

'Implementation Day': Key Aspects of US and EU Implementation of Iran Sanctions Relief

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01/28/16

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January 16, 2016, marked "Implementation Day," the day the International Atomic Energy Agency (IAEA) verified that Iran had complied with certain nuclear-related technical aspects of the Joint Comprehensive Plan of Action (JCPOA or Agreement). The agreement, which was reached on July 14, 2015, between Iran, the P5+1 (the United States, the United Kingdom, China, France, Russia and Germany) and the European Union, required Iran to meet specific requirements before the first phase of U.S., U.N. and EU sanctions relief would be provided.

We discussed the contours of the Iran sanctions relief afforded by the JCPOA, its phased nature, and its implications for U.S., EU and international businesses in a July 2015 [client alert](#). "Implementation Day" has now made the expected relief a reality. With global businesses actively evaluating entering the Iranian market, it is essential to understand what the relief actually means and the myriad risks that remain. We focus below on several key things to know about the sanctions relief and its implementation by the United States and the European Union.

There is now substantial divergence between U.S. and EU sanctions on Iran.

Over the past several years, U.S. and EU sanctions on Iran had converged, with their respective restrictions often mirroring one another. The changes that took effect on Implementation Day change that. While the EU has suspended nearly all sanctions on Iran, the U.S. relief focuses on "secondary sanctions," a set of measures that targets foreign banks and other foreign companies that engage in certain activities involving Iran. The U.S. embargo remains in place, with only limited additional easing as a result of the JCPOA and its implementation. Financial institutions and multinational companies — particularly those based in Europe — that had become accustomed to transatlantic synchronicity will now need to proceed cautiously, given the substantial gaps between remaining U.S. and EU sanctions.

Most EU sanctions on Iran have been lifted, but some remain.

The EU has lifted nuclear-related economic and financial EU sanctions against Iran. EU Iran nuclear-related sanctions had targeted the financial, banking and insurance sector; the oil, gas and petrochemical sector; the shipping, shipbuilding and transport sector; and certain dealings with gold, precious metals, diamonds and newly printed banknotes. Transactions with Iran involving certain enterprise resource planning software and metals (graphite, raw or semi-finished metals) also are no longer prohibited outright, but instead are subject to an authorization regime.

Of likely greatest commercial consequence are the lifting of the EU's financial sanctions, the removal of certain key Iranian actors from the EU's sanctions list, and the reopening of Iran's oil and gas markets to Europe. The removal of most of the EU's financial restrictions allows for the renewal of banking relationships with many Iranian banks that previously had been isolated from much of the international financial system. The removal of the Central Bank of Iran, the National Iranian Oil Company (NIOC) and other significant Iranian commercial players from the EU's sanctions list is expected to free up billions of dollars that, prior to Implementation Day, had been frozen in European banks. A key question is how eager major European financial institutions, a number of which have been subject to U.S. civil enforcement actions and deferred prosecution agreements, will be to reengage with Iran.

The lifting of the EU's oil embargo on Iran will position EU countries, many of which were formerly among Iran's top purchasers, to again purchase Iran's most significant

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export. The removal of EU restrictions on the export of goods, technology and services to Iran's oil and gas sectors will also allow European companies to engage in the development of Iran's energy resources.

Some non-nuclear-related EU sanctions remain in place. Proliferation-related sanctions and sanctions imposed by the EU because of the human rights situation in Iran and Iran's support for terrorism remain in effect. Special caution therefore should be applied when dealing with trade in arms trade and related materials, missile technology, nuclear transfers, equipment that might be used for internal repression and equipment for monitoring telecommunications. Similarly, while most individuals and entities that were sanctioned by the EU under its Iran sanctions have been delisted, several remain subject to asset freeze, the prohibition to make funds available and a visa ban.

Most U.S. "secondary sanctions" have been suspended, but the relief does not extend to transactions with new or remaining Iran-related Specially Designated Nationals (SDNs).

Non-U.S. persons are the primary beneficiaries of U.S. sanctions relief on Implementation Day, as the vast majority of U.S. sanctions relief provided under the JCPOA affects secondary sanctions. The relief includes the suspension of secondary sanctions on transactions by non-U.S. persons related to the following sectors of Iran's economy, goods and services: banking, finance and insurance; energy; shipping, shipbuilding and ports; automotive; precious or other metals, including gold; software; and transactions involving individuals and entities that have been removed from the OFAC SDN List. The relief also extends to the provision by non-U.S. persons of "associated services," including technical assistance, training, insurance, reinsurance, brokering, transportation, or financial services necessary and ordinarily incident to the underlying activity for which sanctions have been lifted.

However, certain U.S. secondary sanctions remain in place. Non-U.S. persons remain subject to U.S. secondary sanctions if they knowingly facilitate significant financial transactions with, or provide material or certain other support to entities not covered by the JCPOA, including the following:

- *Iranian Persons on the SDN List.* Over 200 Iran-related individuals and entities remain on OFAC's SDN list. On January 17, 2016, the day following Implementation Day, OFAC added 11 more persons related to Iran's ballistic missile program to the SDN List. Non-U.S. persons remain subject to U.S. secondary sanctions for engaging in significant transactions involving these individuals and entities.
- *Iranian Revolutionary Guard Corps (IRGC).* Non-U.S. persons who knowingly conduct significant financial transactions with

the IRGC and its designated agents and affiliates continue to be exposed to secondary sanctions. In its Implementation Day guidance, OFAC noted important changes related to certain entities it had identified as agents or affiliates of the IRGC. OFAC determined that NIOC was no longer an agent or affiliate of the IRGC and, beginning on Implementation Day, non-U.S. persons are no longer subject to sanctions for engaging in transactions with NIOC, which was removed from the SDN List and placed on the E.O. 13599 List (see below). Significantly, OFAC also clarified that, based on publicly available information, Tidewater Middle East Co., which remains designated for ties to the IRGC, is not the port operator of Bandar Abbas. Therefore, while dealings with Tidewater continue to create exposure to sanctions, secondary sanctions would not apply to non-U.S. persons solely on the basis of engaging in transactions with or conducting trade through Bandar Abbas.

- *Proliferation- and Terrorism-Related Sanctions.* Non-U.S. persons continue to be exposed to U.S. secondary sanctions for knowingly engaging in significant transactions with any person on the SDN List designated under Executive Order 13224 (terrorism) or Executive Order 13382 (proliferation) in connection with Iran's proliferation of weapons of mass destruction or their means of delivery or Iran's support for international terrorism.

The U.S. "primary sanctions" remain in place, and most dealings related to Iran involving a U.S. nexus continue to be prohibited.

The comprehensive U.S. embargo against Iran remains largely in place and, with very limited exception, U.S. persons remain prohibited from doing business with Iran or the Iranian government. This prohibition extends to U.S. persons providing "associated services" related to any activity now permitted as to non-U.S. persons, unless specifically licensed by OFAC. Further, U.S. export controls continue to prohibit exports, re-exports and transfers to Iran and Iranian entities of defense articles and defense services controlled by the International Traffic in Arms Regulations and almost all U.S.-origin goods, software and technology, as well as many foreign-produced products that contain greater than *de minimis* levels of U.S.-origin content.

There are, however, certain newly authorized activities with Iran under the U.S. sanctions and export controls. Specifically, beyond those categories of transactions previously authorized by OFAC and U.S. export control agencies (e.g., the export to Iran of agricultural commodities, medicine and certain medical equipment, subject to certain conditions), OFAC took the following steps with respect to U.S. person transactions on Implementation Day:

- *Commercial Passenger Aviation:* OFAC has adopted a State-

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ment of Licensing Policy, allowing 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. Companies in the commercial passenger aviation industry still will need to seek specific licenses to engage in these activities. Licenses issued by OFAC will be exclusively for commercial passenger aviation use, although they will extend to include transactions ordinarily incident and necessary to give effect to the license. It will be essential for companies that receive such licenses from OFAC to take robust steps to ensure that goods or services exported thereunder are not provided for purposes other than civil aviation or to individuals or entities on the SDN List, such as Mahan Air.

- *Iranian-Origin Carpets and Foodstuffs*: OFAC has issued a general license that allows for the import into the United States, from Iran or a third country, of Iranian-origin carpets and foodstuffs, including pistachios and caviar. These imports, which had been permitted until September 29, 2010, are subject to certain conditions as well as all other laws and regulations applicable to goods imported into the United States.
- *Foreign Companies Owned or Controlled by U.S. Persons*: U.S. persons may engage in limited activities pursuant to General License H, which allows for U.S.-owned or -controlled foreign entities to engage in most transactions permissible as to non-U.S. persons under the JCPOA. More details on General License H are provided below.

U-turn transactions or U.S. dollar clearing involving Iran are still prohibited.

Until November 2008, a general license permitted U.S. financial institutions to clear "U-turn" transactions, *i.e.*, Iranian U.S. dollar transactions that began and ended with a non-U.S. and non-Iranian financial institution. There has been no return to this regime. No accommodation was made on Implementation Day to allow U-turn transactions. Transactions involving Iran processed by or through U.S. financial institutions will continue to present a risk of sanctions violation for non-U.S. financial institutions and could result in civil or criminal penalties.

The new E.O. 13599 sanctions list provides guidance for U.S. persons.

Although many Government of Iran entities and Iranian financial institutions have been removed from the SDN List, they remain blocked for U.S. persons under Executive Order 13599 and the Iranian Transactions and Sanctions Regulations (ITSR). To assist U.S. persons in meeting their obligations under the ITSR, OFAC has made available on its website a List of Persons Identified as Blocked Solely Pursuant to Executive Order 13599 (the E.O. 13599 List).

Unless an exemption or express OFAC authorization applies, U.S. persons, wherever located, are prohibited from engaging in any transaction with, and must continue to block the property and interests in property of, persons on the E.O. 13599 List, as well as any other person meeting the definition of the Government of Iran or an Iranian financial institution.

It remains to be seen how non-U.S. financial institutions and other non-U.S. businesses will factor the E.O. 13599 List into their transaction screening systems.

Foreign entities owned or controlled by U.S. persons are now permitted to engage in most transactions involving Iran.

As a result of a provision of the Iran Threat Reduction and Syria Human Rights Act of 2012, foreign entities owned or controlled by U.S. persons have been prohibited from engaging in any activity that would be prohibited if it were engaged in by a U.S. person or in the United States. These entities were therefore subject to the same restrictions as U.S. persons. In the JCPOA, the U.S. committed to license non-U.S. entities that are owned or controlled by a U.S. person to engage in activities with Iran that are "consistent with" the Agreement. The scope of activities that would be permitted was not defined in the Agreement and was one of the key open questions heading into Implementation Day.

In the most significant development of JCPOA implementation for U.S. companies, OFAC has authorized non-U.S. entities that are owned or controlled by a U.S. person to now engage in most activities with Iran permitted for other non-U.S. entities. An entity established or maintained outside the United States is considered to be "owned or controlled" by a U.S. person if the U.S. person: holds a 50 percent or greater equity interest by vote or value in the entity; holds a majority of seats on the board of directors of the entity; or otherwise controls the actions, policies or personnel decisions of the entity.

Certain limitations apply to transactions by U.S.-owned or -controlled foreign entities involving Iran. General License H, which authorizes these transactions, prohibits the following activities:

- the direct or indirect exportation or re-exportation of goods, technology or services from the United States or by a U.S. person, without a separate OFAC authorization;
- any transfer of funds to, from or through the U.S. financial system;
- any activity involving individuals or entities on the SDN list or that would be prohibited by non-Iran sanctions administered by OFAC if engaged in by a U.S. person in the U.S.;

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- any activity involving an individual or entity identified on OFAC's list of Foreign Sanctions Evaders;
- any activity involving any item (including information) subject to the Export Administration Regulations (EAR) that is prohibited by the EAR or that requires a license under the EAR, or participation in any transaction with a person whose export privileges have been denied;
- any activity involving any military, paramilitary, intelligence or law enforcement entity of the Government of Iran, or any official, agent or affiliate thereof;
- any activity that is sanctionable under certain executive orders related to WMD proliferation, Syria, Yemen or Iran's human rights abuses; or
- any nuclear activity involving Iran that is subject to the procurement channel established by the U.N. Security Council Resolution 2231 and that has not been approved through that process.

Although OFAC has authorized activities by U.S.-owned or -controlled foreign entities, U.S. persons continue to generally be prohibited from facilitating these transactions. U.S. parent companies whose foreign subsidiaries engage with Iran pursuant to General License H must ensure appropriate policies and procedures are in place to wall off U.S. persons and operations from any Iran-related activity. In apparent recognition of some of the practical realities facing companies seeking to take advantage of General License H, as of Implementation Day OFAC has authorized U.S. persons to engage in a very limited set of activities related to those owned or controlled foreign entities. These include:

- *Establishing or altering policies and procedures:* U.S. persons are permitted to engage in activities related to the establishment or alteration of operating policies and procedures of a U.S. entity or an owned or controlled foreign entity, to the extent necessary to allow the owned or controlled foreign entity to engage in authorized transactions with Iran.
- *Maintenance of automated business support systems:* U.S. persons may make available to their owned or controlled foreign entities engaging 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 otherwise process documents or information related to" authorized transactions. These systems must be available to, and in general use by, the U.S. parent company's global organization, and they must operate passively and without human intervention to facilitate the flow of information between the U.S. company and its owned or controlled foreign entities.

In guidance issued on Implementation Day, OFAC clarified that U.S. persons may be involved in the initial determination to engage in authorized activities with Iran by an owned or controlled foreign entity. However, once that determination is made, U.S. persons must generally cease involvement. U.S. persons may not be involved in the ongoing Iran-related operations or decision-making of its owned or controlled foreign entity. This includes, among other things, participation in the Iran-related day-to-day operations and approving, financing, facilitating or guaranteeing any Iran-related transaction by an owned or controlled foreign entity.

Treasury's finding of Iran as a jurisdiction of "primary money laundering concern" remains in effect.

The JCPOA and the relief provided on Implementation Day do not impact the November 2011 finding by the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) that Iran is a "jurisdiction of primary money laundering concern" under Section 311 of the USA PATRIOT Act. The November 2011 FinCEN finding is based upon multiple factors, including activities outside the scope of the JCPOA and the related sanctions lifting.

Pursuant to Section 311 of the USA PATRIOT Act, the Department of the Treasury has the authority to require U.S. domestic financial institutions to take "special measures" with respect to jurisdictions, financial institutions or international transactions of primary money laundering concern. FinCEN never issued a final rule, but the Notice of Proposed Rulemaking (NPRM) remains in place. In the NPRM, FinCEN selected a prohibition against the opening or maintaining of correspondent accounts by any domestic U.S. financial institution or agency for or on behalf of a non-U.S. banking institution, if the correspondent account involves direct or indirect use on behalf of banking institutions in Iran.

The U.S. government will continue to enforce sanctions and export controls on Iran.

The U.S. government will continue to administer and enforce a range of sanctions with respect to Iran. Apparent sanctions violations are analyzed in light of the laws and regulations that were in place at the time of the underlying activities, and civil and criminal enforcement authorities are applied accordingly. Investigations into apparent violations of U.S. primary sanctions and export control authorities will not be affected by the JCPOA, and future enforcement actions may follow.

However, to the extent an ongoing investigation of a non-U.S. person relates to an activity within the scope of the secondary sanctions lifted on Implementation Day, OFAC has stated it will not sanction the non-U.S. person under those authorities follow-

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ing Implementation Day.

Significantly, none of the enforcement actions that OFAC has finalized to date, including any settlement agreement or the terms and conditions set forth therein, will be altered or impacted by implementation of the JCPOA. OFAC has advised that to the extent that any party, including a non-U.S. financial institution, has entered into a settlement agreement with OFAC, the party will continue to be bound by that agreement after Implementation Day.

Finally, the JCPOA does not alter or impact any prior enforcement actions by other U.S. regulatory or enforcement authorities. Federal regulators and enforcement agencies such as the Department of Justice and the Board of Governors of the Federal Reserve System, and state regulators like the New York State Department of Financial Services, are likely to continue to pursue enforcement actions related to past violations of federal and state law.

Companies entering Iran should be mindful of additional sanctions and the risk of "snap-back."

As mentioned above, non-nuclear sanctions are not affected by the implementation of the JCPOA. As if to emphasize this point, on January 17, 2016, OFAC designated 11 entities and individuals involved in procurement on behalf of Iran's ballistic missile program. Secondary sanctions attach to dealings by non-U.S. companies with these designated individuals and entities. Similarly, on January 25, 2016, the U.S. Bureau of Industry and Security acted to deny the export privileges of certain U.K. individuals and entities involved in a planned transfer of 737 aircraft from Romania to Iran's Caspian Airlines. Additional actions and

designations should be expected in the future.

Beyond the risk of new non-nuclear sanctions, the U.S. and the EU could re-impose (*i.e.*, "snap back") nuclear-related sanctions if Iran fails to live up to its obligations under the Agreement. Such sanctions will not be imposed retroactively to activities undertaken after Implementation Day and prior to the date of the snap-back. However, the Agreement does not grandfather contracts entered into prior to snap-back, and transactions conducted after snap-back could be sanctionable to the extent that they implicate activities for which sanctions have been re-imposed. In the case of the re-imposition of EU nuclear-related sanctions, the execution of contracts concluded in accordance with the JCPOA while sanctions relief was in force will be allowed consistent with previous provisions when sanctions were originally imposed in order to allow companies to wind down their activities. In the legal acts providing for the reintroduction of EU sanctions, the EU will specify details regarding the time allowed for the execution of such contracts. OFAC anticipates that, in the event suspended sanctions are re-imposed, it will work with U.S. and third-country companies to minimize the impact of sanctions on legitimate activities undertaken prior to snap-back.

Additionally, some members of the U.S. Congress have voiced objections and concerns related to the JCPOA and may apply pressure to snap back sanctions should they perceive Iran to be in non-compliance with its obligation under the JCPOA. Some lawmakers have also proposed new sanctions legislation that further targets Iran. Non-U.S. persons contemplating business in Iran should follow these developments closely, given the risks that the U.S. sanctions regime will continue to evolve during the term of the JCPOA.

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