

Legal and Practical Considerations of the Trump Administration's Designation of the IRGC as a Foreign Terrorist Organization

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Key Points

- On April 8, 2019, the U.S. government announced its intention to designate the Islamic Revolutionary Guards Corps (IRGC) as a Foreign Terrorist Organization, effective April 15, 2019. This unprecedented action will result in the first time that the U.S. government has used this designation on a governmental entity.
- The IRGC is already subject to U.S. sanctions due to a variety of illicit activity over the last decade, but now there will be criminal liability for both U.S. and non-U.S. persons who knowingly provide material support to the IRGC (or attempt or conspire to do so) including agents of the IRGC.
- Because of the IRGC's global reach, this action increases the need for heightened due diligence in transactions that may have direct or indirect connections with Iran, including IRGC-owned or-controlled entities anywhere in the world.

On April 8, 2019, the Trump administration announced its intention to designate the IRGC as a Foreign Terrorist Organization (FTO) under Section 219 of the Immigration and Nationality Act.¹ The Trump administration's decision represents the first time that the U.S. government has imposed an FTO designation on a governmental entity, rather than a non-state terrorist organization.

Not only is the IRGC a branch of Iran's armed forces, but since its inception in 1979, IRGC members and affiliated companies have also gained influence and control across key sectors of the Iranian economy, such as energy, construction, telecommunication, media, mining, electronics, automotive, banking and nuclear, among others.² The IRGC operates primarily in Iran but has a vast network with reported ties in Afghanistan, Iraq, Lebanon, Syria and Europe.³

Following the decision to designate the IRGC as an FTO, the Trump administration underscored increased responsibility for both U.S. and non-U.S. companies to ensure that their business is not connected in any material way with the IRGC.⁴ Given the IRGC's global network of business interests, companies with any direct or indirect

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connections to Iran would be well served to engage in enhanced diligence to identify any such connections to the IRGC and entities that it owns or controls.

What U.S. Sanctions Targeted the IRGC Before the FTO Designation?

Prior to the Trump administration's decision to designate the IRGC as an FTO, the U.S. government imposed robust sanctions that specifically targeted transactions with the IRGC. At present, these sanctions operate to prohibit and deter both U.S. and non-U.S. persons from engaging in dealings that have a nexus with the IRGC or entities that are owned or controlled by the IRGC.

U.S. Primary Sanctions

The IRGC was first added to the Specially Designated Nationals and Blocked Persons List (SDN List), on December 19, 2007, for its activities supporting Iran's effort to secure weapons of mass destruction. Additional sanctions designations followed under separate legal authorities for the IRGC's human rights abuses and acts of terrorism and, most recently, on October 31, 2017, the U.S. government designated the IRGC as a Specially Designated Global Terrorist (SDGT). This SDGT designation was imposed pursuant to Section 105 of the Countering America's Adversaries Through Sanctions Act of 2017 (CAATSA), which required the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) to extend terrorism-related sanctions pursuant to Executive Order 13224 to "foreign persons that are officials, agents or affiliates of the IRGC."⁵

U.S. persons⁶ currently face civil and criminal penalties for engaging in virtually any dealing with officials, agents or affiliates of the IRGC listed by OFAC on the SDN List as well as any of their property or interest in property. U.S. persons must also block any IRGC property that comes into their possession or control.⁷ Pursuant to OFAC's 50 percent rule, these restrictions extend to any entity that is owned directly or indirectly 50 percent or more by the IRGC, even in circumstances where that entity is not explicitly designated on the SDN List.⁸ In practice, dealings involving assets associated with the IRGC could present concerns for U.S. persons given that U.S. sanctions broadly prohibit U.S. persons from engaging in business with Iran.

U.S. Secondary Sanctions

The U.S. government also maintains secondary sanctions that target non-U.S. persons that engage in transactions with the IRGC. The U.S. government may impose sanctions on non-U.S. persons for transactions involving the IRGC if they:

- Act for or on behalf of an official, agent or affiliate of the IRGC.
- Materially assist, sponsor or provide financial, material or technological support for, or financial or other goods or services to or in support of, officials, agents or affiliates of the IRGC.
- Knowingly engage in a significant transaction or transactions with the IRGC or any of its blocked officials, agents or affiliates.
- Otherwise associate with officials, agents or affiliates of the IRGC.

Secondary sanctions are not automatic. Rather, the U.S. government must make a determination that the activity by the non-U.S. person is sufficient to trigger

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sanctions—i.e., a finding that the conduct was sufficiently “significant” or “material,” terms over which the U.S. government has discretion to interpret broadly. If these factors are met, non-U.S. persons generally face SDN List designation or other sanctions. Non-U.S. persons may also be subject to what are known as “menu-based sanctions”—imposition of five or more measures from a menu of sanctions, which include: prohibitions on property transactions, export license restrictions, Export-Import Bank assistance restrictions, debt and equity restrictions, visa denials for corporate officers and a U.S. government procurement ban,⁹ or other sanctions within the President’s authority that the President deems appropriate.¹⁰

The U.S. government may also impose secondary sanctions on non-U.S. financial institutions that engage in certain prohibited activities that involve the IRGC. These activities include, for example, “knowingly facilitating a significant financial transaction or providing significant financial services for the IRGC or any of its agents or affiliates whose property or interests in property are blocked.”¹¹ The consequences of engaging in these activities include restrictions or prohibitions on opening or maintaining correspondent or payable-through accounts in the United States.

Legal Implications of FTO Designation

Criminal Liability

The FTO designation also provides a basis for criminal liability (a fine or imprisonment of not more than 20 years, or up to life in prison if the death of any person results) over U.S. persons, as well as over non-U.S. persons if they are subject to U.S. jurisdiction, who knowingly provide, or attempt or conspire to provide, “material support or resources” to the IRGC under Section 2339B of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 18 U.S.C. § 2339B. “Material support or resources” is broadly defined in the statute to include all property, tangible or intangible, and all services, except for medicine and religious materials. Section 2339B of AEDPA applies to U.S. persons, but jurisdiction can also extend to non-U.S. persons in specific instances defined in its extraterritorial jurisdiction clause, including (1) when “conduct required for the offense occurs outside the United States” and the offender is subsequently “brought into or found in the United States,” and (2) when an offense “occurs in or affects interstate or foreign commerce” (emphasis added).¹²

Civil Liability

The FTO designation provides a basis for civil claims by U.S. nationals under the Antiterrorism Act (ATA) against “any person who aids and abets, by knowingly providing substantial assistance, or who conspires with” an FTO that planned, committed or authorized an act of international terrorism.¹³ This cause of action also applies extraterritorially, thus resulting in potential additional exposure for non-U.S. persons. The ATA has often been used as a cause of action by individuals injured by acts of terrorism against banks who provide services to designated FTOs.

Legal Implications for the IRGC

The designation of the IRGC as an FTO has legal implications under U.S. law for former and current members of the IRGC. Specifically, the FTO designation calls for the blocking of IRGC assets¹⁴ and ban admission into the United States for any alien who is a member of the IRGC.^[15] The legal significance of these measures may be

limited, however, given that U.S. sanctions authorities targeting the IRGC (as discussed above) already call for the blocking of IRGC property subject to U.S. jurisdiction. Additionally, IRGC members can already be subject to visa bans under specific sanctions authorities and/or face heightened scrutiny and denial of admission to the United States given the organization's status as an SDGT.

Practical Significance

Designation of the IRGC as an FTO further increases risks of doing business with or involving Iranian entities, results in additional sanctions exposure for non-U.S. companies that engage in business with IRGC-owned or -controlled entities anywhere in the world, and further negatively impacts risk assessment considerations for international financial institutions with respect to business associated with Iran.

In considering business interests and compliance obligations in this environment, companies should be particularly vigilant in tracking further changes in sanctions laws and U.S. policy affecting their activities and business planning, and be diligent in managing their compliance practices. This includes conducting appropriate diligence in conduct of business activities and transactions, including screening of counterparties, end users and end uses of exports and reexports of goods, technology and services to safeguard compliance with U.S. and other countries' sanctions and export controls associated with Iran and more broadly. This also means taking care to avoid activities that could be construed as providing support for IRGC officials, agents and affiliates.

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¹ The White House, "Statement from the President on the Designation of the Islamic Revolutionary Guard Corps as a Foreign Terrorist Organization" (April 8, 2019), <https://www.whitehouse.gov/briefings-statements/statement-president-designation-islamic-revolutionary-guard-corps-foreign-terrorist-organization/>.

² Ahmad Majidiyar, "IRGC's Role in Iran's Economy Growing with its Engineering Arm Set to Execute 40 Mega-projects," Middle East Institute (May 7, 2018), <https://www.mei.edu/publications/irgcs-role-irans-economy-growing-its-engineering-arm-set-execute-40-mega-projects>.

³ Michael R. Gordon, Warren P. Strobel, and Nancy A. Youssef, "U.S. to Designate Iranian Guard Corps a Foreign Terror Group," *Wall Street Journal* (April 5, 2019), <https://www.wsj.com/articles/u-s-to-designate-iranian-guard-corps-a-foreign-terrorist-organization-11554499401?mod=searchresults&page=1&pos=14>.

⁴ *Id.*

⁵ CAATSA, § 105(b)-(c) (requiring the President to impose sanctions on the IRGC); Executive Order 13224 (September 24, 2001).

⁶ The term "U.S. person" means "any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States." See 31 C.F.R. § 560.314; Executive Order 13224, § 3(c).

⁷ Executive Order 13224, § 1(c), 2(a).

⁸ OFAC, “Revised Guidance on Entities Owned by Persons Whose Property and Interest in Property are Blocked” (Aug. 13, 2014), https://www.treasury.gov/resource-center/sanctions/Documents/licensing_guidance.pdf.

⁹ See Iran Threat Reduction and Syria Human Rights Act of 2012, § 302(a)-(b) (“If the President determines under subsection (a)(1) that a foreign person has knowingly engaged in an activity described in that subsection, the President—(1) shall impose 5 or more of the sanctions described in section 6(a) of the Iran Sanctions Act of 1996.”).

¹⁰ See Iran Sanctions Act of 1996, § 6(a).

¹¹ Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010, § 104(c)(2)(E).

¹² Specifically, § 2339B allows for extraterritorial jurisdiction when: (a) an offender is a national of the United States or an alien lawfully admitted for permanent residence in the United States; (b) an offender is a stateless person whose habitual residence is in the United States; (c) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States; (d) the offense occurs in whole or in part within the United States; (e) the offense occurs in or affects interstate or foreign commerce; or (f) the offender aids or abets any person of whom jurisdiction exists under this provision in knowingly providing material support or resources to the IRGC or conspires with any person over whom jurisdiction exists under this provision to knowingly provide material support or resources to the IRGC.

¹³ 18 U.S.C. § 2333(d)(2).

¹⁴ INA § 219(a)(2)(C).

¹⁵ INA § 212(a)(3)(B).