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Status of U.S. Sanctions After Implementation of Iran Deal

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Comprehensive Plan of Action (JCPOA) that restricts Iran's nuclear program in return for the easing of nuclear-related sanctions.

Under the deal, the United States promised to terminate all nuclear-related secondary sanctions, those directed at non-U.S. Persons.[2] The sanctions relief would focus on (1) financial and banking-related sanctions; (2) sanctions on the provision of underwriting services; (3) insurance or re-insurance in connection with activities that are consistent with the JCPOA; (4) sanctions on Iran's energy and petrochemical sectors; (5) sanctions on transactions with Iran's shipping and shipbuilding sectors and port operators; (6) sanctions on Iran's trade in gold and other precious metals; (7) sanctions on trade with Iran in graphite; raw or semi-finished metals such as aluminum and steel; coal; and software for integrating industrial processes in connection with activities that are consistent with the JCPOA; (8) sanctions on the sale, supply or transfer of goods and services used in connection with Iran's automotive sector; and (9) sanctions on associated services for each of the above categories.[3]

The United States also agreed to the removal of three categories of primary sanctions, those targeting U.S. Persons and U.S. entities (referred to here, collectively, as U.S. Persons). Specifically, the United States would license U.S. Persons to (1) export commercial passenger aircraft and related parts and services to Iran and (2) to import Iranian-origin carpets and foodstuffs, including pistachios and caviar. In addition, the United States agreed to license and authorize non-U.S. entities that are owned or controlled by U.S. Persons to engage in activities with Iran that are consistent with the JCPOA. However, the details of these forms of sanctions relief were not announced at that time.

Jan. 16, 2016, marked Implementation Day, when the International Atomic Energy Agency verified that Iran met its obligations to bring its nuclear program into compliance with the JCPOA and in turn triggered the sanctions relief promised under the JCPOA. Simultaneous with this announcement, the Office of Foreign Assets Control (OFAC) issued specific

guidelines regarding the above mentioned forms of sanctions relief. This article provides a summary of the most salient points of these guidelines and an overview of the implications of the newly implemented forms of sanctions relief.

License and Activities

The main documents produced by OFAC were: (1) a Statement of Licensing Policy allowing for the case-by-case licensing of individuals and entities seeking to export, re-export, sell, lease, or transfer to Iran commercial passenger aircraft, and related parts and services, for exclusively commercial passenger aviation; (2) General License H authorizing U.S.-owned or -controlled foreign entities to engage in certain activities involving Iran; and (3) a general license authorizing the importation into the United States of Iranian-origin carpets and foodstuffs, including pistachios and caviar.

One point to highlight about the license related to commercial passenger aircraft is that the need for seeking a license also applies to any aircraft that has 10 percent or more U.S.-controlled content, a provision that makes many of the commercial aircraft in the world subject to this license requirement.[4]

General License H has garnered the most attention from those looking to take advantage of Iran's emerging market. This license allows U.S. Persons to engage in two limited categories of activities, namely (1) "activities related to the establishment or alteration of operating policies and procedures of a U.S. entity or a U.S.–owned or -controlled foreign entity to the extent necessary to allow a U.S.-owned or –controlled foreign entity to engage in transactions authorized" and (2) "activities to make available to those foreign entities that the U.S. person owns or controls any automated and globally integrated computer, accounting, email, telecommunications, or other business support system, platform, database, application, or server necessary to store, collect, transmit, generate, or otherwise process documents or information related to transactions authorized" under the first category.[5]

Aside from the enumerated activities, this general license does not permit U.S. Persons to engage in trade with Iran, act as deal makers for these U.S.–owned or –controlled foreign entities, or in any other way "facilitate" activities that are barred under the primary sanctions regime. For example, a U.S. Person on the board of such an organization is not permitted to be involved in any decisions regarding the specific areas of business with which to engage Iran, nor any financial, strategic, or other decisions regarding such businesses.

In essence, General License H is a general authorization to permit foreign entities that are nonetheless owned or controlled by U.S. Persons to engage in business activities with Iran that are permitted to non-U.S.-owned or -controlled foreign entities. Beyond the minimum authorizations necessary to allow for such foreign entities to engage with Iran, the general license H is written in a manner to uphold all primary sanctions for U.S. Persons regarding business activities with Iran. In other words, this license does not provide a back door for U.S. Persons to engage in business activities with Iran that, for the most part, continue to be banned under U.S. law.

<u>The limited authorizations will also make it extremely difficult for U.S. Persons to establish new foreign subsidiaries with the intent of doing business with Iran</u>. And finally, there is nothing in this license to allow any U.S. employee of foreign entities, U.S.-owned or otherwise, to be engaged in or facilitate transactions with Iran, beyond the limited authorization in General License H.

Continued Prohibitions

Some words of caution are warranted. First, U.S. and non-U.S. Persons continue to be banned from transacting with individuals and entities on the Specially Designated Nationals and Blocked Persons List (SDN list), although around 400 individuals and entities were removed from this list on Implementation Day.

Second, all of the authorized activities remain prohibited from transiting the U.S. financial system, which continues to be barred from facilitating any such transactions unless specifically authorized. U.S. financial institutions are even prohibited from processing what are known as "U-turn" transactions, such as U.S. dollar clearing activities involving Iran, with the exception of transactions that are exempt or authorized by a general or specific license issued pursuant to the Iranian Transactions and Sanctions Regulations (ITSR).[6]

Finally, U.S. Persons and financial institutions are still required to block the property and interests in property of all individuals and entities that meet the definition of the Government of Iran or an Iranian financial institution.[7]

<u>In sum, foreign companies are now theoretically almost free to take advantage of Iran's emerging economy while, with limited exceptions, U.S. companies are not.</u> However, it is important to note that the restrictions caused by the lingering primary U.S. sanctions can still impact non-U.S. Persons and entities. For example, the presence of a U.S. member in the International Group of Protection and Indemnity Clubs, responsible for providing 90 percent of the liability coverage for the world's ocean-going cargo, could have complicated how the club members could react to liabilities from shipments of crude oil and petroleum products to Iran.[8] A subsequent removal of the restriction for U.S. entities by OFAC resolved this problem.[9]

Similarly, many foreign banks have been reluctant to engage with Iran as a result of the continued risk of being unintentionally exposed to U.S. penalties or being subject to additional scrutinies that could impact their business activities.[10] These examples illustrate that practical roadblocks to the full realization of the JCPOA's promised forms of sanctions relief continue to remain. Given the many implementation issues that are just starting to manifest themselves, it is reasonable to consider the current guidelines by OFAC not as the last word, but rather the start of a process of clarifications and adjustments necessary to the proper implementation of the JCPOA. Many more twists and turns are in the books.

Endnotes:

1. The United States, the Russian Federation, China, France, the United Kingdom, and Germany.

2. "U.S. Persons" are U.S. citizens, permanent resident aliens, U.S.-organized entities, non-U.S. entities that are more than 50 percent owned or controlled by U.S. Persons, non-U.S. Person officers, directors, employees, or other agents of U.S. Persons, and persons in the United States. Anyone not fitting the above description is considered a non-U.S. Person.

3. "Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions Under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day," Jan. 16, 2016.

4. Id.

5. 31 C.F.R. Part 560, General License H.

6 U-turn transfers are funds transfers passing through the U.S. financial system but originating and terminating outside the United States.

7 "Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions Under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day," Jan. 16, 2016.

8. Benoit Faucon, "European Companies Struggle to Find Tankers to Ship Iran Crude," Jan. 29, 2016 available at: http://www.nasdaq.com/article/european-companies-struggle-to-find-tankers-to-ship-iran-crude-20160129-00246.

9. Alex Longley, "Iran Gets Help with Oil Cargoes as Insurer Says U.S. Curb Lifted," BLOOMBERGBUSINESS, Feb. 12, 2016 available at: http://www.bloomberg.com/news/articles/2016-02-12/iran-gets-help-with-oil-cargoes-as-insurer-says-u-s-curb-lifted.

10. Najmeh Bozorgmehr and Simeon Kerr, "Iranian Businesses Still Hobbled by Sanctions Fallout," FINANCIAL TIMES, Feb. 14, 2016 available at: http://www.ft.com/intl/cms/s/0/d826bd40-d0b9-11e5-92a1-c5e23ef99c77.html#axzz40SdXfVwD.