

Iran Deal Opens Opportunities, With Significant Risk

January 19, 2016

“Implementation Day” of the Joint Comprehensive Plan of Action (JCPOA) arrived on January 16, 2016, when the International Atomic Energy Agency verified that Iran had taken various steps to contain its nuclear program. Accordingly, the United States lifted a body of sanctions against Iran, following commitments undertaken last July, while leaving many other sanctions in place. Implementation of the JCPOA – as agreed last summer by Iran, the European Union (EU), China, France, Germany, Russia, the United Kingdom, and the United States – opens opportunities for U.S. and non-U.S. companies alike as Iran substantially reintegrates with the global economy. Yet, extreme caution is due, as the United States continues to threaten severe sanctions against domestic and foreign companies that veer into prohibited business with Iran.

Wiley Rein LLP will host a webinar at noon on Friday, February 5 to discuss the opportunities and risks presented as the JCPOA comes into effect. Please register here to attend the complimentary webinar.

A. The JCPOA in a Nutshell

On Implementation Day, the United Nations (UN), the European Union, and the United States all lifted certain sanctions against Iran. UN Security Council Resolutions were lifted that targeted Iranian nuclear proliferation through trade restrictions and asset freezes. The EU lifted sanctions in the banking, insurance, financial, and petrochemical sectors, along with lifting certain asset freezes. Along with U.S. actions, UN and EU sanctions relief allows over \$50 billion in frozen Iranian assets to be repatriated, and allows Iran to engage much more freely in global petro markets and the international financial system (for example, many Iranian banks reportedly

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rejoined the SWIFT international financial messaging system last weekend).

U.S. sanctions relief on Implementation Day fell into a few broad categories:

- Removal of hundreds of designated Iranian entities from the Office of Foreign Assets Control (OFAC) list of Specially Designated Nationals and Blocked Persons (SDN List), including the Central Bank of Iran, many Iranian financial institutions, and the National Iranian Oil Company. So, after Implementation Day, non-U.S. persons are relieved of severe potential penalties that could have applied to doing business while these Iranian entities were SDNs. Yet, even following removals from the SDN List, many sanctions restrictions apply to these Iranian entities, especially restrictions on business with U.S. persons.
- Removal of many “secondary sanctions,” which are regulations indirectly imposed by the United States on non-U.S., non-Iranian companies. (In contrast, a “primary sanction” is regulation imposed by the U.S. government on U.S. companies directly.) “Secondary sanctions” aimed to create strong disincentives against foreign companies doing business with Iran, especially in the Iranian petrochemical and financial sectors. In essence, through “secondary sanctions,” the U.S. government gave foreign companies a choice: either they could do business in U.S. financial markets (and have access to U.S. dollars for transactional purposes), or they could do business with Iran, but not both. After Implementation Day, many secondary sanctions are lifted – removing the “us or them” choice – although some remain.
- U.S. companies have some new opportunities. Most significantly, OFAC will officially authorize the foreign subsidiaries of U.S. companies to do business with Iranians, subject to multiple restrictions. To be sure, the JCPOA gives a head start to European and Asian companies in re-establishing ties with the Iranian economy (a leading economy in the Middle East). U.S.-dollar denominated transactions involving Iran continue to be generally barred, but a U.S. company’s foreign subsidiaries may potentially reenter certain Iranian markets, if U.S. involvement is carefully contained. Trade in Iranian foodstuffs and carpets, as well as transactions involving civil aviation, will be authorized.

B. New U.S. Opportunity, Including General License H for Foreign Subsidiaries of U.S. Companies

As discussed above, the primary U.S. embargo on Iran, which impacts both U.S. companies and their owned or controlled foreign subsidiaries, remains in force. However, OFAC has authorized foreign subsidiaries of U.S. companies to engage in transactions with Iran as long as certain conditions are satisfied. Utilizing this authorization may present practical challenges and risks, especially where the U.S. parent exercises day-to-day control over its foreign subsidiaries.

Authorized Activities by Foreign Subsidiaries

On “Implementation Day,” OFAC issued a blanket authorization – General License H^[1] – that permits U.S.-owned or –controlled foreign subsidiaries to engage in transactions that would otherwise be prohibited by section 560.215 of the Iranian Transactions and Sanctions Regulations (ITSR).

Importantly, although the new general license broadly authorizes foreign subsidiaries to engage in business dealings with Iran, such transactions cannot involve the following:

- U.S.-origin goods, technology, or services, unless otherwise authorized/permitted by OFAC;
- Transfers of funds to, from, or through the U.S. financial system;
- SDNs or individuals or entities on OFAC's Foreign Sanctions Evaders (FSE) List, or other activities that would be prohibited by OFAC's non-Iran sanctions if engaged in by a U.S. person;
- Certain activities prohibited by the U.S. Export Administration Regulations (EAR), such as engaging in transactions with a person on the Entity List or subject to a denial order and engaging in certain activities in support of weapons proliferation;
- Any military, paramilitary, intelligence, or law enforcement entity of the Government of Iran, or any officials, agents, or affiliates of such an entity; and
- A variety of other activity that is otherwise sanctionable under U.S. law.

U.S. "Facilitation" Challenges

U.S. companies are barred from engaging in nearly all business dealings with Iran, and even where foreign subsidiaries are not explicitly prohibited from engaging in activities sanctioned by OFAC, U.S. parent companies must contend with "facilitation" liability.^[2] Generally, facilitation occurs when a U.S. person approves, finances, insures, warrants, facilitates, or guarantees a transaction, if OFAC rules would prohibit the U.S. person from undertaking the underlying transaction itself. Under section 560.417 of the ITSR, facilitation encompasses activities such as altering operating policies or procedures to permit a foreign affiliate to perform a specific transaction involving Iran without the approval of the U.S. parent company, where such transaction previously required approval; referring business opportunities in Iran to a foreign affiliate; or changing a foreign affiliate's policies and procedures with the specific purpose of facilitating transactions barred to U.S. persons.

To give some practical effect to General License H, OFAC has authorized U.S. parent companies to engage in limited facilitation activities, as follows:

Altering corporate policies and procedures: First, U.S. persons can establish or alter corporate policies and procedures to the extent necessary to allow a foreign entity to engage in transactions authorized under the general license. In its published guidance, OFAC has noted that this authorization is intended to cover U.S. person board members, senior management, employees, and outside legal counsel or consultants and allow such persons to be involved in the initial determination to engage in activities with Iran, the establishment of the necessary policies and procedures to do so, and related training and advice on the new/revised operating policies and procedures.

Notably, the general license does not allow U.S. involvement in ongoing Iran operations or the decision-making of foreign entities engaging with Iran after the above-mentioned actions are taken. Specifically, OFAC's guidance states that "U.S. persons may not be involved in the Iran-related day-to-day operations of a

U.S.-owned or -controlled foreign entity, including by approving, financing, facilitating, or guaranteeing any Iran-related transaction by the foreign entity.”^[3] Given the limitations in the general license, U.S. parent companies that exercise day-to-day control over their foreign subsidiaries, such as by approving contracts/projects on a case-by-case basis and/or providing parental guarantees, may face practical challenges (and potential liability) if their foreign subsidiaries seek to avail themselves of the general license. In other words, if a foreign subsidiary is not legally and operationally independent from its U.S. parent company, use of General License H potentially could result in facilitation liability for the U.S. parent company.

Use of automated and globally integrated business support systems: General License H also allows U.S. parent companies to make available to foreign entities engaging in authorized transactions with Iran 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 process documents or information. OFAC has indicated that “automated” refers to processes that operate passively and without human intervention to facilitate the flow of data, and these processes can include systems owned or operated for the U.S. parent company on a contract basis by a third-party service provider.^[4] By way of example, an ERP system that requires a U.S. person to complete a request to generate a purchase order by performing data entry or internal processing would not be considered “automated.”^[5] Additionally, “globally integrated” refers to a system that is broadly available to and in general use by the U.S. parent’s global organization.^[6]

Civil Aviation in Iran

During the negotiations with Iran over its nuclear program, OFAC has applied a “favorable licensing policy” with respect to exports of U.S.-origin goods and services needed to ensure the safe operation of the Iranian civil aircraft industry. This policy has now been expanded and made permanent. Under this policy, U.S. persons may apply for a specific license to export commercial passenger aircraft and related parts and services to Iran. In addition, non-U.S. persons may apply for such a license if it would involve the exportation to U.S.-origin goods or services. The licensing policy applies to aircraft and aircraft parts, as well as to warranty, maintenance, repair and inspection services. The inclusion of “aircraft” in the policy guidance represents a significant expansion, as OFAC’s earlier guidance referred to services and parts, but not to aircraft themselves.

Licenses are subject to two general conditions. First, the goods and services must be for use by the Iranian civil aviation industry. Sales for military use are not eligible under this policy. Second, the policy does not apply to transactions involving anyone on OFAC’s SDN List. Sales to entities or persons on the Commerce Department’s Denied Persons and Entity lists may require a separate authorization from the Commerce Department. The policy does not guarantee that OFAC will grant any individual license request.

During the negotiations with Iran, OFAC had extended the validity of licenses issued under its previous policy regarding the civil aviation industry in Iran. All such licenses now expire on May 31, 2016. Holders of such licenses who wish to renew them should accordingly file an application for renewal with OFAC as soon as possible.

C. Nuclear-Related Secondary Sanctions Have Been Lifted

On Implementation Day, the United States lifted a number of nuclear-related “secondary sanctions”—*i.e.*, sanctions directed toward non-U.S. persons for conduct involving Iran that occurs entirely outside of U.S. jurisdiction and does not involve U.S. persons. The United States lifted the secondary sanctions by issuing waivers for a number of statutory sanctions provisions, committing to refrain from exercising certain discretionary sanctions authorities, and revoking a number of sanctions-related Executive orders.^[7] The United States also removed over 400 individuals and entities from OFAC’s SDN List, the FSE List, and/or the Non-SDN Iran Sanctions Act List (NS-ISA List). As a result, non-U.S. persons are now generally permitted to engage in the activities described below, provided that such transactions do not involve persons remaining on the SDN List after Implementation Day and the conduct does not violate any U.S. sanctions laws applicable under legal authorities that fall outside the scope of the JCPOA.^[8]

Financial and Banking Measures

Secondary sanctions no longer apply to non-U.S. persons who engage in the following financial and banking-related activities:

- Financial and banking transactions with individuals and entities removed from OFAC’s sanctions lists, including the Central Bank of Iran (CBI) and most other Iranian financial institutions.^[9]
- Transactions related to the purchase or sale of Iranian rials and the maintenance of funds or accounts outside of Iran denominated in the Iranian rial.
- Provision of U.S. bank notes to the Government of Iran.
- The purchase, subscription to, or facilitation of the issuance of Iranian sovereign debt, including governmental bonds.
- The provision of financial messaging services to the CBI and other Iranian financial institutions removed from OFAC’s sanctions lists.

Additionally, OFAC clarified that foreign financial institutions engaging in transactions with Iranian financial institutions that do not appear on OFAC’s SDN List will not be subject to sanctions even if those Iranian financial institutions transact with individuals or entities that are on the SDN List as long as the foreign financial institution itself is not involved in any such transactions.

Importantly, transactions related to the activities described above are prohibited from transiting the U.S. financial system. U.S. persons remain prohibited from engaging in transactions or dealings with the government of Iran and Iranian financial institutions and must continue to block the property and interests in property of such persons. U-turn transactions also remain prohibited, and U.S. financial institutions may not engage in any clearing transactions involving Iran.

Energy and Petrochemical Sectors

Secondary sanctions no longer apply to non-U.S. persons who engage in the following activities related to Iran's energy and petrochemical sectors:

- Provision of investment, goods, services, information, technology, and support for Iran's oil, gas, and petrochemical sectors.
- The purchase, acquisition, sale, transportation, or marketing of petroleum, petrochemical products, and natural gas from Iran.
- The export, sale, or provision of refined petroleum products and petrochemical products to Iran.
- Transactions with Iran's energy sector, including the National Iranian Oil Company (NIOC), the Naftiran Intertrade Company (NICO), and the National Iranian Tanker Company (NITC).

In addition, the United States is no longer imposing limitations on the quantities of Iranian crude oil sold and the nations that can purchase it and has lifted restrictions on Iranian oil revenues held abroad. The restriction on the use of proceeds of sales of Iranian petroleum and petroleum products for bilateral trade with Iran that applied to jurisdictions with a "significant reduction exception" has also been lifted. U.S. persons remain prohibited from engaging in activities related to Iran's energy sector, and U.S. financial institutions may not process any payments related to Iranian oil.

Insurance Measures

Secondary sanctions no longer apply to non-U.S. persons who provide underwriting services, insurance, or re-insurance in connection with activities consistent with the JCPOA, including activities in the energy, shipping, and shipbuilding sectors of Iran and for vessels that transport crude oil, natural gas, liquefied natural gas, petroleum, and petrochemical products to or from Iran. U.S. persons remain prohibited from extending insurance coverage and paying claims involving Iran, except that travel insurance remains exempt from OFAC regulation as ordinarily incident to travel.

Shipping, Shipbuilding, and Port Sectors

Secondary sanctions no longer apply to non-U.S. persons who engage in the following activities related to Iran's shipping and shipbuilding sectors and port operators:

- The sale, supply, or transfer to or from Iran of significant goods or services used in connection with Iran's shipping and shipbuilding sectors, including port services such as bunkering, inspection, classification, and financing.
- Transactions with entities determined to be part of the shipping or shipbuilding sectors of Iran (including the Islamic Republic of Iran Shipping Lines (IRISL), South Shipping Line, and NITC), and persons determined to be Iranian port operators (including Bandar Abbas).

- Owning, operating, controlling, or insuring a vessel used to transport crude oil, petroleum products, petrochemical products, or natural gas to or from Iran, or selling, leasing, or providing vessels to Iran.

Gold and Other Precious Metals

Secondary sanctions no longer apply to non-U.S. persons who directly or indirectly sell, supply, export, or transfer, to or from Iran (including the government of Iran), gold and other precious metals. Associated services required to facilitate such transactions (including financing, security, insurance, and transportation services) are also permitted.

Software and Metals

Secondary sanctions no longer apply to non-U.S. persons who directly or indirectly sell, supply, or transfer, to or from Iran, graphite, raw or semi-finished metals such as aluminum and steel, coal, and software for integrating industrial processes in connection with activities consistent with the JCPOA. Transfers of such materials or software for use in Iran's military or ballistic missile programs remain prohibited. U.S. export controls also continue to apply to exports and reexports by U.S. persons or from the United States to Iran or the government of Iran, as well as reexports by non-U.S. persons of items with ten percent or more U.S.-controlled content to Iran or the government of Iran, if undertaken with knowledge or reason to know that the reexportation is intended specifically for Iran or the government of Iran.

Automotive Sector

Secondary sanctions no longer apply to non-U.S. persons who directly or indirectly sell, supply, or transfer to Iran goods or services used in connection with Iran's automotive sector. Non-U.S. persons remain prohibited from reexporting from a third country to Iran any controlled goods, technology, or services that have been exported from the United States if they know or have reason to know that the reexportation is intended specifically for Iran or the government of Iran. Non-U.S. persons also remain prohibited from reexporting to Iran or the government of Iran items containing ten percent or more U.S.-controlled content if undertaken with knowledge or reason to know that the reexportation is intended specifically for Iran or the government of Iran.

Associated Services

In addition to the activities described above, non-U.S. persons may provide "associated services" (including technical assistance, training, insurance, re-insurance, brokering, transportation, and financial services) that are necessary and ordinarily incident to any of the underlying activities for which secondary sanctions have been lifted. Although U.S. persons and U.S.-owned or -controlled foreign entities remain generally prohibited from providing such associated services, U.S.-owned or -controlled foreign entities may do so to the extent that the underlying activity or transaction falls within the scope of General License H described above.

D. Key Sanctions Remain in Place After Implementation Day

Despite the lifting of certain prohibitions, it is important to remember that key sanctions remain in place against Iran and continue to broadly prohibit U.S. persons from doing business with Iran. In particular, the U.S. trade embargo imposed on Iran and implemented pursuant to the ITSR remains in full effect, as do the accompanying export controls imposed on exports and reexports to Iran under EAR and the International Traffic in Arms Regulations (ITAR). In addition, blocking sanctions against several designated entities and individuals, including the government of Iran, remain in place.

- ***Primary U.S. Sanctions and Export Controls Remain in Place***

- The U.S. trade embargo on Iran remains in place, which means that even after Implementation Day, U.S. persons continue to be broadly prohibited from engaging in transactions directly or indirectly with Iran or the government of Iran.
- The exportation or reexportation of goods, technology, or services by a U.S. person or from the United States to Iran or the government of Iran continues to be prohibited.
- Non-U.S. persons are prohibited from reexporting items that contain 10 percent or more U.S.-controlled content with knowledge or reason to know that the reexportation is specifically intended for Iran or the government of Iran.
- Non-U.S. persons continue to be prohibited from knowingly engaging in activities that seek to evade the prohibitions on transactions with Iran or that cause the export of goods or services from the United States to Iran.

- ***Blocking Sanctions Remain in Place.***

- Blocking sanctions remain in place with respect to entities and individuals designated pursuant to authorities relating to support for terrorism; Iran's human rights abuses; proliferation of weapons of mass destruction; destabilizing activities and human rights abuses in Syria and Yemen; diversion of goods intended for the people of Iran; officials, agents, and affiliates of the Iranian Revolutionary Guard Corps (IRGC); and foreign sanctions evaders, among others. These sanctions specifically target the government of Iran, Iranian Financial Institutions, and Islamic Republic of Iran Broadcasting among other entities.

- ***Secondary Sanctions That Involve Iran-Related SDNs Remain in Place.***

- Secondary sanctions continue to apply to non-U.S. persons (primarily foreign financial institutions) who knowingly facilitate significant financial transactions with or provide material or certain other support to Iran-related SDNs. Whether a financial transaction is "significant" continues to be determined by the criteria enumerated under section 561.404 of the Iranian Financials Sanctions Regulations (IFSR). Such criteria include, but are not limited to, the size, number, and frequency of transactions; the nature of the transactions; the level of awareness of the transaction by individuals at the relevant financial institution; the nexus between the financial institution performing the transaction and the blocked person; and the overall impact of the transaction on the objectives of the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA).

- **Certain Menu-Based Secondary Sanctions Remain in Place.**
 - After Implementation Day, menu-based sanctions^[10] continue to apply to the following persons:
 - Persons who materially assist, sponsor, or provide support for (1) the IRGC or agents, officials, or affiliates thereof; (2) persons who engage in significant transactions with the IRGC; or (3) persons subject to financial sanctions under United Nations Security Council Resolutions that impose sanctions with respect to Iran;
 - Non-U.S. persons who engage in certain transactions involving the energy, shipping, and shipbuilding sectors of Iran, or the provision of underwriting, insurance, or reinsurance, if the transactions involve SDNs; and
 - Non-U.S. persons who sell, supply, or transfer directly or indirectly to or from Iran graphite, raw or semi-finished metals such as aluminum and steel, coal, and software for integrating industrial processes will continue to be subject to U.S. sanctions if certain enumerated criteria are met.
- **Non-Proliferation Sanctions Remain in Place.**
 - Sanctions under the Iran, North Korea and Syria Nonproliferation Act related to the acquisition of nuclear-related commodities and services for nuclear activities, and other related non-proliferation sanctions remain in place. The United States will seek legislative changes to these sanctions, as appropriate, on Transition Day.
- **Iran Remains a State Sponsor of Terrorism.**
 - Even after Implementation Day, Iran remains designated as a state sponsor of terrorism. Accordingly, there remains in place several restrictions related to this designation, including but not limited to (1) a ban on the export and sale of defense items to Iran; (2) restrictions on exports of certain sensitive technology and dual-use items; (3) restrictions on foreign assistance; and (4) certain financial restrictions.

Please join us for a webinar at noon on Tuesday, January 26 to learn more about the opportunities and risks presented as the JCPOA comes into effect. Registration is available [here](#).

[1] OFAC, ITSR, *General License H Authorizing Certain Transactions Relating to Foreign Entities Owned or Controlled by a United States Person*, available at: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran_glh.pdf.

[2] 31 C.F.R. § 560.208.

[3] OFAC, *Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day* at FAQ K.6 (Jan. 16, 2016), available at: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_faqs.pdf (FAQ).

[4] FAQ K.9 and K.10.

[5] FAQ K.10. Note that limited human intervention for routine and emergency maintenance of a system is permissible. FAQ K.12.

[6] FAQ K.11.

[7] The statutory sanctions provisions being waived include relevant sections of the Iran Freedom and Counter-Proliferation Act of 2012 (IFCA), the National Defense Authorization Act of Fiscal Year 2012, as amended (NDAA 2012), the Iran Threat Reduction and Syria Human Rights Act of 2012 (TRA), and the Iran Sanctions Act of 1996, as amended (ISA). Executive Orders 13574, 13590, 13622, and 13645 and Sections 5-7 and 15 of Executive Order 13628 were revoked.

[8] For example, secondary sanctions continue to attach to significant transactions with persons on the SDN List designated in connection with Iran's proliferation of weapons of mass destruction (WMD) or their means of delivery. OFAC signaled its resolve to continue exercising such authority by sanctioning eleven entities and individuals involved in procurement on behalf of Iran's ballistic missile program the very day after the nuclear-related secondary sanctions were lifted.

[9] Iranian financial institutions remaining on the SDN List include Ansar Bank, Bank Saderat, Bank Saderat PLC, and Mehr Bank.

[10] "Menu-based" sanctions refer to a list of sanctions that the United States may impose in response to specified conduct.