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Executive Order and Reissued Regulations Impose New Extraterritorial Sanctions Against Iran and Require U.S. Companies and Overseas Subsidiaries to Examine Dealings, Including Licensed Dealings, with Iran

On October 9, 2012, President Obama signed into law an Executive Order ("E.O. 13628") that significantly enhances sanctions against Iran and provides a stronger enforcement mechanism for existing laws and regulations prohibiting activity with or involving Iran. E.O. 13628 implements provisions of the Iran Threat Reduction and Syria Human Rights Act of 2012, H.R.1905 ("ITRSHRA") (P.L. No. 112-158), which was signed into law by the President on August 12, 2012. Most significantly, E.O. 13628 extends the prohibitions on dealings with Iran and the Iranian Government set forth in the Iranian Transactions Regulations ("ITR") (31 C.F.R. Part 560) as well as other specified executive orders to apply to U.S. parent companies' owned or controlled non-U.S. subsidiaries. E.O. 13628 also gives greater enforcement effect to various provisions of the Iran Sanctions Act of 1996 (50 U.S.C. 1701), as amended ("ISA").

Subsequently, on October 22, the Office of Foreign Assets Control ("OFAC") reissued the ITR, renaming them as the Iranian Transactions and Sanctions Regulations ("ITSR"). While the new regulations cite ITRSHRA and E.O. 13628 as authority, the regulations do not implement the prohibitions set forth in the statute or E.O. 13628. Instead, likely due to timing issues, the reissued regulations implement an executive order issued earlier this year, Executive Order 13599 (issued on February 5, 2012) ("E.O. 13599") that requires U.S. persons to block (or "freeze") assets of the Government of Iran, the Central Bank of Iran, any other financial institution in Iran, and persons that are owned or controlled by, or act on behalf of, the Iranian Government or such financial institutions. The reissued ITSR also make various modifications to licensing provisions, including provisions relating to the transfer and sale of foods, medicine and medical devices to Iran and the transmission of payments to and from Iran.

Persons that are or may be affected by E.O. 13628 and the reissued ITSR include U.S. parent companies with overseas subsidiaries and U.S. companies or individuals that are engaging or are contemplating engaging in transactions with Iran under general or specific licenses.

Executive Summary

- Pursuant to E.O. 13628, non-U.S. subsidiaries owned or controlled by a U.S. parent are prohibited from engaging in any dealings or transactions with Iran, the Government of Iran or "persons subject to the jurisdiction of the Government of Iran" that if undertaken in the U.S. or by a U.S. person, would violate U.S. sanctions law applicable to Iran.
  - While the intent of ITRSHRA was to close a loophole by prohibiting non-U.S. subsidiaries from engaging in activities with Iran or the Government of Iran, that would be prohibited if their U.S. parent was involved, E.O. 13628's broad definition of "persons subject to the jurisdiction of the Government of Iran" may be interpreted to impose greater restrictions on non-U.S. subsidiaries than their U.S. parent companies. Specifically, it is unclear whether E.O. 13628 intends to prohibit dealings with Iranian citizens who are temporarily located outside of Iran or non-Iranian businesses, located in third countries, that may be owned by an Iranian citizen, where the Iranian citizen and entity are not otherwise sanctioned by the U.S. Government or acting for or on behalf of the Government of Iran. Until OFAC provides further guidance, non-U.S. subsidiaries and their U.S. parents should exercise caution if dealing with such individuals or entities.
  - While not addressed in the ITSR, according to OFAC's Questions and Answers published on its website, general licenses applicable to U.S. persons relating to Iran extend to non-U.S. subsidiaries. Existing specific licenses issued to U.S. parent companies relating to Iran must

be reviewed carefully to determine whether they also authorize the non-U.S. subsidiary's activities in connection with the same transaction.

  - U.S. parent companies are liable for a non-U.S. subsidiary's breach of sanctions law unless the U.S parent takes action by February 6, 2013 to terminate its relationship with or divest the non-U.S. subsidiary.
  - Non-U.S subsidiaries no longer are permitted to re-export/retransfer U.S. origin products classified as EAR99 to Iran; non-U.S. subsidiaries also must refrain from exporting or transferring any non-U.S. origin item (regardless of whether it has any U.S. content) to Iran. E.O. 13628 does not appear to prohibit non-U.S. entities that are not owned or controlled by a U.S. parent or other U.S. person from re-exporting U.S. origin items classified as EAR99 to Iran, provided that the transaction does not involve a prohibited end-user or restricted end-use under the Export Administration Regulations ("EAR").

- New provisions apply to transfers and sales of food, medicine and medical products to Iran by U.S. parents and, by extension, their U.S. subsidiaries. Activities involving such transfers and sales should be re-examined in wake of the new provisions.
- New provisions apply to payments in connection with otherwise authorized activities. Restrictions now apply to transfers of funds to and from Iran through third party intermediaries, such as money exchangers. Payments in currencies other than U.S. dollars through non-U.S. banks also may be restricted.
- E.O. 13628 sets forth a new statutory basis for enforcement of sanctions under the ISA. As a result, companies need to ensure they are screening to identify persons that have been sanctioned under the ISA. Entities that use third party screening software should contact their screening software provider to ensure that the software now flags entities sanctioned under the ISA.

Non-U.S. Entities Owned or Controlled by a U.S. Parent Required to Comply with Prohibitions on Dealings with Iran and the Government of Iran

As detailed in http://www.bryancave.com/files/Publication/1ffbe15a-fbd3-405c-bd95-66bb31aeef7a/Presentation/PublicationAttachment/c06bc161-d32e-494b-8b0d-69d7c0ae13e0/IRB501.pdf, the ITR (now the ITSR) prohibit U.S. persons from engaging in virtually all dealings directly or indirectly with Iran and the Government of Iran. Various executive orders also prohibit U.S. persons from engaging in transactions directly or indirectly with certain Iranian entities and those entities' affiliates and subsidiaries due to their activities, for example, involving proliferation and terrorism. Prohibited activities include, generally:

- The export, reexport, sale, or supply, directly or indirectly, of any goods, technology, or services to Iran or the Government of Iran (including entities owned or controlled by the Government of Iran, wherever located), or to entities that will ultimately supply the products to those entities;
- Imports into the United States from Iran or of Iranian-origin goods;
- Trade related transactions with Iran, including any transactions or dealings related to (i) goods or services of Iranian origin or owned and controlled by the Government of Iran, or (ii) goods, technology, or services for exportation, reexportation, sale or supply, directly or indirectly, to Iran or the Government or Iran;
- Investments in Iran;
- Facilitation of transactions involving Iran, including approving, financing, or undertaking actions to support a transaction with Iran; and
- Evasion and attempts or conspiracy to evade U.S. sanctions.

In addition to these prohibitions, U.S. persons are required to block (or "freeze") assets, property and interests in property of the Government of Iran, Iranian banks, Iranian persons such as the Islamic Republic of Iran Shipping Lines designated on the List of Specially Designated Nationals and Blocked Persons (the "SDN List") or entities located anywhere that are owned or controlled by the Government of Iran, Iranian banks or designated Iranian persons that come into the U.S. person's possession or control. Transactions and dealings directly or indirectly with such "blocked" persons are also prohibited.

The reissued ITSR do not change these prohibitions and serve only to implement further the requirement to block the property and property interests of the Government of Iran and Iranian financial institutions that has been in effect since February 5 this year. Blocking requirements for certain Iranian entities also appear in other regulations administered by OFAC, such as those implementing sanctions against purveyors of weapons of mass destruction or terrorists and terrorist organizations.

Prior to E.O. 13628, the prohibitions and freezing requirements applied only to U.S. persons, which were defined to include U.S. companies and their non-U.S. branches, U.S. citizens and permanent residents (*i.e.*, green card holders) located anywhere in the world, and anyone, regardless of citizenship or nationality, located in the United States. E.O. 13628 extends the application of the prohibitions set forth in the ITSR to U.S. companies' owned or controlled subsidiaries that are separately incorporated overseas ("non-U.S. subsidiaries"). As a result, such non-U.S. subsidiaries are no longer permitted to engage knowingly in any transaction or dealing with Iran, the Government of Iran or a person subject to the jurisdiction of the Government of Iran where the transaction, if undertaken in the U.S. or by a U.S. person, would violate the ITSR.

In addition, non-U.S. subsidiaries are prohibited from knowingly engaging in transactions with the Government of Iran and entities that are blocked under certain specified executive orders, including Executive Order 13599 (requiring blocking of the Government of Iran, designated Iranian financial institutions and persons owned or controlled by the Government or such financial institutions) and section 5 of Executive Order 13622 (requiring blocking of persons who have been determined to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, NIOC, NICO, or the Central Bank of Iran, or the purchase or acquisition of U.S. bank notes or precious metals by the Government of Iran). According to guidance issued by OFAC, the prohibitions would extend also to any entity that is owned or controlled by the Government of Iran or the entities designated under these specified executive orders. An entity is considered owned or controlled by the Government of Iran or designated entities where the Government or the designated entity owns a 50 percent or greater or controlling interest in or otherwise controls the entity. Non-U.S. subsidiaries, however, are not required to comply with the affirmative blocking (or "freezing") requirements.

Consistent with OFAC practice, E.O. 13628 defines "knowingly" as including either actual knowledge or reason to know. Under E.O. 13628, a non-U.S. subsidiary would be considered to have knowingly engaged in a transaction with Iran where it should have known that the transaction, circumstances, or result involved the Government of Iran, a person subject to the jurisdiction of the Government of Iran, or a SDN designated under one of the specified executive orders. Thus, if they have not already done so, non-U.S. subsidiaries should consider implementing risk-based due diligence processes to identify transactions that potentially involve such sanctioned parties.

Prohibitions on Dealings with Persons Subject to the Jurisdiction of the Government of Iran

As noted above, E.O. 13628 prohibits non-U.S. subsidiaries from engaging in transactions with *inter alia* "persons subject to the jurisdiction of the Government of Iran" where the U.S. parent would be prohibited from engaging in the transaction. E.O. 13628 defines a person subject to the jurisdiction of Iran to include any "person organized under the laws of Iran or any jurisdiction within Iran, ordinarily resident in Iran, or in Iran, or owned or controlled by any of the foregoing."

This definition gives rise to substantial uncertainty regarding the scope of the prohibitions as they apply to non-U.S. subsidiaries. By way of background, the phrase, "persons subject to the jurisdiction of the Government of Iran," did not appear in the ITR and does not appear in the reissued ITSR. While current regulations prohibit U.S. persons from engaging with individuals and entities located in Iran, neither the ITR nor the reissued ITSR prohibit U.S. persons from engaging in transactions with an Iranian resident (for example, the provision of services) while the individual is located outside of Iran – provided that the individual is not an agent of or acting on behalf of the Government of Iran, the individual is not otherwise designated on the SDN List, and that the transaction would not involve the transfer of services or items directly or indirectly to Iran. Similarly, U.S. persons are not prohibited from engaging in a transaction with an entity organized under the laws of a third country (such as the United Arab Emirates) that may have an owner who is an Iranian resident – again provided that owner and entity are not designated on the SDN List, the individual and entity are not agents of or acting on behalf of the Government of Iran, and that the transaction would not involve the transfer of services or items directly or indirectly to Iran.

The definition of "persons subject to the jurisdiction of the Government of Iran" in E.O. 13628, however, could be interpreted by OFAC to prohibit a non-U.S. subsidiary from engaging in transactions with an Iranian resident or entity located outside Iran, even where the U.S. parent may not be prohibited from engaging in such dealings. There is no indication that Congress intended to impose stricter restrictions on non-U.S. subsidiaries than their U.S. parents. OFAC's current guidance does not address this issue. Until it does so, non-U.S. subsidiaries, as

well as their U.S. parents, should exercise reasonable caution before engaging in any transaction with such individuals or entities.

Effect of E.O. 13628 on Reexports to Iran by Non-U.S. Persons

Both the ITSR and the Department of Commerce Bureau of Industry and Security's Export Administration Regulations ("EAR") prohibit the export of all hardware, software and technology from the United States to Iran. However, neither the ITSR nor the EAR prohibit the reexport (retransfer from a third country) to Iran of U.S. origin low technology items classified as EAR99 by a non-U.S. person, provided that no U.S. person is involved in the transaction, no party is designated on applicable U.S. Government lists, including the SDN List, and the end-use does not involve nuclear, chemical or biological weapons, missile delivery systems or unmanned aerial vehicles.

E.O. 13628 extends prohibitions applicable to U.S. persons (such as the prohibition on exports) to non-U.S. subsidiaries. E.O. 13628 did not reference or direct BIS to amend the EAR. Notwithstanding, a reasonable interpretation of E.O. 13628 is that non-U.S. subsidiaries are no longer permitted to re-export/transfer U.S. origin products classified as EAR99 to Iran. While not yet clarified by OFAC, as a general rule non-U.S. subsidiaries also should now refrain from exporting or transferring directly or indirectly to Iran any non-U.S. origin item (regardless of whether it has any U.S. content) other than authorized food, medicine or medical devices or authorized, publicly-available chat, instant messaging or similar communications software. Pursuant to the reissued ITSR, non-U.S. subsidiaries, as well as their U.S. parents, also are no longer permitted to sell any component, regardless of classification, to persons outside of Iran where the non-U.S. subsidiary or U.S. parent knows or has reason to know that the component will be incorporated into an end-item that ultimately is destined for Iran.

On the other hand, under the reissued ITSR as well as the EAR, it continues to be permissible for non-U.S. persons that are not considered "owned or controlled" by a U.S. person (as defined by E.O. 13628) to re-export items classified as EAR99 to Iran, provided that no U.S. person is involved in the transaction, no party is designated on applicable U.S. Government lists, including the SDN List, and the end-use is not prohibited.

Application to Non-U.S. Subsidiaries of Licenses Authorizing Transactions that Otherwise Would Be Prohibited

Pursuant to the ITSR, U.S. persons may be licensed to engage in transactions that otherwise would be prohibited. There are two types of licenses: general licenses and specific licenses. General licenses are set forth in the ITSR and/or are published on OFAC's website. Provided that all conditions are met, general licenses allow the U.S. person to proceed with the transaction, such as certain limited humanitarian relief efforts, without application to OFAC. Specific licenses are issued on a case-by-case basis by OFAC.

OFAC's published guidance states that general licenses applicable to U.S. persons also extend to their non-U.S. subsidiaries. Thus, to the extent a transaction is authorized by a general license if engaged in by a U.S. person, a non-U.S. subsidiary also may engage in such a transaction, provided that it satisfies all the conditions and requirements of the general license.

With respect to specific licenses, OFAC's guidance indicates that each license must be reviewed to determine whether it applies to the non-U.S. subsidiary's activities. OFAC provides no further guidance on how to make this determination. Because existing licenses would have been issued only to the U.S. person to authorize its activities, strictly speaking this guidance could be interpreted to suggest that no specific licenses will authorize any activity by a non-U.S. subsidiary. On the other hand, where an application underlying an existing specific license identified the non-U.S. subsidiary and its role in the transaction, there is an argument that the non-U.S. subsidiary (as well as the U.S. parent) should be permitted to continue in the licensed transaction, as described in the application. Much murkier is whether a non-U.S. subsidiary is allowed to continue, for example, administrative support activities where the non-U.S. subsidiary was not identified in the application but the specific license authorizes transactions "incidental to" the activities by the U.S. parent. Until OFAC issues further guidance on this issue, non-U.S. subsidiaries and their U.S. parents should take great care in reviewing the specific license and the underlying application before continuing with transactions.

New Licensing Provisions Relating to Transfers of Food, Medicine and Medical Devices to Iran Affect Both U.S. Companies and Non-U.S. Subsidiaries

The reissued ITSR now permits U.S. parents and, by extension pursuant to OFAC guidance, their non-U.S. subsidiaries to transfer/sell to Iran most food items, medicines classified as EAR99 and basic medical supplies that are published on OFAC's website, provided that certain conditions, including restrictions on payment methods, are met.

Medical devices not included on the list of basic medical supplies continue to require a license for transfer directly or indirectly to Iran. To the extent that non-U.S. subsidiaries are involved in the transfer of such items pursuant to a specific license issued by OFAC, the non-U.S. subsidiary and/or its U.S. parent should examine the license and related application carefully to assess whether the non-U.S. subsidiary's continuing participation would be authorized.

New Provisions Related to Payment Methods for Licensed Activities Affect Both U.S. Companies and Non-U.S. Subsidiaries

The reissued ITSR contain various revisions to the ITR regarding payment terms. In recent years, due not only to U.S. sanctions but also United Nations and European sanctions, persons involved with the transmission of funds to and from Iran in connection with licensed activities have utilized third party intermediaries such as money service businesses ("MSBs"), money exchangers or "hawalas" outside Iran to facilitate the transfer of funds to or from Iran.

The reissued ITSR do not permit a U.S. person (or by extension, a non-U.S. subsidiary) to deal directly with a MSB, money exchanger or hawala, whether in Iran, the United States or a third country, in connection with the transmission of money to or from Iran. The ITSR, however, does not preclude a U.S. bank from engaging or dealing with third-country MSBs, money exchangers or hawalas in the processing of the authorized transfers pursuant to section 560.550 of the ITSR.

With respect to transactions by non-U.S. subsidiaries, with few exceptions for sale of food, medicine and medical devices and personal remittances, the reissued ITSR also do not appear to allow payments for otherwise authorized activities to be made except through U.S. depository institutions unless specifically licensed by OFAC. To the extent that U.S. companies or their non-U.S. subsidiaries are using money exchangers, transmitting or receiving payments in other currencies such as Euros or Yen through non-U.S. banks for otherwise authorized activities or hand-carrying funds to or from Iran, an examination should be made to verify that existing payment methods continue to be permitted under applicable specific or general licenses.

With respect to authorized sales of food, medicine and medical devices, in addition to payments of cash in advance, sales on open account and financing by third country financial institutions, the reissued ITSR now authorizes payments to be made by a letter of credit issued by an Iranian financial institution that is not blocked under other U.S. sanctions programs, provided that the letter of credit is advised, confirmed or dealt in by a third-country financial institution that is not a branch of a U.S. bank before being advised, confirmed or dealt in by a U.S. bank.
Payments involving Iranian banks that are blocked under other sanctions programs remain prohibited. U.S. parents and their non-U.S. subsidiaries may not engage in any transactions with such financial institutions unless a specific license from OFAC says otherwise.

Contract Sanctity for Non-U.S. Subsidiaries Limited to Divestment from/Cessation of Dealings by the U.S. Parent with the Non-U.S. Subsidiary

E.O. 13628 imposes civil liability on U.S. persons for violations committed by their overseas entities. Potential penalties for such violations include civil fines up to the greater of $250,000 per violation or twice the amount of the transaction. Non-U.S. entities also may be subject to penalties or sanctions for their own activities under the ITSR and other U.S. laws.

Penalties for violations by the non-U.S. subsidiary will not apply if the U.S. person that owns or controls the entity divests or terminates its business with the entity not later than February 6, 2013. There is no provision that allows the non-U.S. subsidiary the sort of "winding down" of business activities associated with completing the servicing of a contract or return of an advance payment nor does it permit, for example, the non-U.S. entity

to receive payment from the Iranian person on a contract for products or services that the non-U.S. entity may have already rendered prior to issuance of E.O. 13628.

A U.S. parent company will be liable for its breach of sanctions law unless the U.S. parent takes action by February 6, 2013 to terminate its relationship with or divest the non-U.S. subsidiary. The provisions of Section 4 do not provide for any wind-down of business by the non-U.S. subsidiary, only divestment or termination of the U.S. parent's business with the non-U.S. subsidiary will avoid liability under the new prohibitions.

Exporters Should Enhance Screening Due to Greater Enforceability of the Iran Sanctions Act

In addition to the new restrictions on non-U.S. subsidiaries, E.O. 13628 provides for more rigorous enforcement of the ISA, as amended. The ISA requires the President to impose certain sanctions on persons (including non-U.S. persons that are not owned or controlled by U.S. persons) for engaging in certain activities with Iran and the Government of Iran involving, for example, Iranian petroleum, petroleum products or petrochemical products or support for Iran's nuclear program. Under the ISA, once the President finds that a person has engaged in such activities, the President must select the sanctions to be imposed from a list of available sanctions.

The list of available sanctions include various provisions that, if selected, would require action by the private sector. Such possible sanctions include:

- Prohibiting loans from a U.S. financial institution to a sanctioned person, unless the purpose is to relieve human suffering;
- Restricting foreign exchange that is subject to the jurisdiction of the U.S. and in which the sanctioned person has any interest;
- Prohibiting any transfers of credit or payments between financial institutions or by, through, or to any financial institution, to the extent that such transfers or payments are subject to the jurisdiction of the United States and involve any interest of the sanctioned person;
- Blocking of all property and interests in property that are in the U.S., that come within the U.S., or that are or come within the possession or control of any U.S. person including any foreign branch, of the sanctioned person, and provide that such property and interests in property may not be transferred, paid, exported, withdrawn, or otherwise dealt in;
- Prohibiting any U.S. persons from investing in or purchasing significant amounts of equity or debt instruments of a sanctioned person; and
- Restricting or prohibiting imports of goods, technology, or services, directly or indirectly, into the United States from the sanctioned person.

The ISA, however, does not provide for penalties for non-compliance by U.S. persons on sanctions imposed under the Act. Put another way, while the ISA allows the President, for example, to prohibit a non-U.S. person from obtaining a loan from a U.S. bank, the ISA does not penalize the U.S. bank for providing such a loan.

E.O. 13628 remedies this situation by extending authority for enforcement of sanctions imposed under the ISA to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*). As a result, in our example above, a U.S. bank that provides the loan to the sanctioned party may now be subject to civil penalties of up to $250,000 or twice the value of the transaction, whichever is greater, as well as criminal penalties.

The practical effect of this provision is that screening lists should now include persons that have been sanctioned under the ISA. Persons sanctioned under the ISA do not necessarily appear on the SDN List. If a transaction does involve a person sanctioned under the ISA, a determination must be made as to whether the contemplated transaction would be prohibited by applicable sanctions. Exporters should be cognizant that, even though the list of available sanctions does not include an export restriction, the imposition of sanctions requiring blocking of property or prohibitions on the transfers of payments may, in effect, prohibit the transaction – either by requiring the exporter to block any property or preventing the exporter from being paid for a sale. Entities that use third party screening software should contact their screening software provider to ensure that entities sanctioned under the ISA are flagged by the software.

Summary

In light of the substantial changes to the prohibitions on dealings with Iran and the Government of Iran, U.S. businesses and their non-U.S. subsidiaries should reassess any ongoing activities, including previously licensed activities, with Iran to ensure compliance with the new provisions.

With respect to activities by non-U.S. subsidiaries to which the sanctions previously did not apply, as noted above penalties for violations by the non-U.S. subsidiary will not apply if the U.S. person that owns or controls the entity divests or terminates its business with its non-U.S. subsidiary not later than February 6, 2013. U.S. companies with non-U.S. subsidiaries that engage in transactions with "persons subject to the jurisdiction of the Government of Iran" or persons designated under the specified Executive Orders should review these transactions and activities to ensure they are in compliance with current U.S. law. To the extent that divestment/cessation of business with the non-U.S. subsidiary is not desired, companies that are currently engaging in such activities should consider their options in terms of obtaining a specific license from OFAC authorizing the winding down of business, the immediate cessation of activities and/or the submission of a voluntary disclosure to OFAC.

Prepared by: Christina Zanette and Lynn Van Buren
1.202.508.6145 or 1.202.508.6320
Christina.zanette@bryancave.com or lynn.vanburen@bryancave.com
Bryan Cave – Washington D.C.

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Bryan Cave LLP International Trade Client Service Group

Los Angeles

Evan Y. Chuck, Partner, CSG Leader
David Stepp, Partner
Nicole Simonian, Partner
Andrew Klungness, Partner
Michael Zara, Associate
Jackson Pai, Associate

Washington

Stanley Marcuss, Partner
Daniel Schwartz, Partner
Susan Kovarovics, Partner
Clif Burns, Counsel
Lynn Van Buren, Counsel
Michael Mellen, Associate
Megan Gajewski, Associate
Christina Zanette, Associate
George Murphy, Associate

Chicago

Nicola Fiordalisi, Partner
Patricia Hanson, Counsel

Hamburg

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Dr. Michael Leue, Partner
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Martin Bosse, Associate

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Atlanta

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David Wilson, Partner

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Zhongdong Zhang, Principal
Yi Huang, Associate
Joseph Wang, Associate
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Estelle Lee, International Regulatory Specialist*
Min Lan, Director of Economic Analysis*
Flora Sun, Director*
Zhao Jun, Senior Advisor*
Chian Voen Wong, Associate Director*
Jeff Chen, PRC Consultant
Stella Huang, PRC Consultant

Singapore

Cecil Leong, CEO of BCIT, International Trade Deputy Leader*
Tony Kerr, Senior Director*
Stephanie Wong, Senior Manager*
George Tan, Director, Asia Export Controls*

Bangkok

Malika Bhumivarn, Managing Director, Thailand*
Kittipong Jangkamolkulchai, Associate Director*

Tokyo

Tatsuya Kanemitsu, Senior Manager*

London

Anita Esslinger, Partner

Paris

Joseph Smallhoover, Partner
Aurelie de Raphelis Soissan, Associate

Frankfurt

Tobias Fenck, Partner

*Non-legal professionals

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