

# Iran/Cuba Sanctions, Export Control and Foreign Corrupt Practices Act

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# Agenda

- Export Controls
- OFAC Sanctions
- Foreign Corrupt Practices Act

# Export Controls

## Where We Were

- Export Control Reform (ECR)
  - In 2009, the Obama Administration's interagency review of the U.S. export control system called for fundamental reform of the current system to enhance U.S. national security interests
    - Reason for reform: the regulations, particularly the ITAR, captured too many items (e.g., "specifically designed")
  - Focus on four component areas of export reform to transform to four singularities
    1. Control List – combine USML and CCL
    2. Primary Enforcement Coordination Center
    3. Information Technology System
    4. Licensing Agency

# Export Controls

## Where We Were (cont.)

- In May 2016, we expected (hoped) the following would occur before the end of the year
  - Final rules for USML Categories
    - XII (Sensors and Optical Equipment): **completed**
    - XIV (Toxicological Agents): **completed**
    - XVIII (Directed Energy Weapons): **completed**
  - Updates to definitions:
    - Export, reexport, retransfer: **completed**
    - U.S. persons abroad rule: **still working**
    - Defense services, fundamental research, public domain, cloud computing: **still working**
  - Proposed rules to rewrite USML Categories I, II, and III: **still working**

# ECR

## Where We Are

- Need to complete the USML/CCL review and
  - Finalize rewrite of USML Categories I, II, and III
  - Update previously rewritten categories as necessary (e.g., USML Category XII)
  - Harmonize remaining definitions, exemptions/exceptions
- Create a combined industry advisory group to update and review control lists and regulations
- Modernize the treatment of cyber issues, including encryption controls and work toward multilateral harmonization

# Export Controls

## Where We Are in the First 100 Days

- Trump Administration has heavy focus on trade agreements
  - Focus on strict enforcement of trade laws, including those that impact national security (e.g., export controls)
- 2 for 1 EO limiting new regulations
  - DDTC unaffected
  - BIS - ?
- Hiring freeze on federal employees
- DDTC/BIS positions to fill
  - Many still remain open
  - Under Secretary for Industry and Security (formerly Eric Hirschhorn)
  - Assistant Secretary for Export Administration (formerly Kevin Wolf)

# Export Controls

## Where Are We Going?

- Letter from Congress to the President (May 3, 2017): "We write to respectfully urge you to complete the Export Control Reform (ECR) Initiative, which was launched nearly eight years ago and has bipartisan support in Congress"
- Proposed rules for USML Categories I, II, and III
- New harmonized definitions
- Create Interagency Trade Advisory Group: combination of DTAG and BIS TACs
- Export Control Modernization: electronic submissions
- DDTC to consider updating its compliance guidelines
- USG to consider white paper on extra-territorial application of US laws; impact of the recent ZTE and Caterpillar enforcement cases

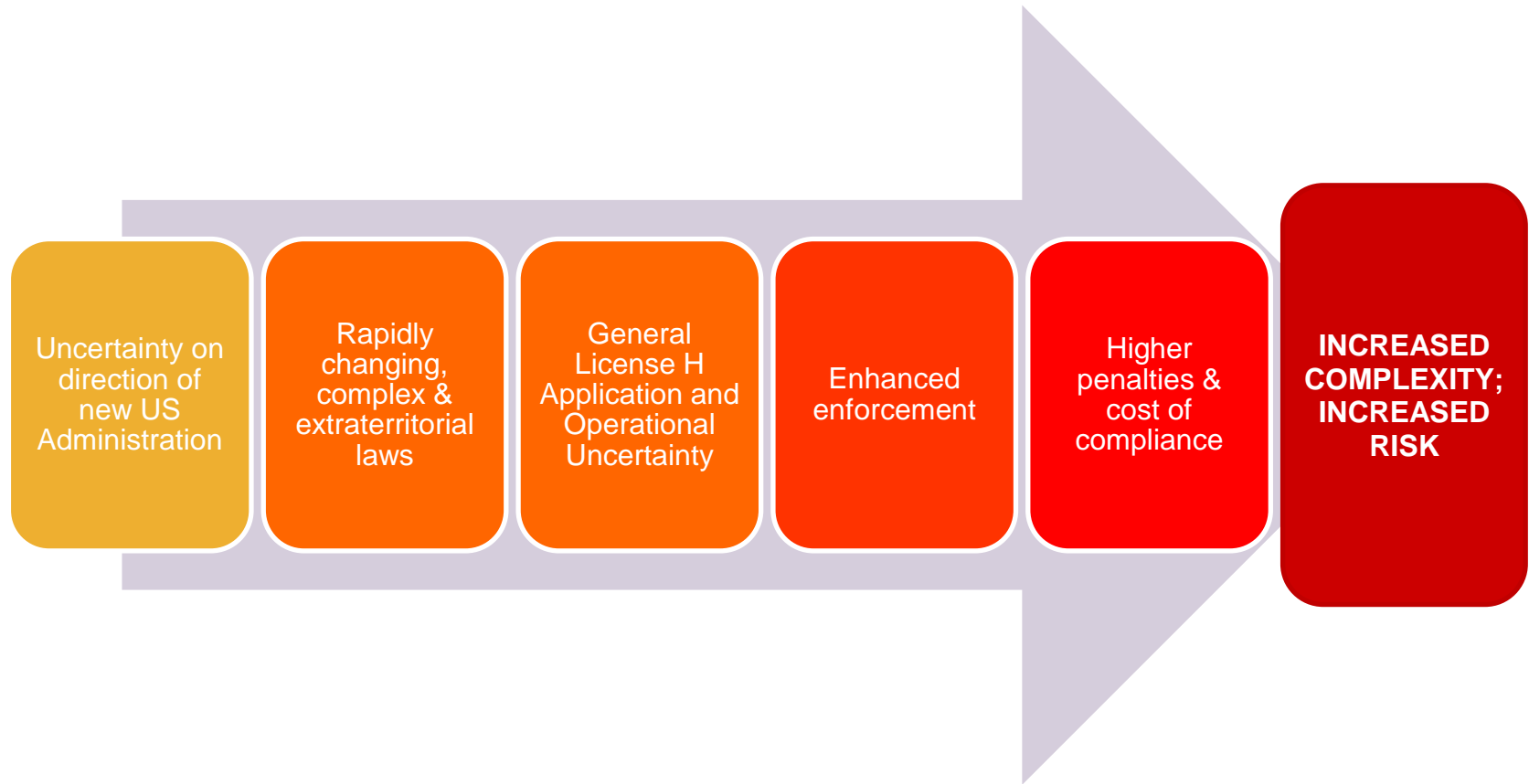
# OFAC Sanctions Updates

## Outlook and Recent Developments

- Cuba
- Iran
- Russia/Ukraine
- Sudan
- Syria
- Myanmar/Burma



# Sanctions Outlook for 2017 and Beyond



# Significant recent developments

Substantial relaxation of Cuba sanctions

JCPOA, General License H and the narrowing of Iran sanctions

De-listing of several Zimbabwe SDNs

Firming up of Burma sanctions relief

Use of SDNTK with major commercial impacts (Waked)

Use of TCO authorities (PacNet)

Continued sanctions on Russia/Crimea, with additional designations

New sanctions authorities for North Korea

Increased use of cyber sanctions designations – Russia and North Korea

Enhanced US jurisdictional claims - B Whale bankruptcy case

Sudan sanctions GL and eventual suspension – delayed effective date – July 2017

Extensive new Syria designations

# Cuba Sanctions Today

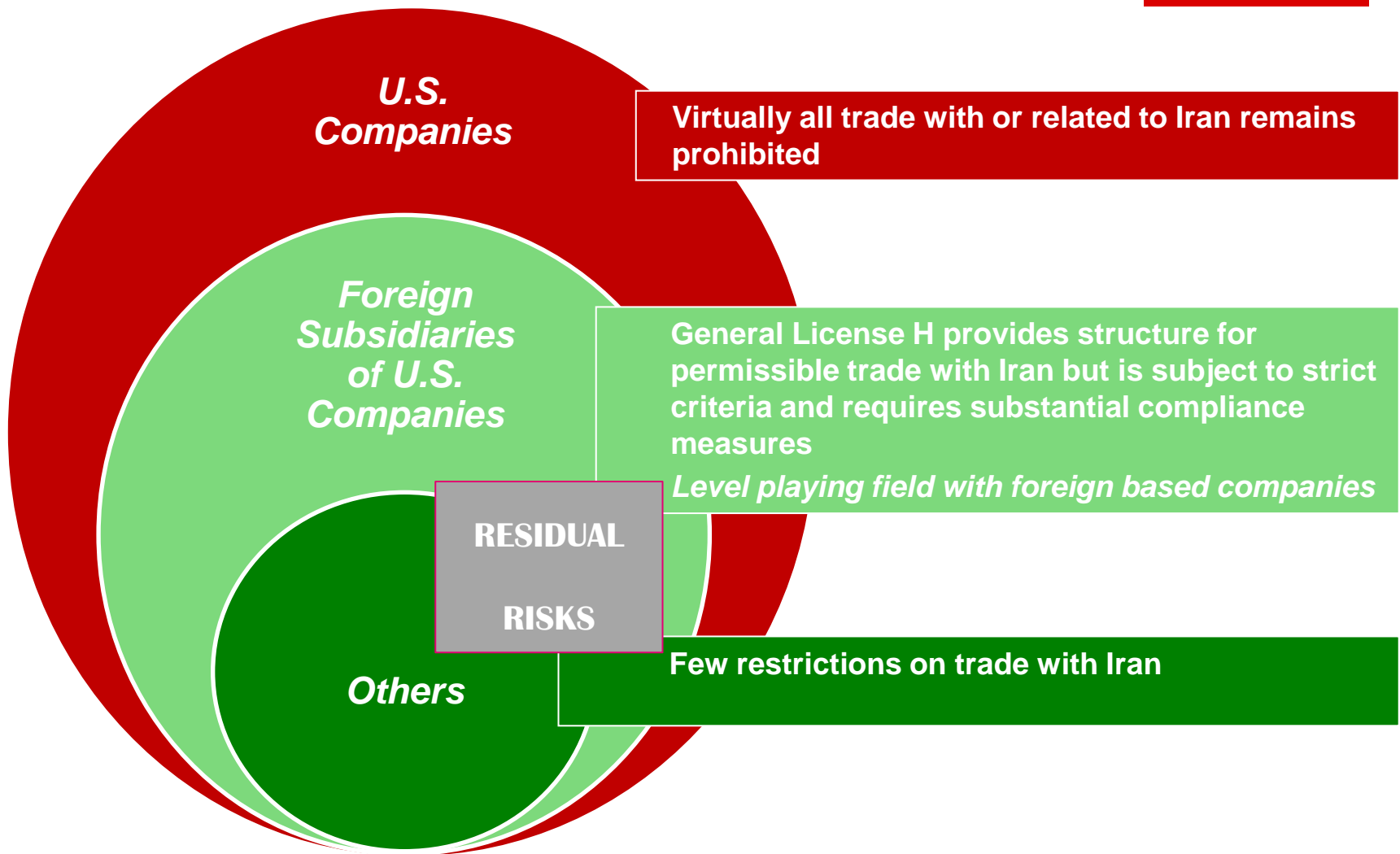


- Embargo still in place: U.S. law continues to prohibit most trade with Cuba, directly or indirectly, including the provision of (re)insurance-related services that involve or benefit the Cuban government, persons in Cuba and Cuban nationals who reside outside the U.S.
  - Even in areas where sanctions and export controls have been eased, there are strict conditions on OFAC GLs and US Department of Commerce Bureau of Industry and Security license exceptions
- Applicability: "persons subject to the jurisdiction of the U.S."
  - U.S. nationals, wherever located
  - U.S. companies
  - Foreign incorporated subsidiaries and foreign branches of U.S. companies

# Future of Cuba Sanctions

- Trump Administration
  - Candidate statements indicate lack of support of lifting of Cuba sanctions
  - Trump stated that he would "cancel" any sanctions-relief deal if it was not to his liking and if it did not serve the people of Cuba in "protecting religious and political freedom"
  - Potential to change (reverse) policy by Executive Order
- Further significant change would require Congressional action
  - Cuba sanctions mandated by law
    - Cuban Democracy Act (1992) statutorily requires certain sanctions
    - Helms Burton (1996) stipulates political conditions for lifting of embargo

# Iran Sanctions Today



# Future of Iran Sanctions

- Trump Administration: foreign policy team and the President have expressed skepticism regarding the effectiveness of the JCPOA
  - Potential to change (reverse) policy by Executive Order
  - Uncertain approach to Iranian "aggression"
    - Snap back?
    - Increased enforcement against U.S. and foreign companies?
    - Additional unilateral U.S. sanctions, particularly against the Iranian Revolutionary Guard Corps (IRGC)
- U.S. Congressional support for sanctions against Iran remains strong
- Divergence between the U.S. and EU remains possible

# Russia/Ukraine Related Sanctions

## What to Expect

- Few licenses have issued from OFAC
  - General feedback during the prior administration was that there was no desire to issue any licenses
- The dynamic for the Trump administration is changing day-to-day
  - Perception exists that Trump himself supports easing of sanctions
  - Has suggested a policy of engagement over sanctions
  - Powers in Congress disagree with an engagement approach and seek to increase sanctions on Russia
  - Flynn resignation, other developments, and brewing investigations will hamper any attempted easing
  - Legislation has been proposed as response to any attempt to ease

# Russia/Ukraine Related Sanctions

## What to Expect (cont.)

- Other ways Trump can potentially impact the situation without taking on an easing of sanctions directly
  - Issue specific licenses
  - Issue licenses for Crimea (potentially citing humanitarian reasons)
  - Issue general licenses to address problems arising from Obama's Dec. 2016 actions
  - Similar to Gen. License 11, which was necessary when the FSB was designated, and resulted in problems for companies doing business in Russia that required compliance with Russian regulations administered by the FSB



# Sudan

- President Obama signed executive order (EO) titled "Recognizing Positive Actions by the Government of Sudan and Providing for the Revocation of Certain Sudan-Related Sanctions," providing for the revocation of Sudanese sanctions provisions in EOs 13067 and 13412 on July 12, 2017
- General License issued effective January 17 authorizing transactions prohibited under EOs 13067 and 13412 and the SSR
- Government of Sudan must sustain positive actions it has taken over the last 6 months

# Burma/Myanmar

- President Obama signed an EO on Oct. 17, 2016 revoking the Burma sanctions EO and waiving other statutory blocking and financial sanctions on Burma

# FCPA Related Enforcement

## 2016-2017

- FCPA enforcement reached record high levels in 2016
  - DOJ reported corporate FCPA resolutions involving 13 companies (not including the 5 declinations), charges or guilty pleas involving 17 individuals, and corporate criminal fines, penalties, and forfeiture of \$1.36B
  - By comparison, the 3-year period from 2013 to 2015, the Fraud Section reported 16 corporate resolutions, 34 cases in which individuals were charged or pleaded guilty (or had charges against them unsealed), and \$1.71B in corporate fines.
- DOJ published "Evaluation of Corporate Compliance Programs" guidance
  - Based on USAM and the "Filip" factors of what measures a corporate entity must undertake to qualify for "cooperation" credit
    - Existence and effectiveness of the corporation's pre-existing compliance program

# FCPA Related Enforcement

## 2016-2017 (cont.)

- Recent corporate resolutions reflect the DOJ's goal, as stated in the Pilot Program, of encouraging voluntary disclosure by giving "markedly less" credit to companies that do not voluntarily disclose FCPA violations
  - Jan. 2017: Las Vegas Sands, which reportedly did not voluntarily disclose misconduct, entered into an NPA and received a 25% discount from the bottom of the applicable fines guidelines range for its full cooperation and remediation
  - Dec. 2016: General Cable, which voluntarily disclosed more than a decade of FCPA violations, entered into an NPA under which its fine reflected a 50% reduction from the bottom of the applicable guidelines range
- Government has heightened its focus on responsible individuals, which is reflected in recent corporate resolutions; individual prosecutions may very well be in the works

# FCPA Related Enforcement

## 2016-2017 (cont.)

- Pilot Program reserves full mitigation credit for companies that voluntarily disclose misconduct; repeat offenders are treated more harshly
  - Zimmer Biomet holdings
    - In Jan. 2017, Zimmer was deemed ineligible for voluntary disclosure credit because its disclosures were mandated by a 2012 DPA, which resolved earlier allegations of FCPA misconduct
    - As a consequence, Zimmer experienced a 2-point increase to its culpability score under the sentencing guidelines, a middle-of-the-guidelines range fine, and a subsidiary's guilty plea.
- DOJ continues its focus on disgorgement of ill-gotten profits, even in the absence of criminal fines
  - In Sept. 2016, DOJ announced 2 declinations that obligated the companies, HMT LLC and NCH Corporation, to disgorge illegal profits of \$2.7M and \$335,342, respectively
  - Declinations illustrate DOJ's commitment "to ensuring that those who violate the law don't profit from their crimes, even when we decline to prosecute"
  - HMT and NCH letters focused on the companies' termination of high level employees, including those whose failures were purely supervisory

# Questions?