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Implementation Day Brings Historic Shift in Iran Sanctions Policy

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Implementation Day under the Joint Comprehensive Plan of Action (JCPOA) occurred on Saturday, January 16, 2016, when the International Atomic Energy Agency (IAEA) verified that Iran had met its nuclear-related commitments under the JCPOA. IAEA verification triggered E.U. and U.S. sanctions relief under the JCPOA, but the sanctions lifted by the United States are limited compared to the broad rollback of E.U. sanctions, and the primary U.S. embargo and several secondary sanctions programs beyond the scope of the JCPOA remain in place.

Implementation of U.S. sanctions relief included actions by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) and the Department of State, as well as the issuance of an Executive Order. Implementation of E.U. sanctions relief came in the form of a Council Decision providing that the Council Decision issued on Adoption Day would apply as from January 16, 2015. For a discussion of the Adoption Day measures, see our October 22, 2015 alert here.

OFAC Actions Implementing Limited Primary Sanctions Relief

On Implementation Day, OFAC took several steps to implement the three limited categories of U.S. primary sanctions relief agreed in the JCPOA.

First, the Department of the Treasury's released the text of a general license allowing transactions relating to Iranian-origin foodstuffs and carpets, including certain related financing and brokering transactions. Importantly, however, this general license will not take effect until published in the Federal Register, and will have no retroactive effect. OFAC also released guidance on this general license in the form of FAQs L.1 and L.2.

Second, OFAC issued a Statement of Licensing Policy under which it signaled its intention to begin accepting applications for licenses authorizing export, re-export, sale, lease or transfer to Iran of commercial passenger aircraft and parts and components for exclusively civil aviation end-use, as well as associated services. However, sanctions under the Iran-Iraq Arms Nonproliferation Act will continue to apply, and the licensed activities may not involve persons on the List of Specially Designated Nationals and Blocked Persons (SDN List). In addition, exports or re-exports to persons on the Department of Commerce's Denied Persons List and certain persons on the Entity List will require separate authorization from the Department of Commerce, which should be applied for at the same time as the application for the OFAC license is submitted. Newly released FAQs J.1 through J.8 provide additional guidance.

Finally, OFAC issued General License H authorizing U.S. owned or controlled foreign entities to engage in transactions that would otherwise be prohibited by the Iranian Transactions And Sanctions Regulations (ITSR), except for several enumerated categories of transactions that remain off-limits for such entities. FAQs K.1 to K.13 provide guidance on the scope of the General License. The General License also addresses certain concerns of the U.S. persons who own or control such entities by authorizing U.S. persons to: (1) alter operating policies and procedures to the extent necessary to permit activities authorized by the General License and provide related training, and (2) make available to their foreign subsidiaries certain automated and globally integrated business support systems. FAQs K.1 to K.13 provide guidance on the scope of the General License. Notably, however, General License H does not authorize transfers of funds to, from or through a U.S. depository institution or a U.S.-registered broker or dealer in securities or use of the U.S. person's business support system in connection with such transfers.

Other categories of transactions *not* authorized by General License H are: re-exportation with knowledge that the intended destination is Iran of U.S. origin export controlled services; re-exportation with knowledge that the intended destination is Iran of U.S. origin controlled goods or technology that has not been substantially transformed into foreign made product or incorporated into foreign made product of which such goods and technology represent less than 10% of the value of the foreign made product; transactions with persons listed on the SDN List, the List of Foreign Sanctions Evaders or the list of persons denied export privileges by the U.S. Department of Commerce; transactions involving Iranian military, paramilitary, intelligence or law enforcement entities or officials, agents or affiliates; transactions involving any item or information prohibited by or requiring a license under Part 744 of the Export Administration Regulations; activities sanctionable under various Executive Orders; and nuclear activity subject to the procurement channel of the JCPOA that has not been approved through the procurement channel process. However, FAQ K.13 does make it clear that "the exportation or re-exportation of U.S.-origin goods that are designated as EAR 99 from a third country to Iran without knowledge or reason to know at the time of export from the United States that the goods are intended specifically for Iran is not prohibited."

In all other respects, the U.S. primary embargo that prohibits U.S. persons from engaging in trade and transactions with Iran unless authorized by a general or specific license from OFAC remains in effect, including the prohibitions on facilitation by U.S. persons. In addition, notwithstanding the implementation of secondary sanctions relief for those doing business with the government of Iran via removals from the SDN List, OFAC issued a new List of Persons Identified as Blocked Solely Pursuant to Executive Order 13599 in order to emphasize that such persons continue to meet the ITSR definitions of the term Government of Iran or Iranian financial institution. As such, their property remains blocked and U.S. persons are prohibited from dealing with them.

Implementation of Secondary Sanctions Relief

As agreed in the JCPOA, on Implementation Day the President issued an Executive Order terminating various Executive Orders imposing secondary sanctions on non-U.S. persons (Executive Orders 13574, 13590, 13622 and 13645) and amending Executive Order 13628. In addition, the contingent waivers issued on Adoption Day became effective. These actions, together with removal of over 400 individuals, entities and vessels from the SDN List, the List of Foreign Sanctions Evaders and/or the Non-SDN Iran Sanctions Act List, had the effect of lifting secondary sanctions applicable to the financial and banking, insurance, energy and petrochemical, shipping and shipbuilding, and automotive sectors, port operators, and trade in gold and precious metals and certain raw or semi-finished metals and software consistent with the JCPOA. Extensive joint guidance issued by the Departments of the Treasury and State and FAQs issued by OFAC provide a detailed description of these steps, the effect of which is to permit non-U.S. persons to engage in activities in the affected sectors without fear of reprisal in the form of U.S. secondary sanctions.

Secondary Sanctions Remaining in Place After Implementation Day

The U.S. JCPOA commitments to lift secondary sanctions focused only on nuclear-related sanctions. However, like the primary embargo, several other secondary sanctions programs will remain in place. Designation and blocking authorities under various statutes and Executive Orders will continue to apply to persons who engage in certain activities, including supporting terrorism, human rights abuses in Iran and proliferation of weapons of mass destruction. Other examples of remaining secondary sanctions include correspondent and payable-through account sanctions, which will continue to apply to foreign financial institutions that knowingly facilitate significant financial transactions with SDNs or persons subject to remaining menu-based secondary sanctions, and menu-based secondary sanctions will continue to apply to persons who materially assist the Islamic Revolutionary Guard Corps or certain other SDNs or engage in transactions involving certain metals not approved by the JCPOA procurement channel or in support of Iran's military or its ballistic missile program. Designations of eleven individuals and entities for supporting Iran's ballistic weapons program the day after Implementation Day signaled the U.S. intent to continue to impose secondary sanctions under these remaining authorities as and when warranted.

In addition, Iran remains designated as a state sponsor of terrorism and the JCPOA leaves that designation in place. As a result, restrictions on foreign assistance, the ban on defense exports, controls on exports of certain sensitive technology and dual-use items and various financial and other restrictions remain in place notwithstanding implementation of the JCPOA.

Finally, although the U.S. Congress failed to block implementation of the JCPOA, there remains considerable Congressional support for additional statutory sanctions against Iran, so the possibility of new statutory sanctions in the future cannot be ruled out entirely.

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