

Iran Nuclear Deal Is Implemented: A First Look at What It Means for Sanctions Relief and Continuing Compliance

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On January 16, 2016, the International Atomic Energy Agency ("IAEA") declared that Iran had fully complied with its first phase obligations under the July 2015 Joint Comprehensive Plan of Action ("JCPOA") to reduce its ability to develop and produce nuclear weapons. Thus arrived the long-awaited JCPOA Implementation Day under which, in exchange for Iran's nuclear activity commitments, the United States, the EU and the UN all agreed to revoke or waive many of the sanctions they had imposed against Iran in an effort to convince Iran not to develop nuclear weapons. Iran also achieved under the Agreement the ability to access some \$100 billion in frozen assets, and to begin freely selling its oil on world markets.

To avoid re-imposition of sanctions, Iran must continue to abide by its JCPOA commitments for at least the next ten years. In return, the EU has now lifted most of the sanctions it had imposed on Iran, freeing EU companies to resume most normal commercial activities with Iran. The United States also has provided some sanctions relief, but primarily for the benefit of non-U.S. persons that were under threat of U.S. secondary, or extraterritorial, sanctions for many activities with Iran. U.S. persons continue to be subject to a near total embargo against Iran, subject to a few very limited general licenses, including a new authorization that applies to U.S.-owned or controlled foreign entities.

What Can U.S. Companies Now Do?

For U.S. persons, the U.S. embargo against Iran remains almost completely intact. That means, unlike their foreign (including EU) competitors, U.S. companies will not be able to take advantage of economic opportunities in Iran. Specifically, with a handful of exceptions, U.S. persons will continue to be prohibited from doing business in or with Iran, meaning no investments, no exports (of goods, technology or services), and no imports. Further, the Government of Iran and all Iranian government owned entities and businesses will continue to be blocked, meaning any of their assets that come into the possession or control of U.S. persons are frozen and cannot be dealt in. In addition, U.S. financial institutions will continue to be prohibited from any involvement in Iranian transactions that are not expressly allowed for U.S. persons - including involvement in clearing foreign transactions between Iran and non-U.S. persons denominated in U.S. dollars. U.S. persons also will continue to be generally prohibited from approving or facilitating actions by non-U.S. persons that a U.S. person could not engage in directly (a notable exception being the new authorization for U.S.-owned or controlled foreign entities discussed below).

There are some exceptions. First, U.S. persons will continue (as before Implementation Day) to be able to trade with Iran in foods and many medicines and medical devices, and in certain consumer communications and information technology goods and services. Second, the Treasury Department's Office of Foreign Assets Control ("OFAC") will give favorable consideration on a case-by-case basis to authorizing the export and sale of U.S. commercial aircraft for civilian use, export of parts of such aircraft, and export of repair services. Last, OFAC will be issuing a general license authorizing imports from Iran of Iranian foodstuffs and carpets.

The other major change in the U.S. sanctions regime affecting U.S. persons is a new general OFAC authorization to allow non-U.S. companies owned or controlled by U.S. persons to engage in many transactions with Iran and to allow limited actions by U.S. persons to enable such activity. Before Implementation Day, such foreign companies were subject to the same prohibitions as U.S. persons. This is discussed in the next section.

What Can Foreign Subsidiaries of U.S. Companies Do?

As part of the U.S. implementation of the JCPOA, OFAC issued a general license that allows foreign entities owned or controlled by U.S. persons to engage in transactions with Iran, with a number of limitations. The general license authorizing foreign entities owned or controlled by U.S. persons to do business in Iran is General License H ("GL-H"), and can be found at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran_glh.pdf.

The key elements of the OFAC license are as follows:

1. **Allowing Entry into Iran through Foreign Subsidiaries and Joint Ventures.** GL-H authorizes foreign entities owned or controlled by U.S. persons to engage in all transactions with Iran except to the extent prohibited by GL-H or by other OFAC sanctions programs (e.g., dealing with Iranians sanctioned for terrorism).

2. **Authorization to Change Policies and Procedures.** As noted above, one of the continuing restrictions that will apply to U.S. persons is on approving or facilitating actions by non-U.S. persons with Iran. That said, GL-H authorizes U.S. parent companies to engage in certain limited "activities related to the establishment or alteration of operating policies and procedures of a United States 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" by the general license.
3. **Use of Corporate IT System to Support Business in Iran.** GL-H authorizes U.S. parent companies "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" in the general license. GL-H defines key terms:
 - "'automated' refers to a computer, accounting, email, telecommunications, or other business support system, platform, database, application, or server that operates passively and without human intervention to facilitate the flow of data between and among the United States person and its owned or controlled foreign entities."
 - "'globally integrated' refers to a computer, accounting, email, telecommunications, or other business support system, platform, database, application, or server that is available to, and in general use by, the United States person's global organization, including the United States person and its owned or controlled foreign entities."

GL-H goes on to provide that such automated and globally integrated systems cannot be used to transfer funds to, from, or through the United States.

4. **Continuing Prohibitions.** Foreign subsidiaries of U.S. person will continue to be subject to certain restrictions in dealing with Iran. These include:
 - **Facilitation Remains Prohibited.** U.S. persons will continue to be prohibited from facilitating action by non-U.S. subsidiaries. Thus, U.S. nationals working for non-U.S. subsidiaries will not be able to participate in, and U.S. parent companies will not be able to provide financing or other operational support for, Iran activities.
 - **Export/Re-export Restrictions.** The prohibition on U.S. or non-U.S. persons exporting anything, directly or indirectly, to Iran with 10% or more U.S. content remains in effect. Non-U.S. subsidiaries will be allowed to re-export U.S. items from third countries if they are EAR99 (the lowest level of U.S. export control), however.
 - **Prohibitions on Dealing with Prohibited Parties.** Restrictions on dealing with Iranian persons that remain on the various U.S. government prohibited party lists remain in place.

Are Other Non-U.S. Entities Now Free of the Threat of U.S. Secondary Sanctions?

The primary sanctions relief offered by the U.S. under the JCPOA was the removal of the threat of secondary sanctions for engaging in most activities with Iran. Thus, non-U.S. persons will now be able to purchase and sell Iranian petroleum and petrochemical products, invest in Iran, provide financing for activities in Iran, provide insurance for Iranian transactions, and deal with Iran's shipbuilding, shipping, and automotive sectors.

The U.S. has not eliminated all secondary sanctions, however. Activities by non-U.S. persons with Iranian persons that remain on OFAC's Specially Designated Nationals ("SDN") List¹, or that are later placed on the SDN List, may result in secondary sanctions. Activities that may cause U.S. persons to violate the U.S. embargo (such as trying to clear U.S. dollar denominated payments involving Iran through a U.S. financial institution) can result in sanctions. And, non-U.S. persons remain subject to restrictions on exporting and re-exporting to Iran U.S. origin items and U.S. items with more than 10% U.S.-controlled content.

Finally, non-U.S. persons need to be aware that the U.S. reserved the right to unilaterally re-impose any of the waived secondary sanctions if it determines that Iran has violated its obligations under the JCPOA. Any such snap-back of sanctions will not apply to activities conducted before the snap-back, but can apply to activities started before and that continue after the snap-back.

The Takeaway

The Implementation Day sanctions roll-back is just one step, which primarily affects non-U.S. persons and the foreign subsidiaries of U.S. persons. The changes on January 16 are far from a complete lifting of the U.S. embargo, which remains very much in effect. All parties looking to enter the Iran market pursuant to these changes should be very careful in considering how the U.S. sanctions program may still affect their proposed activities. As described above, facilitation by U.S. persons, or transactions involving the U.S. financial sector (such as payments in U.S. dollars) or U.S.-origin products, as well as dealings with Iranian entities and persons that remain targeted on the SDN List, can expose non-U.S. parties to sanctions liability under U.S. law. Further, specific licenses from OFAC may be necessary to allow U.S. parent companies to provide certain support necessary for their non-U.S. affiliates to operate in Iran. Therefore, the development of any Iran business plans should involve careful consideration of the requirements and restrictions of the remaining U.S. sanctions regime.

OFAC's published guidance and frequently asked questions ("FAQs") regarding the U.S. government's JCPOA sanctions relief can be found at the following link: <https://www.treasury.gov/resource-center/sanctions/Programs/pages/iran.aspx>.

^[1] Under the JCPOA, the U.S. agreed to remove from the SDN List many - but not all - Iranian persons that had been designated as SDNs as part of the U.S. nuclear sanctions against Iran. Iranian persons listed for reason of antiterrorism, violation of human rights, or proliferation of weapons of mass destruction, or destabilizing activities with respect to Syria or Yemen, remain subject to sanctions. Indeed, just one day after Implementation Day OFAC added a number of Iranian persons to the SDN List for activities associated with Iran's ballistic missiles program.

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