

CLIENT MEMORANDUM

OFAC Provides First Significant Guidance on Iran Sanctions Since Implementation Day

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AUTHORS

David Mortlock | **Miriam A. Bishop** | **Noman A. Goheer**

On June 8, 2016, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") provided the first written guidance on the dramatic changes made to Iran sanctions since Implementation Day, on January 16, 2016.¹ OFAC updated the Frequently Asked Questions ("FAQs") relating to the lifting of certain U.S. sanctions under the Joint Comprehensive Plans of Action ("JCPOA"), issuing two new FAQs on financial and banking issues and nine new FAQs on the scope of General License H and permissible activities for foreign subsidiaries of U.S. persons. OFAC issued this new guidance to further clarify the scope of the sanctions easing that occurred on Implementation Day and the remaining prohibitions under the Iranian Transactions and Sanctions Regulations ("ITSR").²

The FAQs on sanctions easing pursuant to the JCPOA include sections on the following: (1) energy and petrochemicals; (2) financial and banking; (3) insurance; (4) shipping, shipbuilding, and ports; (5) gold and other precious metals; (6) software and metals; (7) automotive; (8) designations and other sanctions listings; (9) commercial passenger aviation; (10) foreign entities owned or controlled by U.S. persons; and (11) imports of Iranian-origin carpets and foodstuffs. More

¹ <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20160608.aspx>

² 31 C.F.R. Part 560.

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information about the easing of U.S. sanctions on Iran on Implementation Day can be found in Willkie Farr & Gallagher LLP's January 19, 2016 client memorandum, [Changes to Iran Sanctions Post-Implementation Day](#).

A. Financial and Banking Issues

The new FAQs confirm that U.S. financial institutions may transact with foreign financial institutions that maintain correspondent banking relationships with Iranian financial institutions that are not on the OFAC List of Specially Designated Nationals and Blocked Persons (the "SDN List").³ The ITSR do not prohibit U.S. financial institutions from opening and maintaining correspondent accounts for those foreign institutions that maintain correspondent relationships with Iranian institutions. However, U.S. institutions remain prohibited from processing Iran-related transactions through correspondent accounts, and foreign financial institutions could face potential liability for routing transactions involving Iran through their U.S. correspondent accounts.

The new FAQs also address the presence of a U.S. person director or senior manager in a foreign company that is engaging in transactions involving Iran.⁴ The presence of U.S. persons in such positions does not preclude the non-U.S. financial institution from doing business with Iran, so long as the U.S. person is walled off or "ring-fenced" from any Iran-related business, as U.S. persons remain generally prohibited from engaging in transactions with Iran. OFAC states that financial institutions establishing compliance policies should consider instituting a blanket recusal policy for U.S. persons with respect to Iran-related matters and suggests that case-by-case abstentions could be considered a prohibited facilitation or export of services under the ITSR.

B. General License H and Subsidiaries of U.S. Persons

OFAC also provides new guidance on the scope of General License H and "Foreign Entities Owned or Controlled by U.S. Persons." General License H, issued on January 16, 2016, broadly authorized non-U.S. persons owned or controlled by a U.S. person to engage in transactions involving Iran.⁵ General License H also authorized U.S. persons to establish or alter policies and procedures to allow those foreign entities to engage in transactions involving Iran and to provide globally available, automated IT services in support of the transactions involving Iran.

The new FAQs clarify that a non-U.S. entity is considered owned or controlled by "a U.S. person" if one or more U.S. persons, both singularly or in the aggregate, hold a 50 percent or greater equity interest in the non-U.S. entity.⁶ As a

³ See *Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions Under the Joint Comprehensive Plans of Action*, FAQs C.1, C.4, C.14 and C.15.

⁴ FAQ C.16

⁵ 31 C.F.R. 560.556.

⁶ FAQ K.17

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result, such entities can take advantage of the authorizations in General License H, which permit U.S. persons to establish or alter policies and procedures to allow a foreign subsidiary to engage in transactions involving Iran.

The OFAC guidance also states that, in the case of foreign companies that are publicly traded or where ownership interests are otherwise widely dispersed, OFAC would not regard such an entity to be owned or controlled by a U.S. person if the U.S. shareholders have only a passive interest, even when the aggregate U.S. ownership of the company is 50 percent or greater.⁷ Thus, General License H would not apply to these entities.

In addition, OFAC clarifies that General License H allows U.S. persons to modify a foreign subsidiary's policies and procedures to allow it to establish a physical presence in Iran.⁸ However, the foreign company would remain prohibited from exporting, re-exporting, selling, or supplying any goods, technology, or services if the items are destined for Iran or the Government of Iran when they are exported the United States.⁹ Expanding on the FAQ referencing U.S. ownership and control, OFAC also clarifies that U.S. persons may modify both the policies and procedures of a parent U.S. company that owns or controls a foreign company *and* the policies and procedures of a foreign company in order to allow the foreign company to do business under General License H.¹⁰

The new FAQs reiterate that, in the case of a foreign company operating under General License H, U.S. person directors, managers, and other employees should be recused or "walled off" on a blanket basis, rather than a case-by-case basis, to prevent prohibited facilitation or a potential export of services.¹¹ U.S. persons are authorized to establish policies and procedures in their owned or controlled foreign companies that permit these recusals. In addition, according to another new FAQ, the U.S. company and its employees may continue to be involved in the foreign company's day-to-day operations that do not involve Iran.¹² Furthermore, despite the recusal requirements, U.S. persons (both the parent company and its employees) may still receive and review reports from the foreign company that detail the foreign company's transactions with Iran.¹³ However, no U.S. person may attempt to influence any Iran-related business decisions of the foreign company.

The new FAQs also clarify that General License H authorizes U.S. –owned or –controlled foreign companies to do business with foreign entities on the Executive Order 13599 List, which identifies those entities that, while no longer on the

⁷ FAQ K.17

⁸ FAQ K.14

⁹ 31 C.F.R. 560.204.

¹⁰ FAQs K.18 and K.19

¹¹ FAQ K.20

¹² FAQ K.21

¹³ FAQ K.22

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SDN List, are persons that OFAC has identified as meeting the definition of the Government of Iran or an Iranian financial institution and that remain blocked for persons subject to U.S. jurisdiction.¹⁴

Conclusion

OFAC's FAQ update demonstrates the U.S. Government's continued commitment to the success and endurance of the JCPOA. While many sanctions involving Iran have been eased, it remains vital for companies to review the specific details of any transaction that may involve Iran to determine whether U.S. sanctions will apply and to maintain adequate due diligence procedures to detect any transaction that may implicate the sanctions.

If you have any questions regarding this memorandum, please contact David Mortlock (202-303-1136; dmortlock@willkie.com), Miriam A. Bishop (202-303-1126, mbishop@willkie.com), Noman A. Goheer (202-303-1295; ngoheer@willkie.com) or the attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.

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¹⁴ FAQ K.16