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Understanding the Changes to the Iran Sanctions Regime: OFAC Issues Guidance, General Licenses on JCPOA Implementation Day

On January 16, 2016, international inspectors verified that Iran had complied with the initial nuclear requirements of the Joint Comprehensive Plan of Action (the “JCPOA”), and the Secretary of State confirmed that verification. This milestone marked January 16 as “Implementation Day,” the day on which U.S. and European sanctions relief under the JCPOA took effect. On that day, the Treasury Department’s Office of Foreign Assets Control (“OFAC”) issued new guidance, FAQs, and general licenses to give effect to these changes.

The limited easing of U.S. sanctions and the broader easing of European and United Nations sanctions¹ present certain new opportunities for U.S. and non-U.S. companies, but with these opportunities come considerable risks and the need for heightened legal vigilance. This memorandum reviews the key changes to the United States’ Iran sanctions regime, highlights important aspects of OFAC’s recent guidance and actions, and discusses the practical implications for U.S. and non-U.S. multinational companies.

Overview of U.S. Sanctions Relief

In the United States, the Iran sanctions regime has been the product of many years of legislation and executive actions that progressively isolated Iran from the U.S. and international economy. As described below, the U.S. sanctions relief that took effect on January 16 left primary sanctions largely intact, but resulted in a substantial reduction in secondary sanctions.

Primary sanctions. Under the JCPOA, U.S. primary sanctions are largely maintained in their previous form. As OFAC has stated, “The U.S. domestic trade embargo on Iran remains in place.”² Among other things, U.S. persons are still prohibited from engaging in business with Iranian persons or entities, and U.S. financial institutions still cannot engage in dollar clearing on behalf of Iranian entities or for transactions that involve Iran.³ In the Iran context, primary sanctions apply to U.S. persons,⁴ overseas

¹ See JCPOA Annex II at A, Annex V at C.

² Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions Under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day (“FAQs”), A.3 (Jan. 16, 2016).

³ See *id.* C.6.

entities owned or controlled by U.S. persons, non-U.S. persons who facilitate violations or engage in U.S. dollar transactions involving Iran that transit the U.S. financial system, and the exportation and re-exportation of U.S. goods.

However, as required under the JCPOA, on January 16, OFAC provided for three exceptions to primary sanctions:

- OFAC released a “statement of licensing policy” providing that it will consider on a case-by-case basis requests for specific licenses for the export or re-export to Iran of commercial passenger aircraft and related parts and services.⁵
- OFAC issued a general license (meaning that no application to OFAC is necessary) that permits the importation of Iranian carpets and food into the United States. The general license will be effective upon publication in the Federal Register.⁶
- OFAC issued General License H, which provides that, subject to certain exceptions discussed in more detail later in this memorandum, a foreign entity owned or controlled by a U.S. person is authorized to engage in transactions with Iranian individuals and entities, including the Iranian Government. As discussed further below, General License H also permits certain limited activities that a U.S. parent company or asset management firm may undertake with respect to its foreign subsidiaries’ or overseas controlled entities’ dealings with Iran.⁷

Secondary sanctions. Secondary sanctions threaten non-U.S. persons with negative consequences if they do business in certain Iranian sectors or with particular Iranian individuals and entities, even where such transactions have no U.S. nexus. Non-U.S. persons who violate secondary sanctions could be subject to a range of consequences, such as freezing of assets in the United States, prohibitions on imports and exports into and out of the United States, denial of entry into the United States, and other measures designed to cut off access to the United States and its financial system.

⁴ “The term *United States person* means any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States.” 31 C.F.R. § 560.314.

⁵ See Statement of Licensing Policy for Activities Related to the Export or Re-Export to Iran of Commercial Passenger Aircraft and Related Parts and Services, Department of the Treasury (Jan. 16, 2016). As a practical matter, each request for a specific license may take OFAC significant time to process, and ultimately OFAC has discretion to grant or deny the request.

⁶ See Text of General Licenses To Be Published in the ITSR (amending 31 C.F.R. § 560.534). OFAC has also maintained the preexisting general licenses for the export to Iran of food, medicine, and certain other items. See FAQs A.5.

⁷ See General License H, Authorizing Certain Transactions Relating to Foreign Entities Owned or Controlled by a United States Person, Department of the Treasury (Jan. 16, 2016) (“General License H”).

As of Implementation Day, secondary sanctions that were imposed because of Iran's nuclear program have been lifted, including prohibitions on non-U.S. persons' dealings with Iran involving:

- transactions with the Central Bank of Iran and most other Iranian financial institutions; transactions and other activity related to the Iranian rial; provision of U.S. bank notes to the Iranian government; purchase, subscription to, or facilitation of the issuance of Iranian sovereign debt; and provision of financial messaging services to certain Iranian financial institutions;
- underwriting services, insurance, and reinsurance in connection with activities consistent with the JCPOA;
- Iran's energy and petrochemical sectors, including purchase of Iranian crude oil and natural gas;
- Iran's shipping, shipbuilding, and automotive sectors;
- software for industrial processes; and
- trade in gold and other precious metals.⁸

OFAC has also removed more than 400 names from its List of Specially Designated Nationals and Blocked Persons ("SDN List"), Foreign Sanctions Evaders List, and Non-SDN Iran Sanctions Act List, and non-U.S. persons can now conduct business with these delisted individuals and entities without running afoul of secondary sanctions.⁹

While nuclear-related secondary sanctions have been lifted, the secondary sanctions related to other activities remain intact—for example, secondary sanctions against individuals and entities engaging in terrorism, proliferation of weapons of mass destruction, and support for Iran's human rights abuses.¹⁰ Non-U.S. persons also still face secondary sanctions for dealing with the more than 200 Iranian or Iran-related persons and entities that remain on or are added to OFAC's SDN List after Implementation Day,

⁸ See FAQs A.2 and JCPOA, Annex II at B.4.1-4.7 for a full list. See also FAQs C.9 (detail on relief of financial and banking sanctions).

⁹ See JCPOA Attachment 3.

¹⁰ On January 17, 2016—one day after Implementation Day—Treasury demonstrated its continued willingness to expand other Iran-related sanctions where appropriate by adding 11 individuals and entities to the SDN List due to their involvement with procurement related to Iran's ballistic missile program. Press Release, Department of Treasury, Treasury Sanctions Those Involved in Ballistic Missile Procurement for Iran (Jan. 17, 2016), available at <https://www.treasury.gov/press-center/press-releases/Pages/jl0322.aspx>.

engaging in activities that support Iranian terrorism- or proliferation-related activities, and dealing with the Islamic Revolutionary Guard Corps (“IRGC”) or any entity owned 50% or more by the IRGC.¹¹

Implications for U.S. Companies with Overseas Entities

Because primary sanctions remain largely intact, U.S. companies, including asset management firms, remain subject to a sanctions regime that is as complex as that which existed before Implementation Day, and enforcement is expected to be as active as ever. The most significant change for these companies is General License H, which permits foreign entities owned or controlled by U.S. persons (for convenience, “U.S. overseas entities”) to have dealings with Iran free from the strictures of primary sanctions, subject to certain exceptions. As a result, many U.S. companies with foreign subsidiaries, as well as U.S. asset management firms with overseas controlled interests and ventures, may give serious consideration to doing business in Iran. Although there will undoubtedly be attractive business opportunities in this space—and pressure to compete with European and other foreign counterparts that will enjoy greater freedom to take advantage of relaxed sanctions—there is good reason to be cautious when entertaining these possibilities. As discussed below, doing business in Iran safely as a U.S. overseas entity would involve threading a delicate needle and could be beyond the risk appetites or practical abilities of many U.S. firms.

Compliance Risks. A U.S. overseas entity seeking to do business in Iran pursuant to General License H must still comply with the host of remaining secondary sanctions. General License H lists several types of transactions that are *not* authorized despite the license, including:

- re-exportation of goods, technology, or services prohibited under sections 560.204 and 560.205 of the Iranian Transactions and Sanctions Regulations;
- transfer of funds to, from, or through a U.S. depository institution or U.S.-registered broker or dealer in securities;
- transactions involving any person on OFAC’s SDN List or Foreign Sanctions Evaders List or any military, paramilitary, intelligence, or law enforcement entity of the Iranian government, or any official, agent, or affiliate thereof;
- activity prohibited by or subject to licensing under the U.S. Export Administration Regulations or that involves a person whose export privileges have been denied under part 764 or 766 thereof (absent authorization from the Department of Commerce); and
- transactions prohibited by the remaining secondary sanctions.¹²

¹¹ See FAQs A.3; see also 31 C.F.R. § 561.404.

Respecting these limitations would require robust due diligence and strong controls and would involve appreciable compliance risk.¹³ Effective due diligence would need to include an examination of each counterparty entity to determine whether an aggregate of 50% of the entity is owned, directly or indirectly, by parties who appear on the SDN List.¹⁴ The ability to determine the ultimate ownership of entities in Iran for purposes of this rule would likely be challenging given Iran's unregulated and opaque environment. Notably, over the past two decades, many Iranian entities have developed networks of front companies to disguise just these sorts of activities.¹⁵

Risk of Facilitation by U.S. Entities. Another significant risk that looms over any U.S. overseas entity's dealings in Iran is that an enforcement agency could conclude that a U.S. entity, such as a parent corporation or an asset management firm, "facilitated" the overseas entity's Iranian transactions. As in other sanctions regimes, no U.S. person may "approve, finance, facilitate, or guarantee any transaction by a foreign person where the transaction by that foreign person would be prohibited . . . if performed by a [U.S.] person."¹⁶ For example, last year a company in the oilfield services sector entered a guilty plea for conspiracy to violate the International Emergency Economic Powers Act and paid a significant penalty where, among other things, a U.S.-based entity facilitated sanctions violations by approving capital expenditures related to a foreign entity's business with Iran and Sudan and making and implementing other business decisions related to operations in Iran and Sudan.¹⁷

Given the prohibition on facilitation, if a U.S. overseas entity engages in business with Iran there must be a clear separation between the overseas entity and the U.S. entity with respect to that business. To ease this situation to a degree, General License H makes certain allowances of activity by U.S. persons,

¹² See General License H at (c) for a full list.

¹³ See FAQs M.2.

¹⁴ See Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property Are Blocked, Department of the Treasury (Aug. 13, 2014), available at https://www.treasury.gov/resource-center/sanctions/Documents/licensing_guidance.pdf.

¹⁵ See, e.g., Media Note, Department of State, Additional Treasury and State Designations Targeting Networks Linked to Iranian WMD Proliferation and Sanctions Evasion (Dec. 12, 2013), available at <http://www.state.gov/r/pa/prs/ps/2013/218637.htm>.

¹⁶ 31 C.F.R. §§ 560.208, 560.417.

¹⁷ Statement of Offense, *United States of America v. Schlumberger Oilfield Holdings, Ltd.*, Case No. 1:15-cr-00041, ¶¶ 4, 27-61 (D. D.C. Mar. 25, 2015); see also Press Release, Department of Justice, Schlumberger Oilfield Holdings Ltd. Agrees to Plead Guilty and Pay Over \$232.7 Million for Violating US Sanctions by Facilitating Trade with Iran and Sudan (Mar. 25, 2015) (U.S. Attorney: "Even if you don't directly ship goods from the United States to sanctioned countries, you violate our laws when you facilitate trade with those countries from a U.S.-based office building.").

including permitting U.S. entities to take steps to change corporate policies and procedures to authorize their overseas entities to conduct business with Iran.¹⁸ OFAC emphasizes that this allowance does not “extend to the involvement of U.S. persons in the Iran-related day-to-day operations” of a U.S. overseas entity.¹⁹ Notably, the general license also allows a U.S. entity to “make available” to an overseas entity doing business with Iran globally integrated servers and systems—for example, computer servers, accounting applications, and information technology systems—so long as they are automated, *i.e.*, there is no human intervention on the part of any U.S. person (except for “establishment or maintenance”).²⁰ Interpreting the parameters of this permission will be a key work stream in any serious effort to assess the feasibility of making use of General License H.

Despite these allowances, it will be a challenge for many U.S. overseas entities to operate with the requisite degree of operational independence with respect to their Iranian dealings. This is particularly true for overseas entities owned by public companies subject to Sarbanes-Oxley or controlled by U.S. asset management firms. Even if such independence is practically achievable, companies may decide that it is not desirable, given the many business, reputational, and compliance risks (*e.g.*, the risk of liability under the Foreign Corrupt Practices Act) that dealings in Iran could involve. At a minimum, U.S. parent companies and asset management firms that contemplate permitting overseas entities to engage in Iranian business should undertake a detailed analysis of legal and reputational risk and should consider the development of substantial compliance policies and procedures.

Continued Securities Disclosure Obligations. Companies should also bear in mind that the JCPOA did not affect section 13(r) of the Securities Exchange Act of 1934, which requires any domestic or foreign issuer that must file reports with the SEC to disclose in its quarterly and annual reports certain business transactions with Iran or Iranian entities or individuals.²¹

Implications for Non-U.S. Companies

The easing of U.S. secondary sanctions and the more expansive lifting of European and United Nations sanctions provide non-U.S. companies with a significantly greater degree of freedom in their dealings with Iran. The entry of non-U.S. companies into Iran, however, will also give rise to risks. Most significantly, as described above with regard to U.S. overseas entities, non-U.S. companies will need to ensure that they

¹⁸ General License H at (b). This provision gives the license practical meaning, as OFAC regulations otherwise would have prohibited a U.S. entity from altering its policies to permit business with Iran. *See* 31 C.F.R. § 560.208; *see also* FAQs K.6, K.7.

¹⁹ FAQs K.8.

²⁰ General License H at (b)(2); FAQs K.12 (citing 31 C.F.R. § 560.405).

²¹ 15 U.S.C. § 78m(r).

are complying with the remaining U.S. secondary sanctions, which will involve heightened compliance efforts given the challenges of the Iranian environment.

Additionally, non-U.S. companies will need to continue to wall off any U.S. operations from their Iranian business. If a non-U.S. company's U.S. operations become entangled in Iranian dealings, the U.S. entity could be liable for either engaging in direct business with Iran or facilitation. The risks and practicalities involved in separating the U.S. operations from Iranian dealings will depend on the structure and systems of each company, including the degree to which shared services are based in the United States. In general, the ability of a non-U.S. company to segregate its U.S. operations will be greater than a U.S. overseas entity's ability to stay separate from its parent, but for some non-U.S. companies the challenges may be comparable. Non-U.S. companies—and, in particular, non-U.S. financial institutions—must also ensure that Iran-related transactions do not involve the U.S. financial system (which would be the case for almost any electronic payment denominated in U.S. dollars).²²

Conclusion

The changes to the Iran sanctions regime effected by the JCPOA present U.S. and, to a greater extent, non-U.S. companies with opportunities to enter a previously isolated marketplace. These opportunities are accompanied by important legal, reputational, and practical risks. Thoroughly understanding the recent guidance and actions issued by OFAC is essential to gauging these risks, and companies should anticipate that OFAC will continue to augment its guidance over the next year.

In addition to waiting for additional guidance with respect to the particularly difficult issues—such as facilitation risks and U.S. overseas entities—it remains to be seen what enforcement posture OFAC, the Department of Justice, and other federal and state agencies that play a role in sanctions enforcement will take. For now it is unclear whether the U.S. government's goal is to provide for workable, albeit narrow, opportunities for U.S. overseas entities to deal with Iran, or whether its appetite for such dealings is more theoretical. It also remains to be seen how vigorously the government will enforce its remaining secondary sanctions authorities. Realistically, there is likely no clear, collective outlook by the various agencies at this point and their views and approaches may change as the geopolitics (and domestic politics) that form the backdrop of Iran sanctions continue to evolve.

Links to the JCPOA can be found [here](#), and links to the OFAC guidance and other related documents can be found [here](#).

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²² See FAQs C.7.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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