreign banks dating back to the Iranian Revolution and that "some of Iran's funds have been blocked for a long time, and they have nothing to do with the nuclear agreement." Matt Pearce, *Where are Iran's billions in frozen assets, and how soon will it get them back?*, Los Angeles Times (Jan. 20, 2016), <http://www.latimes.com/world/middleeast/la-fg-iran-frozen-assets-20160120-story.html>. Even if the JCPOA freed \$100 billion worth in previously unfrozen assets, the resulting windfall to Iran is likely more limited; Iran's preexisting financial obligations probably

These authorities comprise of four congressional statutes—the IFCA, ITRSHRA, NDAA 2012, and section 5 of the ISA (which includes the amendments to the statute under the ITRSHRA and CISADA)—along with five executive orders implementing the sanctions mandated under the statutes. In aggregate, these statutes sought to discourage foreign companies from transacting with Iranian entities by imposing three types of sanctions: correspondent or payable-through account sanctions, blocking sanctions, and menu-based sanctions.

Correspondent or payable-through account sanctions targeted foreign financial institutions that did business in Iran by prohibiting them from maintaining a correspondent account or a payable-through account in the United States. Such accounts allow a foreign bank to authorize a U.S. bank to act as its agent in managing its financial affairs in the United States.⁶⁹ In particular, a foreign bank with correspondent and payable-through accounts at a U.S. bank empowers the U.S. bank to provide credit, deposit, collection, clearing, and payment services to U.S. customers in the foreign bank's name.⁷⁰ Thus, by maintaining correspondent and payable-through accounts in the United States bank, foreign banks are able to conduct business in the United States without a physical presence and access the U.S. dollars.⁷¹

decrease the amount of usable liquid assets to approximately \$50 billion, of which \$25 billion will probably be kept in foreign reserves. Cyrus Amir-Mokri and Hamid Biglari, *A Windfall for Iran?*, *Foreign Affairs*, 25 (Nov./Dec. 2015). Although not an insignificant amount, \$25 billion pales in comparison to the levels of investment and business activity experts forecast are needed to help rebuild Iran's economy, estimated to be close to \$1 trillion. *Ibid.* For this reason, both proponents and opponents of the JCPOA have downplayed the significance of the unfreezing of assets in their assessment of the impact of sanctions relief on Iran. *Ibid.*; Matt Pearce, *Where are Iran's billions* (quoting Mark Dubowitz, director of the Foundation for Defense of Democracies and a critic of the JCPOA, "Iran's overall economic relief as a result of [the lifting of] sanctions is multiples of [the amount currently frozen in banks]... Ultimately it will prove to be a rounding error compared to what Iran will earn over the next number of years."). See also Patrick Clawson, *Iran's 'Frozen' Assets: Exaggeration on Both Sides of the Debate; Will Iran Get Its Billions Back*, *The Washington Institute* (Sept. 1, 2015), <http://www.washingtoninstitute.org/policy-analysis/view/irans-frozen-assets-exaggeration-on-both-sides-of-the-debate>. Finally, it is worth remembering that while the United States has historically spearheaded the sanctions effort against Iran, the JCPOA also lifts sanctions imposed by the European Union, which include designations that overlap with those removed by the United States. Disentangling the impact of these sanctions regimes on the behavior of foreign multinationals is difficult, if not impossible, but the multilateral character of these suggests that one should not automatically explain the unfreezing of assets by foreign businesses as the product of U.S. delisting actions, particularly to the degree those assets include assets previously frozen by foreign businesses in response to designations by their home countries.

⁶⁹ Avi Jorisch, *Iran's Dirty Banking: How the Islamic Republic Skirts International Financial Sanctions* 13 (2010).

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

Blocking sanctions referred to the prohibitions on transactions involving the property interests of foreign persons doing business with Iran when those interests were within the United States or came within the possession or control of a U.S. person. Blocking is another word for “freezing” and is a means for controlling the property of a sanctioned person; title to the blocked property remains with the sanctioned person, but the exercise of powers and privileges normally associated with ownership is prohibited without authorization from OFAC.⁷² Blocking immediately imposes an across-the-board bar on transfers or dealings of any kind with regard to the property.⁷³ As a result, pre-JCPOA, a foreign company doing business with Iran ran the risk that it would lose the ability to use, access, or transfer all of its property within the United States.

Finally, menu-based sanctions were sanctions prescribed by Congress in a “menu” from which Congress directed the President to implement a certain number of sanctions. For example, Section 1245(a) of the IFCA (waived under the JCPOA with respect to non-U.S. persons) directed the President to “impose 5 or more of the sanctions described in section 6(a) of the [ISA]” on persons who sell, supply, or transfer graphite, raw or semi-finished metals to or from Iran.⁷⁴ In the case of the JCPOA, all the menu-based sanctions waived by the U.S. government were the 13 types of sanctions listed in section 6(a) of the ISA, which primarily included prohibitions on government loan assistance and the ability to engage in business activity in the United States.⁷⁵ Before the signing of the JCPOA, a foreign entity who ran afoul of these sanctions faced the possibility that it would be completely closed off from the U.S. marketplace.

⁷² OFAC FAQs: General Questions, U.S. Dep’t of Treasury, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx

⁷³ *Ibid.*

⁷⁴ Pub. L. No. 112–239, 126 Stat. 1632, §1245(a).

⁷⁵ These are prohibitions on the following: Export-Import bank assistance for exports to sanctioned persons; exports to sanctioned persons; loans from U.S. financial institution to any sanctioned person totaling more than \$10 million any 12-month period, unless such loans are for the purpose of facilitating humanitarian activities; designation of sanctioned persons as primary dealers in United States government debt securities (relevant only in the case of financial institutions); service on the part of sanctioned persons as agents of the United States government or repositories for United States government funds (relevant only in the case of financial institutions); contracts between the U.S. government and sanctioned persons; foreign exchange transactions subject to the jurisdiction of the United States and in which the sanctioned person has any interest; banking transactions subject to the jurisdiction of the United States and in which the sanctioned person has any interest; property transactions subject to the jurisdiction of the United States and in which the sanctioned person has any interest; investments by a United States person in the equity or debt of a sanctioned person; issuance of visas to corporate officers, directors, and controlling shareholders of a sanctioned person; and imports from a sanctioned person. In addition, section 6(a) empowers the President to impose any of these sanctions on the principal executive officer or officers of the sanctioned person. Pub. L. No. 104–172, 110 Stat. 1541, §6(a).

THE DOLLAR-CLEARING BAN AND ENFORCEMENT ACTIONS

While the JCPOA lifted virtually all of the United States' secondary sanctions, it did not remove or in way deal with two non-secondary legal measures that played a critical role in isolating Iran from international markets—the prohibition on banks in the United States from effecting dollar-clearing transactions on behalf Iranian entities and the slew of U.S. enforcement actions in the mid-2000s against multinational banks with business ties to Iran.

Beginning in November 2008, the U.S. government barred banks in the United States from converting payments into dollars—dollar-clearing—for the benefit of Iranian entities, even when non-Iranian, foreign financial institutions are at both ends of the transactions. An example of a prohibited transaction is the following: Iran sells oil to a non-U.S. customer, who in turn directs its bank, a non-Iranian foreign bank, to deposit dollars obtained from a bank in the U.S. into a second non-Iranian foreign bank, for the direct or indirect benefit of persons in Iran or the Government of Iran.⁷⁶

As a result, the ban on dollar-clearing transactions creates serious challenges for foreign businesses effectuating deals with Iranian counterparts. Foreign companies rely significantly on dollar-clearing to effectuate international deals as the vast majority of global transactions are priced in US dollars.⁷⁷ By one measure, transactions in U.S. dollars account for approximately 85 percent of global trade transactions, even when the parties involved are based outside the United States.⁷⁸ Companies trade goods in US dollars, purchase raw materials and supplies in US dollars, and borrow and raise US dollars to fund their purchases and operations.⁷⁹ Indeed, before November 2008, the Treasury Department specifically authorized dollar-clearing of Iran-related transactions because almost all oil transactions are priced in dollars and it did not want to significantly disrupt the oil markets, particularly in light of the dependency of many countries (including allies) on Iranian oil.⁸⁰

Second, the JCPOA does not reckon with the effects of the United States' campaign of devastating enforcement actions against foreign banks doing business with Iran. Starting in 2004, various U.S. authorities began aggressively pursuing foreign banks that had violated sanctions, imposing

⁷⁶ Client Alert, *Iranian "U-Turn" Transfers Now Prohibited*, Gibson Dunn (Nov. 12, 2008), <http://www.gibsondunn.com/publications/pages/IranianU-TurnTransfersNowProhibited.aspx>.

⁷⁷ Ernest T. Patrikis, *Will enforcement of US sanctions reshape how US-dollar transactions are cleared?*, *Financier Worldwide* (Sept. 2014).

⁷⁸ Bashir and Lorber, *Unfreezing Iran After the Moderate Win*.

⁷⁹ Patrikis, *Will enforcement of US sanctions reshape how US-dollar transactions are cleared*.

⁸⁰ Zarate, *Treasury's War* 308.

multi-billion dollar fines and in certain instances limiting banks' access to U.S. markets. What is important to stress about these actions is that they all involved foreign financial institutions insufficiently walling off their Iran operations from their U.S. businesses, *not secondary sanctions violations*. All of the United States' enforcement actions targeted banks that had violated primary sanctions by covering up their transactions with Iranian entities so as to deceive U.S. counterparties or otherwise process those transactions through the U.S. financial system.⁸¹

These enforcement actions pushed banks to exit their Iran businesses in several ways. First of all, banks entering into deferred prosecution agreements with U.S. authorities often had to explicitly agree to cut off their Iran operations for a specified period of time, frequently ranging from three to five years. Second, many foreign banks who had yet to find themselves in the crosshairs of U.S. authorities reasoned that the potential of a mammoth financial penalty rendered any Iran business prohibitively risky, and decided instead to altogether eliminate their Iran operations. A process called "de-risking", banks made the determination that they would be better served by completely exiting the business line giving rise to the risk of financial penalties, instead of investing in the technologies and compliance systems to manage that risk.⁸²

⁸¹ See e.g., Information at 4-5, *U.S. v. H.S.B.C. Bank*, No. 12-763 (E.D.N.Y. Dec. 11, 2012); Deferred Prosecution Agreement at 19-20, *U.S. v. Standard Chartered Bank*, Case: 1:12-cr-00262 (D.C. Cir. Dec. 10, 2012); Deferred Prosecution Agreement at 29-S1, *U.S. v. Commerzbank AG*, Case: 1:2015cv00818 (D.C. Cir. Mar. 12, 2015); Information at 1-4, *U.S. v. BNP Paribas, S.A.*, No. 1:14-cr-00460, (S.D.N.Y. Jun. 30, 2014).

⁸² Victoria Anglin, *Why Smart Sanctions Need a Smarter Enforcement Mechanism: Evaluating Recent Settlements Imposed on Sanction-Skirting Banks*, 104 *Geo. L.J.* 693, 715 (2016). In part contributing to this determination was a sense that the cost of instituting the necessary additional safeguards to prevent sanctions violations would be too high and never sufficiently full-proof. *Ibid.* At the same time, U.S. government officials would regularly emphasize the intentional, recurring nature of the conduct they prosecuted. Indeed, as part of their settlements with U.S. authorities, foreign banks would frequently agree to factual statements affirming their knowledge and responsibility. BNP Paribas is one particularly egregious example; according to the Justice Department, the bank "went to elaborate lengths to conceal prohibited transactions, cover its tracks, and deceive US authorities." See Information at 1-4, *U.S. v. BNP Paribas, S.A.*, No. 1:14-cr-00460, (S.D.N.Y. Jun. 30, 2014). Nevertheless, many do not believe that this narrative captures the whole story. According to one commentator, "identifying proliferation-related transactions is no easy feat, and of the millions of daily transactions, the vast majority are quite benign. Identifying violators is akin to finding the proverbial needle in a haystack." Aaron Arnold, *Big banks and their game of risk*, *Bulletin of the Atomic Scientists* (Jan. 20, 2015), <http://thebulletin.org/big-banks-and-their-game-risk7941>. And banks have in certain cases attributed sanctions violations to the failure of their internal controls. Following authorities' decision to impose additional penalties on Standard Chartered in 2014, the bank specifically attributed the sanctions violations to an inadequate information technology system that failed to detect potentially high-risk transactions. *Ibid.*

The JCPOA has not addressed any of these drivers behind banks' behavior. While it is arguably permissible for parties to engage in dollar-clearing outside of the United States, the structure and economics of the dollar-clearing business mean that dollar-clearing services must invariably be routed through the United States, which goes against the primary sanctions regime.⁸³ Consequently, many foreign companies continue to express reluctance about re-engaging Iranian businesses. According to Clyde & Co., a London-based law firm, the prohibition on dollar-clearing transactions plays a significant role in explaining why 85% of respondents to a recent survey continue to have a "negative risk appetite" as to the question of renewing ties with Iran.⁸⁴ Business people have also publicly made the point. In an interview with Reuters in March, an international banker operating in the Persian Gulf stated that his bank continued to have an aversion to Iranian transactions because of the continued

⁸³ See Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions Under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day, U.S. Dep't of Treasury (Mar. 24, 2016) ("After Implementation Day, foreign financial institutions need to continue to ensure they do not clear U.S. dollar-denominated transactions involving Iran through U.S. financial institutions.") (emphasis added).

Dollar-clearing is only viable as business model in the United States because dollar-clearing in the U.S. takes place via two clearing networks—the Federal Reserve's Fedwire Funds Service ("FFS") and the privately-owned Clearing House Interbank Payment System ("CHIPS"), which can facilitate payments due its status as a customer of FFS—that rapidly and efficiently process payments as a result of the dollar liquidity provided by the Federal Reserve. Duncan Kerr, *Clearing: European banks weigh up US dollar clearing options*, Euromoney (Jan. 2015); see also Yalman Onaran, *Dollar Dominance Intact as U.S. Fines on Banks Raise Ire*, Bloomberg (July 16, 2014). To participate in the FFS, participants must maintain an account with a Federal Reserve Bank. Subject to the Federal Reserve Bank's and the Federal Reserve Board's risk reduction policies, where applicable, entities authorized by law, regulation, policy, or agreement to be participants include depository institutions, agencies and branches of foreign banks, member banks of the Federal Reserve System, the Treasury and any entity specifically authorized by federal statute to use the Reserve Banks as fiscal agents or depositories, entities designated by the Secretary of the Treasury, foreign central banks, foreign monetary authorities, foreign governments, and certain international organizations; and any other entities authorized by a Federal Reserve Bank to use Fedwire Funds or Security Service. See FFIEC IT Examination Handbook Infobase (2016). To participate in CHIPS, a banking organization must have a "regulated U.S. presence" and members must jointly maintain a pre-funded balance account on the books of the Federal Reserve Bank of New York. *Ibid.* Without that backstop, dollar-clearing becomes impracticable as a business model; banks are not able to provide dollar-clearing services to business clients on a sustainable basis and dollar-clearing is a commodity business with low profit margins that relies on volume to justify the required capital investment. See Ernest T. Patrikis, *Will enforcement of US sanctions reshape how US-dollar transactions are cleared?*, *Financier Worldwide* (Sept. 2014). Accordingly, although dollar-clearing has technically been available in Hong Kong and Singapore for two decades, those platforms have not taken off and the aggregate volume of dollar-clearing transactions in those cities accounts for less than one percent of the global total. See Onaran, *Dollar Dominance Intact*.

⁸⁴ *London Market's Risk Appetite for Iran Business Weighed Down by Remaining US sanctions*, Clyde & Co (Feb. 22, 2016), <http://www.clydeco.com/blog/sanctions/article/london-markets-risk-appetite-for-iran-business-weighed-down-by-remaining-us>.

ban on dollar-clearing. "Around 85 percent of trade is in U.S. dollars and if you're dealing in dollars you cannot risk that by involvement with Iran."⁸⁵

As for regulatory enforcement actions, OFAC has explicitly stated that the agreement does not alter the terms or conditions of deferred prosecution agreements into which banks may have entered.⁸⁶ This means that, barring any actions by the relevant regulatory authorities, foreign banks that have entered into these agreements are legally unable to enter into the Iranian market even if they want to. As for the rest of the banking industry, the JCPOA does nothing to deal with why foreign banks have decided to de-risk themselves from the Iranian market. Not only have regulators not made any indications that they will scale back penalties or other punishments, but the JCPOA did not alter the underlying legal basis upon which they were able to go after banks in the first place—namely, the United States primary sanctions regime against Iran. Insofar as the past decade's campaign of regulatory actions against banks has scared the industry away from the Iranian market, foreign financial institutions will not find any language in the JCPOA to alleviate that fear.

Thus, the fact that the United States does not deal with the ban on dollar-clearing or the U.S.'s campaign of enforcement actions means that the partial unwinding of sanctions under the JCPOA is unlikely to simultaneously provide Iran the economic relief it expects while leaving the rest of the U.S. sanctions architecture unaffected. If the ban on dollar-clearing transactions and the possibility of enforcement actions continue to dissuade foreign businesses from pursuing business opportunities in Iran, Iran will probably not get the economic relief it anticipates. For many of the foreign banks and businesses who shut down their Iran operations in the late 2000s—and with which Iran hopes to reconnect—these measures prohibitively raise the cost of doing business.

Alternatively, if foreign businesses re-enter the Iranian market, they will have to do so despite these government actions, by definition rendering them a less dissuasive force. More specifically, to the degree that rational business actors seek to pursue Iranian business opportunities, they will have to develop workarounds that decrease their exposure to the United States, making it more difficult for the United States to pressure them by threatening to close them off from the U.S. financial system. To do business with Iran despite the ban on dollar-clearing transactions, foreign companies will have to find ways to effectuate deals in alternative currencies to the dollar. To eliminate their vulnerability to enforcement actions, financial institutions will have to figure

⁸⁵ Tom Arnold and Jonathan Saul, *Iranians exasperated as U.S. sanctions frustrate deal making* (Mar. 22, 2016), <http://www.reuters.com/article/us-iran-trade-finance-idUSKCN0WO1Y3>.

⁸⁶ Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions Under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day, U.S. Dep't of Treasury (Mar. 24, 2016).

out ways to do business with Iranian entities without running afoul of primary sanctions—either by devoting more resources to walling off Iranian transactions from the United States financial system or by simply reducing their exposure to U.S. markets. European and Asian companies have a special incentive to decrease their exposure to U.S. markets in light of the fact that, while the United States has not lifted the ban on dollar-clearing transactions or indicated that it will stop pursuing enforcement actions, the European Union and other states have mostly relaxed their Iran sanctions programs.⁸⁷ The different paces at which the United States and the rest of the P5+1 have unwound sanctions means that in the long-term foreign businesses will have an easier time avoiding U.S. markets, thereby diminishing the United States' ability to effectively levy sanctions in the future.⁸⁸

While global companies have by no means started exiting the U.S. market in mass, there is evidence that some foreign businesses have begun exploring ways to decrease their exposure to the U.S. financial system in order to transact with Iran after the signing of the JCPOA. In an interview with the author, a European lawyer noted that some companies have begun working around the United States' prohibition on dollar-clearing by closing and settling dollar-priced contracts in alternative currencies, such as the euro.⁸⁹ In Japan, the Bank of Tokyo-Mitsubishi has announced that it will handle payments by Japanese oil refiners to Iran in both yen and euros and two other Japanese banks have reportedly looked into reinitiating non-dollar wiring services to Iran.⁹⁰ Foreign governments have also been responding to the renewed business interest in the Iranian market by actively exploring ways to enable businesses to carry out transactions in alternative currencies. The Government of Pakistan has asked the State Bank of Pakistan to come up with an interim payment mechanism so that Pakistani companies can enter Iran without relying dollars; South Korea is exploring ways to encourage dealings with Iran in its own currency or euros; and Brazil's trade minister announced in February that his government will look to enable payments in euros and other currencies to and from Iran because "everyone is racing after Iran now...the trade potential is very big."⁹¹

⁸⁷ Bashir and Lorber, *Unfreezing Iran After the Moderate Win*.

⁸⁸ *Ibid.*

⁸⁹ Telephone Interview, (Feb. 23, 2016).

⁹⁰ *Japan's Bank of Tokyo-Mitsubishi UFJ restarts Iran oil transactions*, S&P Global (Feb. 9, 2016).

⁹¹ Kazim Alam, *Treading with caution in trade with Iran*, The Express Tribune (Feb. 15, 2016), <http://tribune.com.pk/story/1046858/long-way-still-to-go-treading-with-caution-in-trade-with-iran/>; Yi Whan-Woo, *Korea, Iran to revive economic ties*, The Korea Times (Jan. 27, 2016), <http://www.koreatimes.co.kr/www/news/>. The author thanks Omar Bashir and Eric Lorber for their excellent summary of these various reports in their recent Foreign Affairs article. See *Unfreezing Iran After the Moderate Win*.

Indeed, according to Omar Bashir and Eric Lorber of the Financial Integrity Network, these moves “only continue a recent, larger trend of companies and countries avoiding the U.S. financial system” out of fear of U.S. sanctions.⁹² For instance, “many analysts believe that the recent Chinese push to make the renminbi a reserve currency was partly the result of a Chinese desire to ensure that the United States would not be able to bring significant coercive economic leverage to bear on China in the future.”⁹³ Likewise, Bashir and Lorber discuss the potential that China’s new China International Payment System, a financial messaging network like Brussels-based SWIFT—the global system on which banks rely to coordinate the transfer of trillions of dollars every day—will “insulate the country from the sanctions that proved so powerful against Iran.”⁹⁴

TREASURY’S PRIVATE OUTREACH TO FOREIGN BANKS

The JCPOA also does not address an *extra*-legal effort on the part of the United States government during the 2000s—namely, Treasury officials’ private outreach to foreign banks and their efforts to persuade banks to cut off their Iran operations by demonstrating the inherent riskiness of transacting with Iran. From 2006 to 2012, Treasury officials directly reached out to over 200 banks in more than 60 countries to convince them to cut off ties with Iranian banks.⁹⁵

Treasury’s argument boiled down to making clear to banks the “core risk” of doing business in Iran, which in the words of Treasury official Danny Glaser was the risk that in any business involving Iran “you cannot be certain that the party with whom you are dealing is not connected to some form of illicit activity.”⁹⁶ This risk had several counters, the details of which Glaser described in a House Committee hearing in 2008. One, the Iranian government and designated Iranian entities regularly used “front companies and intermediaries in ostensibly legitimate commercial transactions that [were] actually related to its nuclear and missile programs.”⁹⁷ Two, Iranian banks would ask foreign financial institutions “to remove their names when processing transactions” and thus “elude the controls put in place by responsible financial institutions”, potentially involving them in transactions that they otherwise would never engage in.⁹⁸ Accordingly, Iranian banks would

nation/2016/01/120_196402.html; Alonso Soto, *Exclusive: Brazil could waive U.S. dollar to bolster Iran trade – minister*, Reuters (Feb. 16, 2016), <http://www.reuters.com/article/us-brazil-iran-trade-idUSKCN0VP249>.

⁹² Bashir and Lorber, *Unfreezing Iran After the Moderate Win*.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ Kittrie, *Lawfare* 137.

⁹⁶ *Between Feckless and Reckless*, at 32.

⁹⁷ *Ibid.*, at 28.

⁹⁸ *Ibid.*

proceed “undetected as they move money through the international financial system to pay for the Iranian regime’s illicit and terrorist-related activities.”⁹⁹ Three, foreign financial institutions could place little faith in Iran’s anti-money laundering (“AML”) regime, which was wrought with substantial deficiencies that hampered Iran’s ability to detect or prevent terrorist financing.¹⁰⁰ Treasury would specifically cite findings by the Financial Action Task Force (“FATF”), an intergovernmental organization dedicated to develop policies to combat money laundering, and the International Monetary Fund (“IMF”), detailing Iran’s AML problems.¹⁰¹ These included “insufficient criminalization of money laundering, failure to criminalize terrorist financing, lack of AML supervision, lack of financial intelligence unit, lack of sanctions implementation, and lack of international cooperation in AML investigations.”¹⁰²

To the extent that the “core risk” of doing Iranian business materialized, foreign financial institutions would find themselves wrapped up in a sanctioned transaction that would damage their reputations in the international marketplace and make them the target of U.S. enforcement actions—a possibility that, in light of the increasingly punitive fines and other penalties U.S. authorities were imposing on sanctions violators, no bank wanted to entertain.¹⁰³ Juan Zarate neatly illustrates Treasury’s emphasis on the inherently suspect nature of Iranian business in an account of one particular meeting between Stuart Levey, then Treasury Under Secretary for Terrorism and Financial Intelligence, and a German bank executive team:

On one occasion, Levey had compiled information about Iran’s use of a German bank to move money for acquisitions for their operations, potentially for the nuclear program. When Levey met with the bank’s CEO and chief compliance officer, he asked them if they knew what was happening in their bank. The compliance officer seemed confident. The CEO less so and worried about what was to come. Levey then calmly explained what the U.S. government knew about Iranian financial transactions and the use of cover payments and front companies to hide the real purpose for their banking. The IRGC was using bank accounts in Europe to acquire nuclear equipment and to develop its missile systems while lining their leaders’ pockets. Levey went on to explain that most banks did not realize this, but that it was happening. The banks thus far had no way to know what was transpiring through Iranian front operations and accounts. Levey then

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, at 34.

put a file on the table that contained documents detailing those types of transactions happening in that very bank.

After absorbing this revelation, the CEO was stunned, the compliance officer sheepish and worried. The CEO took the documents and thanked Levey for the information. He said he would take the information under consideration and look into the matter. The meeting was over, and it had its effect. The bank began to close its accounts with Iranian customers and curtail its business with Iran.¹⁰⁴

The JCPOA does not address the effect of this campaign of financial suasion on international banks' risk assessment of Iran. To be sure, the hefty fines coming out of the "stripping cases" —in which U.S. authorities penalized banks like BNP Paribas for stripping the names of Iranian customers before processing them through the U.S. financial system—are unlikely to lead financial institutions to honor requests to strip the names of their Iranian counterparts. The JCPOA also establishes a legal framework for Iran to pursue a nuclear program and thus allows for legitimate nuclear-related commercial transactions. Nevertheless, the risks that Treasury highlighted in the mid-2000s remain as true today as they did before the JCPOA—by doing business in Iran, foreign banks still open themselves up to the possibility of dealing with front companies and intermediaries engaged in illicit conduct and they cannot count on a robust Iranian AML regime to manage this risk. While the United States now allows foreign financial institutions to transact with Iranian entities as long as they are not SDN's, the JCPOA does not deal with the bigger elephant in the room—the perception that has developed among many banks that they can never know for sure that an Iranian counterparty is not mired in the type of illegal activity that will expose them to heavy fines and penalties.

Since the JCPOA does not address any of these risks beyond those specifically implicated by Iran's nuclear program, any move by foreign banks to re-enter the Iranian market would necessarily require them to discount Treasury's arguments concerning the potential dangers posed by transacting with Iranian entities. For foreign entities to pursue business opportunities in Iran despite these risks, they will either have to envision the possibility of greater returns following the JCPOA (to offset these risks) or discount the existence of these risks altogether. Although Iran presents significant business and investment opportunities for foreign companies, those opportunities (e.g., development of oil and gas resources, infrastructure renewal, technology investment) pre-date the JCPOA and have been long known by foreign companies. Accordingly, in light of the current terms of the JCPOA, any re-orientation by foreign banks with respect to the Iranian market will likely require them to discount

¹⁰⁴ Zarate, *Treasury's War* 301.

Treasury's arguments about the underlying risk of transacting with Iranian entities.

Such a move would also more generally undermine the U.S.'s credibility in applying financial suasion against foreign financial entities. Companies would have less reason to give weight to the U.S.'s arguments about the risks a particular country poses to the integrity of the financial system if they know that they have no other purpose than to effectuate a particular political goal of the United States. This is important because, amidst the multiple factors pushing foreign businesses to withdraw from the Iranian market, Treasury's arguments about the inherently suspect nature of Iranian transactions played a special role in convincing banks to completely cut off their Iranian operations (rather than try to manage their risks through additional compliance efforts). For example, by characterizing the Iranian financial system as inherently risky, Treasury helped give rise to a virtuous cycle of foreign banks exiting the Iranian market as no foreign bank wanted to be the last international bank transacting with "shady" designated Iranian banks.¹⁰⁵ In turn, "such private sector decisions" made it more "politically feasible for foreign governments to impose restrictions because some or all of the major relevant companies in their jurisdiction had already foregone the business."¹⁰⁶ Thus, Juan Zarate writes that it is "the threat to the international financial system of the illicit and suspect flows of money that [has been] the baseline for Iran's isolation."¹⁰⁷ "If the perception is that this suspicion is gone and normalization is to follow, then the ability to use this kind of financial suasion... will be weakened."¹⁰⁸

C. *The Meaninglessness of Nuclear-Only Sanctions*

More clearly than the secondary/primary sanctions distinction, the distinction between nuclear and non-nuclear-related sanctions fails as an organizing principle by which to partially unwind sanctions. While the JCPOA mostly dismantled secondary sanctions under legal authorities that were enacted as Iran ratcheted up its nuclear program in the late 2000's, none of these authorities exclusively cite Iran's nuclear program as their driving rationale. The United States has thus provided sanctions relief that is, as a legal matter, inherently overinclusive.

¹⁰⁵ Kittrie, *Lawfare* 138.

¹⁰⁶ *Ibid.*

¹⁰⁷ Juan Zarate, *Sanctions and the JCPOA*, Statement before the Senate Foreign Relations Committee, 11 (July 30, 2015)

¹⁰⁸ *Ibid.*

STATUTORY SANCTIONS

Pursuant to the JCPOA, the Secretary of State has waived sanctions mandated under four statutes—the Iran Sanctions Act of 1996 (“ISA”), the National Defense Authorization Act of 2012 (“NDAA 2012”), the Iran Threat Reduction and Syria Human Rights Act of 2012 (“ITRSHRA”), and the Iran Freedom and Counter-Proliferation Act of 2012 (“IFCA”). For the most part, these statutes do not explicitly link the imposition of sanctions to specific rationales, but they do recite various policy objectives and findings that shed light on Congress’s reasoning.

The ISA, which is the basis of most of the United States’ sanctions on Iran’s energy sector, comes closest to promulgating sanctions on the basis of specific objectives. The ISA grounds its sanctions in two rationales—Iran’s pursuit of nuclear weapons and support of terrorism. On the face of the statute, the ISA notes as its first finding that “[t]he efforts of the Government of Iran *to acquire weapons of mass destruction* and the means to deliver them and *its support of acts of international terrorism* endanger the national security and foreign policy interests of the United States.”¹⁰⁹ In the subsequent section—Declaration of Policy—the ISA more forcefully articulates this dual threat as the rationale for its prescriptions: “[t]he Congress declares that it is the policy of the United States to deny Iran the ability to support acts of international terrorism and to fund the development and acquisition of weapons of mass destructions and the means to deliver them by limiting the development of Iran’s ability to explore for, extract, refine, or transport by pipeline petroleum resources of Iran.”¹¹⁰

The National Defense Authorization Act is an approximately 600-page act passed by Congress on an annual basis specifying the budget and expenditures of the United States Department of Defense. The NDAA 2012’s sanctions against Iran—which target Iran’s financial services sector—appear under Section 1245. Like the ISA, the NDAA 2012 clearly delineates Congress’s “findings” before laying out sanctions. And again, the NDAA 2012 does not focus solely—or even primarily—on Iran’s nuclear weapons program. Instead, the NDAA 2012 highlights Iran’s status as “jurisdiction of primary money laundering concern” and the “terrorist financing, proliferation financing, and money laundering risks” Iranian banks pose “for the global financial system.”¹¹¹

The ITRSHRA and IFCA are more opaque, but they also do not focus exclusively on Iran’s nuclear program. The ITRSHRA sanctions waived by the

¹⁰⁹ Pub. L. No. 104–172, 110 Stat. 1541, §2(1) (emphasis added).

¹¹⁰ *Ibid.*, §3(a).

¹¹¹ Pub. L. No. 112–81, 125 Stat. 1298, §1245(a)(3).

JCPOA are Sections 212(a) and 213(a) of the ITRSHRA, which target persons who provide underwriting services or insurance for the National Iranian Oil Company and National Iranian Tanker Company and transactions involving Iranian sovereign debt. How one distinguishes the rationale of Sections 212(a) and 213(a) depends on how one understands their placement within the overall structure of the statute. Like the ISA and NDAA, the first section of the ITRSHRA—Title I, “Expansion of Multilateral Sanctions Regime With Respect to Iran”, Section 101—recites Congressional findings and identifies multiple policy objectives, stating: “[i]t is the sense of Congress that the goal of compelling Iran to abandon efforts to acquire a *nuclear weapons capability* and *other threatening activities* can be effectively achieved through a comprehensive policy that includes economic sanctions, diplomacy and military planning, capabilities and options.”¹¹² However, Sections 212(a) and 213(a) appear under Subtitle B of Title II, “Expansion of Sanctions Relating to the Energy Sector of Iran and Proliferation of Weapons of Mass Destruction by Iran”, which includes no perambulatory text.¹¹³ Subtitle A is titled “Expansion of the Iran Sanctions Act of 1996” and simply amends ISA 1996 while Subtitle B is titled “Additional Measures Relating to Sanctions Against Iran.”¹¹⁴ If one reads Title I and Title II as addressing different sets of sanctions—multi-lateral sanctions versus energy/WMD sanctions—one may be more inclined to read Sections 212(a) and 213(a) in light of Title II’s grounding in the ISA and thus impute the act’s same underlying rationale to these two sections, Iran’s pursuit of weapons of mass destruction and support of terrorism.¹¹⁵

The IFCA is even more convoluted in how it defines its rationales. Section 1243—titled “Sense of Congress Relating to Violations of Human Rights by Iran”—is the statute’s first section following “Definitions” and states that “Congress finds that the interests of the United States and international peace are threatened by the ongoing and destabilizing actions of the Government of Iran, including its massive, systematic, and extraordinary violations of the human rights of its own citizens.”¹¹⁶ However, the JCPOA does not encompass this section, which includes no sanctions, and instead waives sanctions

¹¹² Pub. L. No. 112–158, 126 Stat. 1214, §101.

¹¹³ *Ibid.*, §212(a), §213(a).

¹¹⁴ *Ibid.*

¹¹⁵ It is possible to parse the statute further to obtain a narrow rationale. Since the ISA targets Iran’s energy sector, one could read Title II’s sequencing of the targets of sanctions as meaning that Subtitle A prescribes sanctions “relating to the energy sector of Iran” and Subtitle B prescribes sanctions pertaining to the “proliferation of weapons of mass destruction by Iran.” While this reading would conveniently transform Sections 212(a) and 213(a) sanctions into “nuclear-only” sanctions, it would presume that Title II implies a neat, mutually exclusive division of energy sector and WMD sanctions between Subtitle A and B—an unworkable assumption in light of the fact that that the ISA also targets Iran’s WMD program and that Section 212(a) patently targets Iran’s energy sector by designating the National Iranian Oil Company and National Iranian Tanker Company.

¹¹⁶ Pub. L. No. 112–239, 126 Stat. 1632, §1243.

promulgated under Sections 1244, 1245, 1246, and 1247. Roughly speaking, these sections impose sanctions on activity involving Iran's energy, shipping, and shipbuilding industries, transactions involving precious metals or specified materials used in connection with Iran's nuclear, military, or ballistic missile program, the provision of underwriting services, insurance, or reinsurance in connection with any sanctioned activity, and significant financial transactions between foreign financial institutions and designated Iranian banks. If one parses each section, one gets a bit more clarity on the rationale, but nothing that looks like exclusively nuclear program-related sanctions. Section 1244 comes closest, with subsection (a)(1) stating that "Iran's energy, shipping, and shipbuilding sectors and Iran's ports are facilitating the Government of Iran's *nuclear proliferation activities* by providing revenue to support proliferation activities."¹¹⁷ However, the use of the term proliferation suggests that the section not only covers Iran's efforts to acquire nuclear weapons (the focus of the JCPOA) but also Iran's efforts to distribute nuclear technology, which the JCPOA addresses only as an ancillary matter. Section 1245 includes no similar subsection describing Congress's findings, but the fact that it imposes sanctions in relation to conduct involving Iran's nuclear, military, or ballistic missile programs suggests that these multiple programs (not just Iran's nuclear program) are what motivated these sanctions.¹¹⁸ Section 1246 also includes no preambulatory language and opens up a bigger can of worms given that it imposes sanctions on individuals providing services in connection with already sanctioned activities; the section then arguably imputes all of the rationales cited by the various Iran sanctions statutes, executive orders, and regulations.¹¹⁹ Finally, Section 1247 does not rationalize its set of sanctions, but in light of the fact that it expands the financial services sanctions promulgated under NDAA 2012, one can perhaps infer that the rationale motivating the NDAA 2012 also underlies Section 1247—namely, the terrorist financing, proliferation financing, and money laundering risks posed by Iranian banks.¹²⁰

EXECUTIVE ORDERS

In addition to waiving statutory sanctions, the United States has revoked five executive orders mandating sanctions against Iran—in their entirety, Executive Order (“E.O”) 13574, 13590, 13622, and 13645, and partly, E.O 13628 (Sections 5-7). All five of the Executive Orders revoked by the President predicate sanctions on the basis of the general statutory authority of IEEPA, while three additionally cite Iran-specific statutory authorities. None exclusively recite Iran's nuclear program as their underlying rationale.

¹¹⁷ *Ibid.*, §1244(a)(1).

¹¹⁸ *Ibid.*, §1245.

¹¹⁹ *Ibid.*, §1246.

¹²⁰ *Ibid.*, §1247.

E.O. 13574, dated May 23, 2011 and promulgated on the basis of IEEPA, ISA, and CISADA 2010, provides implementation authority for certain “menu-based” sanctions set forth in the ISA, including sanctions added to the ISA through amendment by CISADA 2010.¹²¹ Both ISA and CISADA 2010 unequivocally rationalize sanctions on various grounds—Iran’s nuclear program, ballistics weapon program, and support of terrorism—and the President explicitly justifies E.O. 13574 in these terms in his IEEPA certification to Congress.¹²²

E.O. 13590, dated November 20, 2011, provides for menu-based sanctions with respect to persons who provide goods and services to Iran that could advance the maintenance or expansion of Iran’s petrochemical industry.¹²³ While E.O. 13590 grounds sanctions entirely in the President’s IEEPA authority, the President’s IEEPA certification to Congress emphasizes that “[t]his order expands upon actions taken pursuant to ISA, as amended by... CISADA” by expanding the scope of targeted persons. Accordingly, the same multifaceted rationale of ISA and CISADA imputed to E.O. 13574 can be imputed to E.O. 13590.

E.O. 13622, dated July 30, 2012 and based on the President’s IEEPA powers, also imposes sanctions on activities involving Iran’s petrochemical industry, including persons and financial institutions engaged in transactions with the National Iranian Oil Company (“NIOC”) and Nafitran Intertrade Company (“NICO”), along with sanctions on persons and financial institutions doing business with the Central Bank of Iran.¹²⁴ In both the Order and the accompanying message to Congress, the President cites three rationales: “the Government of Iran’s use of revenues from petroleum, petroleum products, and petrochemicals for illicit purposes”, “Iran’s continued attempts to evade international sanctions through deceptive practices”, and “the unacceptable risk posed to the international financial system by Iran’s activities.”¹²⁵

E.O. 13645, dated June 3, 2013 and grounded in IEEPA, ISA, CISADA 2010, and IFCA 2012, imposes sanctions on persons transacting in the Iranian rial, engaging in business involving Iran’s automotive sector, and providing

¹²¹ Exec. Order No. 13,576.

¹²² ISA is discussed above. Sections 2 – Findings and Section 3 – Sense of Congress Regarding the Need to Impose Additional Sanctions With Respect to Iran of CISADA, collectively, rationalize the imposition of new sanctions on the following bases: “illicit nuclear activities of the Government of Iran”, Iran’s “development of unconventional weapons and ballistic missiles”, Iran’s “support for international terrorism”, and Iran’s “serious, systematic, and ongoing violations of human rights.

¹²³ Exec. Order No. 13,590.

¹²⁴ Exec. Order No. 13,622.

¹²⁵ *Ibid.*

material support to any Iranian person on the SDN list.¹²⁶ Like E.O. 13574, E.O. 13645's rationale can be inferred in light of its grounding in multiple specific statutory authorities, each of which is predicated on a variety of rationales. That inference is supported by the fact that the Order targets Iran's petrochemical industry and financial services sector. ISA and CISADA mandate sanctions on the petrochemical sector in light of the revenues the Government of Iran allegedly raises from the industry to fund its nuclear program, ballistic missiles programs, and support of terrorism. And the IFCA calls for sanctions on Iranian banks that build on the NDAA's codification of the U.S. Treasury's designation of Iran as a center of primary money-laundering concern.

E.O. 13628, dated October 9, 2012 and based on IEEPA, ISA 1996, CISADA 2010, and ITRSHRA 2012, implements sanctions required by ITRSHRA 2012, including its amendments to the statutory requirements of ISA and CISADA.¹²⁷ In particular, Sections 5-7 of the Order, waived by the JCPOA, prescribes menu-based sanctions on persons who between the dates of July 1, 2010 and August 10, 2012 provided goods and services to Iran that could advance the maintenance or expansion of Iran's refined petrochemical industry or Iran's ability to import refined petrochemical products.¹²⁸ Again, multiple justifications can be deduced from the jumbled rationale of the specific statutory authority underlying the Order—the IRSHRA cites Iran's nuclear program, "other threatening activities," while also piggybacking off of the ISA's more expansive delineation of the threats posed by Iran. Moreover, that the sanctions under Sections 5-7 target the petrochemical industry suggests that these sections specifically implement the ITRSHRA 2012's amendments to the ISA, which would implicate the ISA's broad rationale for sanctions.

SDN DESIGNATIONS

Finally, pursuant to the JCPOA, the United States has removed 385 Iranian individuals and entities from the SDN list, decreasing the number of Iranian SDNs by approximately two-thirds.¹²⁹ While accounting for the rationale of each designation is a cumbersome task, many of the notable removals involved entities designated for reasons unrelated to Iran's nuclear program. For example, all 49 financial institutions removed from the SDN list were originally designated for various reasons, including financing terrorist activities, money laundering, and running afoul of global standards.¹³⁰

¹²⁶ Exec. Order No. 13,645.

¹²⁷ Exec. Order No. 13,628.

¹²⁸ *Ibid.*, Sec 5- Sec.7.

¹²⁹ Joint Comprehensive Plan of Action, Ann. II, attach. 3.

¹³⁰ See Fact Sheet, U.S. Dep't of Treasury, Overview of Iranian-Linked Financial Institutions Designated by the United States (Jan. 23, 2012),

Likewise, the National Iranian Oil Company (“NIOC”) and National Iranian Tanker Company (“NITC”), respectively Iran’s main oil and tanker companies, were originally designated as affiliates of the Islamic Revolutionary Guard Corps (“IRGC”), whose status as an SDN results from non-nuclear-related activities and is not altered by the JCPOA.¹³¹ In fact, the Treasury Department effected the removal of NIOC and NITC from the SDN list by finding that they were no longer affiliates of the IRGC.¹³²

IMPLICATIONS OF THE MEANINGLESSNESS OF THE NUCLEAR/NON-NUCLEAR DISTINCTION

Fundamentally, the meaninglessness of the nuclear/non-nuclear distinction means that, as a legal matter, the United States has structured sanctions relief in a way that is inherently overinclusive. Pursuant to the JCPOA, the United States has dismantled sanctions that either say nothing about Iran’s nuclear program or additionally cite various non-nuclear related activities of the Iranian government, including support of terrorism and money laundering.

The disconnect between the rationale that the legal authorities dismantled by the JCPOA reference and the JCPOA’s characterization of those authorities also means that the nuclear/non-nuclear distinction fails as a device by which to frame how policymakers and the rest of the public evaluate which sanctions ought to be within the substantive scope of the agreement. In other words, no single yardstick exists against which to evaluate the appropriate substantive scope of the U.S.’s sanctions commitment. No matter how proponents of the deal justify the characterization of these sanctions as in truth related to Iran’s nuclear program, critics can always counter by referencing the actual text of the legal acts. For example, strident critics of the JCPOA can simply look to the text of the NDAA—which cites the threats posed by Iran’s financial sector—when they say that the financial services secondary sanctions that the JCPOA waives with respect to the NDAA have nothing to do with Iran’s nuclear program.¹³³

<http://www.iranwatch.org/sites/default/files/us-treasury-ofac-iranianlinkedfinancialinstitutions-012312.pdf>
Sheet-_Designated_Iranian_Financial%20Institutions.pdf.; Fact Sheet, U.S. Dep’t of Treasury, Increasing Sanctions Against Iran (July 12, 2012), <https://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20-%20Increasing%20Sanctions%20Against%20Iran.pdf>

¹³¹ Press Release, U.S. Dep’t of State, Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism

¹³² Guidance Relating to the Lifting of Certain U.S. Sanctions Pursuant to the Joint Comprehensive Plan of Action on Implementation Day, U.S. Dep’t of Treasury and U.S. Dep’t of State, 27, n. 75.

¹³³ Mark Dubowitz and Eric Lorber, *Sanctions Experts: Granting Iran Access to Dollars Endangers Global Banking System*, The Tower (Apr. 12, 2016),

The meaninglessness of the nuclear/non-nuclear distinction not only makes it harder for policymakers and analysts within the United States to think through what ought to be within the scope of the U.S.'s sanctions relief package, but it also translates into a lost opportunity to manage Iran's expectations as to what it should expect from the deal. If the sanctions lifted by the United States are nuclear-related in the sense that they came after Iran's escalation of its nuclear program in the 2000s, does it not follow that the United States' commitment to lift all nuclear-related sanctions should encompass all sanctions imposed during this period, such as the prohibition on dollar-clearing transactions? To be sure, the determination as to which sanctions were lifted was ultimately the result of a bargaining process between the United States and Iran; thus, if the Iranian negotiators did not manage to get a particular sanction removed, it is arguably their problem. But such a perspective is lacking to the extent that Iran sees the JCPOA as not simply an agreement in which the United States and its allies have agreed to rescind specific legal authorities but instead a commitment to some baseline level of economic normalization (pursuant to paragraphs viii and 29 of the JCPOA). In this context, if the United States' conception of what sanctions it is lifting transcends the text of the underlying legal authorities, then the United States' ability to use those very authorities as a means whereby to box Iran's expectation of what constitutes a baseline level of economic realization also diminishes. A categorization of the sanctions to be lifted that derives from the text of the underlying legal authorities would make it easier for the U.S. to credibly answer complaints about the slow pace of economic normalization by making those authorities constraints as to how much normalization Iran should reasonably expect.

Put another way, paragraphs viii and 29 of the JCPOA establish a sort of *floor* for the level of economic normalization to which Iran is entitled, an objective that is theoretically to be facilitated by the United States' removal of secondary sanctions. The fact that the nuclear/non-nuclear distinction is meaningless means that the JCPOA fails to also establish a concrete *ceiling* on what constitutes a reasonable expectation of normalization.

The seriousness of this problem will depend in large part on how broadly the parties read their commitment to "economic normalization" and the "spirit and intent" of the JCPOA pursuant to paragraphs viii and 29. And whether this would actually enable the United States to resolve a particular controversy with Iran about the pace of economic normalization is an open question. Nevertheless, the problem is embedded in the text of the agreement. The disconnect between the nuclear/non-nuclear distinction and the rationale of the underlying legal authorities means that the United States will have a harder time taking advantage of the constraining force of a legal categorization in framing the discussion around normalization. For now, it is worthwhile to note

that in response to the Iranian government's recent accusations that certain U.S. sanctions continue to impede economic normalization, Administration officials have not countered by simply arguing that these sanctions should be off the table by virtue of their non-nuclear-related status.¹³⁴

IV. THE PATH FORWARD

A. *Fixing the JCPOA Without Throwing It Away—Financial Remediation*

Since the signing of the JCPOA, policymakers have extensively discussed ways in which to resolve the various problems created by the structure of the United States sanctions commitment under the JCPOA. Unfortunately, none of the proposed solutions manage to fix these problems without diminishing the possibility of economic relief for Iran, compromising the integrity of the post-JCPOA Iran sanctions architecture, or assuming a new round of negotiations among the parties. Policymakers have generally suggested that the United States do one of three things: unilaterally offer additional sanctions relief (which by definition cuts away at the post-JCPOA Iran sanctions architecture), start an aggressive wave of sanctions (which would hinder economic normalization with Iran and thus go against paragraphs 29 and viii of the JCPOA), or re-bargain for additional concessions in exchange for additional sanctions relief (which would basically amount to a new round of negotiations).¹³⁵ All these solutions fall short in helping to realize the promise of partial sanctions relief within the structure of the JCPOA.

This dearth of good fix-ups may very well mean that the survival of the JCPOA will depend on political goodwill among the signatories or a new round of negotiations. Nevertheless, this paper proposes a solution to deal with one particular gap in the JCPOA—the deal's disregard of Treasury's campaign of financial suasion—that seeks to realize the promise of partial sanctions relief as it is envisioned under JCPOA. In particular, this paper proposes that the United States spearhead a financial remediation program whereby Iranian banks are given the opportunity to verifiably demonstrate the integrity of their

¹³⁴ See generally Jay Solomon, *U.S. Moves to Give Iran Limited Access to Dollars*, Wall Street Journal (Apr. 1, 2016), <http://www.wsj.com/articles/u-s-moves-to-give-iran-limited-access-to-dollars-1459468597>; Jacob Lew, *Remarks of Secretary Lew on the Evolution of Sanctions and Lessons for the Future at the Carnegie Endowment for International Peace*, U.S. Dep't of Treasury (Mar. 30, 2016), <https://www.treasury.gov/press-center/press-releases/Pages/jl0398.aspx>.

¹³⁵ See generally Tyler Cullis, *Iran Nuclear Deal at Risk*, National Iranian American Council (Apr. 25, 2016), <http://www.niacouncil.org/iran-nuclear-deal-at-risk/>; Juan Zarate, *Sanctions and the JCPOA*; Katherine Bauer, *Potential U.S. Clarification of Financial Sanctions Regulations*, The Washington Institute for Near East Policy (Apr. 5, 2016), <http://www.washingtoninstitute.org/policy-analysis/view/potential-u.s.-clarification-of-financial-sanctions-regulations>.

businesses by subjecting themselves to inspection and examination by international financial-standard setting bodies, regulators, and technical experts. Just as the United States and its allies have developed a set of procedures by which to ascertain the peaceful nature of Iran's nuclear program, they should develop a roadmap to ascertain the integrity of Iranian financial institutions that leverages independent international bodies (like the Financial Action Task Force) and employs technical experts (like financial regulators and consultants) to carry out an on-the-ground examination of the operations of Iran's financial sector.

Such a mechanism would offer Iran the opportunity to prove to the world the integrity of its financial system, while providing the United States and its allies with a platform for inspecting Iranian banks that will allow the United States to make financial suasion credible and help build a constituency within Iran's financial services sector with a real stake in ensuring AML compliance and transparency.¹³⁶ Accordingly a remediation program would simultaneously increase the possibility that foreign banks will transact with Iranian entities and maintain—or even enhance—the United States' ability to apply pressure vis-à-vis Iranian business activity.

Most importantly, by offering such a program, the United States can start shifting the conversation around the JCPOA's commitment to economic normalization from one focused on whether the U.S. has given enough sanctions relief to one where economic relief is understood to be contingent on Iran proving the integrity of its financial sector to the international banking community. Iran, not the United States, must assume the burden of proof.

To make such a program work, policymakers will have to first determine which banks to engage. This will not be an easy determination to make. Iran's economy is state-dominated and the financial sector is no exception. Iran's major banks are run by the government and state-sponsored entities whose entanglement with sanctioned activities likely make them unsuitable candidates for a remediation program.¹³⁷ Even many nominally private-owned Iranian banks are owned by semi-government entities or have reportedly had a track record of financing designated entities.¹³⁸ For example, the U.S. Treasury has designated Bank Saderat, privately-owned and Iran's largest bank, because of the Iranian government's use of the bank to channel funds to terrorist

¹³⁶ *Ibid.*

¹³⁷ *Iran Commercial Banking Report Q1 2016*, BMI Research, 33-34 (Oct. 2015).

¹³⁸ Bijan Khajepour, *Can Iran's private banks make a difference?*, Al-Monitor: Iran Pulse (Jan. 3, 2014), <http://www.al-monitor.com/pulse/originals/2014/01/iran-private-banks.html#>.

organizations, including Hezbollah and EU-designated terrorist groups like Hamas, PFLP-GC, and Palestinian Islamic Jihad.¹³⁹

These challenges are not insurmountable. One potential starting point is to work with only those banks that the U.S. government never individually and specifically designated for having been entangled in illicit activities. From January 2007 to January 2012, the U.S. Treasury individually designated 23 Iranian banks for processing transactions related to Iran's nuclear and ballistic missile program, financing terrorist organizations, or otherwise facilitating the activities of designated entities.¹⁴⁰ It was only in July 2012, after the President's issuance of Executive Order 13599, which implemented the NDAA's call for sanctions on the entire Iranian banking system, that the Treasury Department designated in one full swoop the 17 other banks comprising the Iranian banking sector.¹⁴¹ While it is by no means clear that this latter category of banks lack the problems that led Treasury to specifically designate banks in its actions before July 2012, Treasury's unwillingness to individually designate these entities and to do so earlier at least suggests that these problems were not of the same systematically significant or dangerous nature justifying the particularized designations of these other banks. Indeed, none of these 17 banks are government-run financial institutions and they all seem to be smaller than the formally privately-owned Iranian banks whose more significant size arguably helped facilitate their exposure to illicit activity.

Once the United States and its allies have engaged Iranian banks, they should make sure to define and allocate burdens of proof in a way that reflects their presumptive status as suspect actors by placing upon Iranian banks the ultimate responsibility of demonstrating the integrity of their business operations. Given the logic of Treasury's financial campaign, which sought to isolate Iranian banks by specifically highlighting the risks of transacting with Iranian financial entities, it makes sense that it ought to be up to the targeted institutions to prove the integrity of their business operations. Any alternative scheme would upend the gist of this narrative. Rather than committing to rehabilitating the Iranian banking sector or otherwise assuming the onus of fixing the industry's problems, policymakers should place the burden of persuasion squarely on the shoulders of Iranian banks.

¹³⁹ Fact Sheet, U.S. Dep't of Treasury, Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism (Oct. 25, 2007), <https://www.treasury.gov/press-center/press-releases/Pages/hp644.aspx>.

¹⁴⁰ Fact Sheet, U.S. Dep't of Treasury, Overview of Iranian-Linked Financial Institutions Designated.

¹⁴¹ These 17 banks are Bank-E Shahr, Credit Institution for Development, Dey Bank, Eghtesad Novin Bank, Hekmat Iranian Bank, Iran Zamin Bank, Islamic Regional Cooperation Bank, Joint Iran-Venezuela Bank, Karafarin Bank, Mehr Iran Credit Union Bank, Parsian Bank, Pasargad Bank, Saman Bank, Sarmayeh Bank, Tat Bank, Tosee Taavon Bank, and Tourism Bank. *See* Fact Sheet, U.S. Dep't of Treasury, Increasing Sanctions Against Iran.

While such an allocation of burdens may appear one-sided, U.S. policymakers can justify such a burden-shifting regime in light of how they go about rescinding actions against banks with AML problems in other contexts. For instance, an entity designated by FinCen as a primary money laundering concern may challenge the ruling, but it is incumbent on the entity to “explain why rescission or modification is warranted.”¹⁴² FinCen’s has complete discretion to subsequently modify or rescind its designations. Likewise, the Office of the Comptroller of the Currency (“OCC”), which regulates national banks, only terminates an enforcement action—including those based on deficiencies in a bank’s AML regimes—in the event that the target bank has complied with all the requirements laid out in the action. The OCC makes limited exceptions, such as in cases where a bank has complied with all of the “material requirements” of the enforcement action or where “the articles in noncompliance have become outdated or irrelevant to the bank’s current situation,” but again this determination is entirely at the discretion of the OCC.¹⁴³

Finally, the United States should try to engage international expert bodies to ensure the credibility of the underlying process for assessing the integrity of Iran’s financial system. The Financial Action Task Force (“FATF”) is the most natural candidate for spearheading the process. Established in 1989, FATF is an inter-governmental policymaking body whose purpose is to establish international standards and promote policies to combat money laundering and the financing of terrorism. The FATF membership consists of the United States and 36 other full members, plus nine regional bodies that serve as associate members, 22 international organizations that serve as observer organizations, and two observer states. While much of FATF’s focus is on monitoring legislative, financial and law enforcement activities at the national level, FATF also has track record of working with the private sector. FATF regularly provides guidance to banks on internal controls and risk management and hosts an annual “Private Sector Consultative Forum” that brings together financial practitioners from across the world.¹⁴⁴ The international effort could also be supplemented by the more aggressive monitoring of Iranian cross-border transactions, piggybacking off of an existing financial services platform like SWIFT (the Brussels-based financial messaging network).¹⁴⁵ This

¹⁴² 31 C.F.R. § 1010.716

¹⁴³ Policies and Procedures Manual, Comptroller of the Currency Administrator of National Banks (Sept. 9, 2011), <http://www.occ.gov/static/publications/ppm-5310-3.pdf>

¹⁴⁴ See generally *Guidance for a Risk-Based Approach: The Banking Sector*, Financial Action Task Force (Oct. 2014), <http://www.fatf-gafi.org/media/fatf/documents/reports/Risk-Based-Approach-Banking-Sector.pdf>; *Dialogue with the Private Sector*, Financial Action Task Force, <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/private-sector-apr-2016.html>.

¹⁴⁵ Juan Zarate has recently proposed a monitoring mechanism of this sort. See Juan Zarate, *Missiles and Corruption: The Risks of Economic Engagement with Iran*, Statement before

additional level of scrutiny could help alleviate the concerns of international financial institutions regarding the risks involved in transacting with Iranian banks.¹⁴⁶

Making a remediation program work may be difficult. Such a program would require Iranian banks to expose their books to foreign bodies (something that the Iranian government may not be fully on board with), while likely committing the United States to some internationally scrutinizable process by which to assess the integrity of banks (which may make some U.S. policymakers queasy). But these same issues arise in the context of nuclear inspections, which arguably implicate a more significant national security interest for both inspected and inspecting countries. And yet the international community for the most part accepts IAEA and U.N.-led nuclear examinations as legitimate mechanisms. While policymakers should be mindful of the potential risks and limitations associated with a financial remediation program, they should not let those potentialities constrain them from considering a solution that can help resolve a gap in the JCPOA that furthers the promise of partial sanctions relief.

B. *Looking Beyond the JCPOA—Rationalizing Sanctions*

Understanding the structural problems that underlie the United States' sanctions relief package is important not only for what those problems may say about the viability of the JCPOA, but also because of their implications for sanctions policy in general. Future targets of sanctions may differ from Iran in substantial ways, but insofar as future adversaries pose a multiplicity of threats and policymakers intend to deploy sanctions to counter those threats, policymakers will have to be able to effectively disentangle sanctions that address issues that have been worked out without undermining the rest of the sanctions architecture.

The JCPOA offers a potential lesson regarding one design issue—the legal articulation of a sanction's rationale. The meaninglessness of the nuclear/non-nuclear distinction is not a problem simply because the legal authorities rescinded by the JCPOA lack a coherent rationale; the vast majority of authorities under which the United States has imposed sanctions against Iran have the same amorphous reasoning.¹⁴⁷ When one reads the panoply of statutes, executive orders, and designations that comprise the Iran sanctions

the House Committee on Foreign Affairs, 18 (May 12, 2016), <http://docs.house.gov/meetings/FA/FA00/20160512/104912/HHRG-114-FA00-Wstate-ZarateJ-20160512.pdf>.

¹⁴⁶ *Ibid.*

¹⁴⁷ For a convenient summary of the relevant authorities and their underlying rationale, see Rennack, *Iran: U.S. Economic Sanctions*, Tables 1-4, 1-31.

regime, the approach of the government looks a lot like the strategy of an aggressive prosecutor who seeks to secure a conviction by amassing as much evidence as possible against a defendant. And if one sees the objective of lawmakers as simply a matter of securing support from the public and other lawmakers, the courtroom mentality makes sense: a kitchen-sink approach listing all the reasons why a country ought to be sanctioned functions to maximally justify the imposition of sanctions to the relevant “judge and jury” (the American public in the case of the President plus enough lawmakers to pass a statute in the case of Congress). But, as the experience of the JCPOA demonstrates, the courtroom analogy does not fully reflect a core premise of sanctions—namely, that they can be unwound if the target country sufficiently changes its behavior. A jumbled or confused rationale makes it harder for policymakers to look to the underlying rationale of the authorities in determining—and setting expectations as to—the amount of sanctions relief to which a sanctioned country will be entitled by pursuing a particular course of action. This is not just a matter of semantics; it means a lost opportunity for policymakers to frame both domestic discussions and international negotiations around the types of sanctions that ought to be within the scope of a particular deal.

Thus, when formulating sanctions in the future, U.S. policymakers should consider pivoting away from the prosecutorial approach they deployed in justifying sanctions against Iran. Instead, policymakers should consider rationalizing sanctions by predicating them in terms of limited, defined policy grounds that focus on specific categories of business activity. Congress, which has been very active in formulating sanctions policy in recent years, can play a special role in instilling discipline in this process by coupling a statutory sanction’s defined rationale with a Presidential waiver power appropriately tailored to that rationale. Such a waiver authority should clearly delineate the steps a target country must take in order for sanctions to be lifted so as to clarify the expectation of all parties as to which policy issues implicate which sets of sanctions. This would be in contrast to the statutory sanctions targeting Iran, which by and large include broad waiver provisions allowing the President to cease applying sanctions when in furtherance of the “national security interest.”¹⁴⁸

Although there is an argument to be made that rationale-based waiver authority may hamper executive flexibility in diplomatic negotiations, it may also increase the overall leverage of the President by enabling a President to more credibly ask for concessions. Rather than simply ask that an adversary engage in a particular course of conduct before offering sanctions relief, a President

¹⁴⁸ Two notable exceptions are the waiver requirements associated with waiving sanctions related to CISADA and Iran’s status as a State Sponsor of Terror. The U.S. government has not exercised these waiver requirements in connection with its sanctions commitment under the JCPOA.

can say that domestic law prohibits him from even considering waiving a statutory sanction unless certain minimum actions are taken. Moreover, there are ways in which lawmakers can work to mitigate the risk of inflexibility. Depending on the particular issue at stake, policymakers can help strike the right balance by articulating the minimum actions a sanctioned country ought to take in terms of standards that generally define what the target country must do to meet the threshold for a waiver, but give the President discretion in determining what conduct actually satisfies this threshold.

Rationalizing sanctions in terms of clear and limited policy grounds would not be entirely unprecedented. The European Union already formulates sanctions by reference to specific rationales. In fact, in the case of Iran, the European Union had in place a set of exclusively nuclear-related sanctions that defined the scope of the E.U.'s sanctions commitment under the JCPOA. Even the United States' sanctions against Russia (imposed in the aftermath of the 2014 Ukraine crisis) suggest the beginning of a re-orientation by American policymakers. Rather than cite all of the potential threats posed by Russia's domestic and international behavior, the sanctions focus almost exclusively on Russia's actions in Ukraine. The Russia sanctions are also formulated as "Sectoral Sanctions", each of which target a particular industry, thereby making it easier for policymakers to draw a line between the dismantling of a particular sanction and the economic relief the sanctions target should reasonably expect.¹⁴⁹ Whether these sanctions are the perfect model for larger-scale sanctions regimes is a question that policymakers ought to investigate in depth, but at the very least they show that rationalizing sanctions is not a practical impossibility.

V. CONCLUSION

By partially unwinding the sanctions regime against Iran, the United States has sought to achieve two goals: provide Iran some meaningful level of economic relief such that it carries through with its commitment to scale back its nuclear program, while preserving its architecture of sanctions that target Iran for non-nuclear reasons. Barring any additional actions by policymakers, the simultaneous achievement of these two goals is unlikely in light of the legal distinctions on the basis of which the United States has unwound sanctions. In the short- to medium-term, the United States can work to mitigate this problem by proposing a financial remediation program whereby Iranian banks are given the opportunity to verifiably demonstrate the integrity of their businesses through international inspections. Looking beyond the JCPOA, U.S. policymakers should consider rationalizing sanctions by predicating them in

¹⁴⁹ Press Release, U.S. Dep't of Treasury, Announcement of Treasury Sanctions on Entities Within the Financial Services and Energy Sectors of Russia, Against Arms or Related Material Entities, and those Undermining Ukraine's Sovereignty, (July 16, 2014), <https://www.treasury.gov/press-center/press-releases/Pages/jl2572.aspx>.

terms of precisely defined policy grounds that focus on specific categories of business activity.