

IRAN SANCTIONS | January 20, 2016

Navigating Iran Sanctions After Implementation Day

Although the United States, the European Union, and the United Nations lifted a number of sanctions targeting Iran on January 16, 2016 (“Implementation Day”) in accordance with the terms of the recent Iran nuclear deal, the immediate impact for financial institutions and companies considering doing business in Iran may be more limited than some of the news headlines may suggest. In this Client Memorandum, we highlight some of the main issues for financial institutions and companies.¹

Key Takeaways

- **Implementation Day² Impact:** Because UN, US, and EU commitments vary widely, for the first time in many years, US and EU sanctions are no longer broadly in sync, which raises significant compliance challenges for financial institutions which are subject to or which, as a matter of practice, follow both US and EU rules.
- **Significant sanctions relief for non-US financial institutions:** EU sanctions targeting Iran which relate to Iran’s nuclear program have now been amended or removed altogether, removing many of the restrictions for European banks to process transactions with Iranian banks or on behalf of Iranian entities. US so-called “secondary” sanctions have also now been removed, with some exceptions, reducing the risk that non-US financial institutions will themselves be sanctioned by US authorities for engaging in transactions with Iran or Iranian entities prohibited by US sanctions programs. Thus, in theory, EU financial institutions are now free to undertake a wide range of business in Iran’s finance and energy sectors.
- **US embargo on Iran and US dollar clearing restrictions remain in place:** US sanctions however, largely remain in place insofar as they apply to US financial institutions and companies, including their non-US branches (but not their subsidiaries), i.e., US “primary” sanctions have not been removed. Thus, US dollar clearing restrictions remain and pose a significant challenge for non-US banks who may be able to do business in Iran, but will be unable to be paid in dollars. Moreover, with very limited exceptions, the US embargo on dealing with Iran has not been watered down despite the nuclear deal: US businesses and individuals continue to be prohibited generally from dealing with Iran, including the Government of Iran.

¹ See our previous client publications on Iran sanctions for further details on key dates in the JCPOA and opportunities and challenges of Iran sanctions relief, available at: <http://www.shearman.com/en/services/key-issues/iran-sanctions?section=publications&page=all>.

² Implementation Day is designated in the Joint Comprehensive Plan of Action (“JCPOA”) as the date on which the International Atomic Energy Agency reports that Iran has complied with its commitments under the JCPOA. This proclamation triggers a number of commitments by the United Nations (“UN”), the United States (“US”), and the European Union (“EU”).

- **A US general license for non-US subsidiaries issued on Implementation Day:** the new general license allows non-US subsidiaries (though not branches) of US companies to enter into transactions with the Government of Iran and Iranian financial institutions. The general license does not allow non-US subsidiaries to clear US dollar transactions. The license allows US parent companies to modify policies to isolate non-US subsidiaries that do business with Iran, but multinational companies will have to take care to ensure compliance with US rules on facilitation by US persons.
- **US issuers will continue to have to disclose even permissible business with Iran:** issuer disclosure obligations under Section 219 of the Iran Threat Reduction Act remain. All issuers, including non-US companies with securities registered and traded on US exchanges, are required to file quarterly or annual reports with the US Securities and Exchange Commission disclosing certain activities involving Iran, including permissible and non-permissible business with the Government of Iran.
- **Many US and EU restrictions remain in place and will be lifted at a later time:** a large number of restrictions are lifted between now and 18 October 2025 when the JCPOA terminates. In particular, a number of asset freeze restrictions remain in place, which can be breached indirectly, so it is critical to know the identity of counterparties, which may be challenging given the opacity in many corporate ownership structures in Iran.
- **“Snap back” remains a possibility despite sanctions relief:** the JCPOA contains provisions which permit sanctions to be reinstated in the event that a participant to the JCPOA alleges that there has been significant non-performance of the obligations of another participant to the deal. Although the US Treasury Department has stated that it would not, in that case, view contracts entered into after Implementation Day before any “snap back” as sanctionable, it also warns that such contracts are not “grandfathered” and thus there is no guarantee that Treasury will license payments under those contracts in the event of a “snap back.” Moreover, although the Treasury Department notes that it has, in the past, permitted a limited winding down period under certain sanctions programs, it states only that such relief may be considered but offers no assurance as to its scope or duration. In similar circumstances in the past, OFAC has recommended including a termination clause in contracts to limit exposure should sanctions be reinstated; this would appear to be a prudent risk management tool in these circumstances as well.
- **Practical considerations for doing business with Iran:** those considering engaging with Iran should consider updating their internal policies and procedures on Iran to account for the divergences which now exist in US and EU sanctions targeting Iran, prepare recusal policies for “US persons” in EU businesses who will be unable to personally conduct certain business, conduct relevant due diligence on all counterparties, prepare exit/wind-down strategies for possible snapback of sanctions, and consider obtaining outside legal advice before entering into a transaction which raises Iran sanctions risk.
- **Enforcement trends in the sanctions arena continue to point towards aggressiveness by authorities and regulators:** while a large number of financial institutions have spent recent years “de-risking” and have stopped all business with Iran, there may be some limited appetite to re-engage with Iran, insofar as this is permitted under applicable rules. Extreme care needs to be taken to ensure appropriate sanctions compliance throughout global business operations, and to identify where there are possible traps and issues under rules that remain in

place. Sanctions authorities and regulators have been very unforgiving in recent years where there have been lapses in compliance, in certain cases resulting in fines running into the billions of dollars.

US Primary Sanctions on Iran Largely Remain in Place

The lifting of the US sanctions includes the revocation of a number of Executives Orders and the issuance of various waivers permitted under sanctions legislation. The scope of this relief, and its limits, are set out in [Guidance](#), [FAQs](#), a [general license](#) and a [licensing policy](#), all issued by OFAC on Implementation Day.

US “primary” sanctions apply to “US persons,” which includes any US citizen or green card holder anywhere in the world, any entity organized under US law (including US branches of non-US companies in the US) and any person located in the US regardless of citizenship. US persons, including US financial institutions, will continue to be prohibited from engaging in transactions or dealings in, or with, Iran, with the exception of narrow licenses granted by OFAC, such as licenses for exportation of medical supplies to Iran or the importation of rugs and pistachios.

US Financial Institutions Continue to be Prohibited From Clearing US Dollar Transactions Involving Iran

Importantly, primary sanctions will continue to prohibit US financial institutions from clearing US dollar transactions involving Iranians or the Government of Iran. OFAC guidance published on Implementation Day clearly states that “the clearing of transactions involving Iran through the US financial system, including foreign branches of US financial institutions continues to be prohibited.” The prohibition on non-US persons causing US persons to violate US sanctions law also remains; therefore, non-US financial institutions, businesses, or individuals may not cause any US person to engage in US dollar clearing or any other prohibited transaction with Iranians. Likewise, US persons may not facilitate or provide support to any transaction in which a US person itself cannot enter.

US Businesses Continue to be Prohibited from Engaging with the Government of Iran and Iranian Financial Institutions

US persons also continue to be broadly prohibited from dealing with an entity owned or controlled by the Government of Iran or an Iranian financial institution that was removed from the Specially Designated Nationals (“SDNs”) List on Implementation Day unless a specific exemption or license applies. Part of this prohibition includes US persons’ obligations to continue to block the property and interests in property of the Government of Iran or an Iranian financial institution. Certain Iranian banks, such as Bank Saderat, also remain on the SDN List, therefore, parties should consult the most recent versions of the lists of prohibited individuals and entities on the OFAC website before engaging with Iranians.

New General License H allows non-US subsidiaries to do business with Iran with limitations

General License H, issued by OFAC on Implementation Day, permits a non-US entity (not a branch) “owned or controlled” by a US person to engage in transactions, directly or indirectly, with the Government of Iran and in Iran even when its parent entity is prohibited from doing so. However, this license does not allow non-US subsidiaries to transfer funds to or from the US financial system, to engage with an SDN, or to re-export goods, technology, or services from the United States to Iran. Significantly, General License H also provides a limited license to the US parent to modify its corporate policies and practices to isolate the non-US subsidiary’s activities and to ensure that no US person (including US nationals employed by the non-US subsidiary) participates or facilitates in any business with Iran. Further, General License H deviates from prior practice and somewhat reduces inadvertent risk by specifically authorizing multinational companies based in the US to provide automated, globally integrated

support, such as email or accounting facilities, even if the non-US subsidiaries access the facilities in the course of conducting business with Iran, e.g., by processing a payment. All of this clearly requires careful planning and oversight to ensure that new corporate policies and the pursuit of Iranian business by non-US subsidiaries and affiliates are carefully controlled to ensure compliance with US sanctions. Recent US enforcement actions show that regulators have taken a broad view of what constitutes facilitation, therefore multinational businesses will have to extreme care to ensure that US and non-US businesses operations and services are properly segregated.

Issuers will Continue to Have to Disclose Even Permissible Business Activity with Iran Notwithstanding Sanctions Relief

Section 219 of the Iran Threat Reduction Act (ITRA) required all issuers, including non-US companies with securities registered and traded on US exchanges, to file quarterly or annual reports with the US Securities and Exchange Commission disclosing certain activities involving Iran, including business involving certain industrial sectors, transactions involving the Government of Iran, or business with SDNs. This disclosure was mandated notwithstanding whether such business was permissible under US primary or secondary sanctions. Although the sanctions relief provided on Implementation Day lifts much of the secondary sanctions regime, the disclosure obligation under section 219 remains in place, exposing companies that jump into the pool of Iran business to potential reputational and financial risks, such as that resulting from US state laws that remain in place and require divestment by state pension funds from companies doing business with Iran.

Lifting of US Secondary Sanctions May Have Limited Immediate Impact on Business Opportunities with Iran

As a result of the lifting by the US of the vast majority of secondary sanctions targeting Iran on Implementation Day, non-US financial institutions may now engage in financial and banking transactions with specified Iranian banks and financial institutions, including the Central Bank of Iran, provide financial messaging services to the Central Bank of Iran and specified Iranian financial institutions, conduct transactions in Iranian rial and provide underwriting services, including insurance and re-insurance services. Non-US entities may also now invest in Iran, including joint ventures, in goods, services, information, technology and support for Iran's petroleum and petrochemical sectors.

However, there are critically important limitations on these activities, and non-US financial institutions remain at risk if they fail to maintain careful controls and exercise searching due diligence on transactions involving Iran. In each case in which the US lifted secondary sanctions, it carefully limited such relief to exclude transactions with Iranian persons or entities that remain designated on OFAC SDN lists after Implementation Day, such as Bank Saderat. Thus, a non-US financial institution that engages in significant transactions with such SDNs, in any currency, runs the risk of being subjected to secondary sanctions, including potentially being excluded from the US financial system.

As importantly, non-US financial institutions and companies must be aware that US financial institutions, and US persons, continue to be restricted by primary sanctions. As a result, any non-US financial institutions or companies looking to do business with Iran or process a transaction for an Iranian are limited to non-US dollar transactions or transactions that do not otherwise touch the US financial system or US persons. Likewise, while non-US persons are now permitted to purchase Iranian oil without previous restrictions under secondary sanctions, they may not purchase Iranian oil by a US dollar transaction.

Non-US financial institutions must also continue to take the lesson from the many enforcement actions brought against non-US banks for engaging in non-transparent payment practices to assist Iranian banks and other Iranian entities in evading US sanctions. The guidance from the Treasury Department makes it clear that it expects to continue to prosecute past conduct that violated sanctions as they existed at the time of the relevant transactions. Indeed, even in its current state, given the ongoing restrictions on US dollar processing by US banks – and the US branches of non-US financial institutions – OFAC guidance published on Implementation Day recommends that non-US financial institutions continue to conduct “customary due diligence to ensure that they are not facilitating transactions that remain sanctionable.”

European Union Commitments under the JCPOA: Impacts for Financial Institutions

The EU Iran sanctions amendments were contained in legislation published on October 18, 2015, which is “Adoption Day” in the JCPOA. By [Council Decision 2016/37](#) of January 16, 2016, the Council adopted the earlier [Decision 2015/1863](#) of October 18, 2015, under which it was agreed to terminate all economic sanctions relating to Iran’s nuclear program.

The EU has published detailed guidance in an Information Note,³ which contains a number of Q&As on the amended Iran sanctions regime. The UK has also updated its guidance.⁴

European financial institutions are now permitted to engage in a wide range of financial activities which were previously prohibited by [EU Regulation 267/2012](#) on Iran sanctions (the “EU Regulation”), including the following:

- Transfers of funds between EU persons and entities, including financial institutions, and Iranian persons and entities (including financial institutions) without prior authorization or notification;
- Banking activities, including the establishment of new correspondent banking relationships and the opening of new branches and subsidiaries of Iranian banks in the territories of EU member states;
- The provision of insurance and re-insurance in relation to a large number of activities which were previously restricted;
- Transactions in public or public-guaranteed bonds;
- Investment in the oil, gas and petrochemical sectors;
- The delivery of Iranian banknotes and coinage; and
- The export of gold, precious metals and diamonds.

Similar to the US, the EU has rules in place which freeze the assets of designated Iranian persons by prohibiting the making available of “funds” or “economic resources” to such persons (in each case, broadly defined), as well as preventing the travel of such persons into or through EU Member States. Under the JCPOA, asset freeze measures

³ http://eeas.europa.eu/top_stories/pdf/iran_implementation/information_note_eu_sanctions_jcboa_en.pdf

⁴ <https://www.gov.uk/government/publications/doing-business-with-iran/frequently-asked-questions-on-doing-business-with-iran>

targeting Iranians are to be lifted in two phases. There were a number of de-listings on Implementation Day, including certain Iranian banks (e.g., the Central Bank of Iran and its European subsidiaries), and certain Iranian oil, gas, petrochemical and shipping industry companies (e.g., the National Iranian Oil Company), as listed in Attachment 1 to Annex II of the JCPOA. There will be a second round of de-listings of persons listed in Attachment 2 to Annex II of the JCPOA on the earlier of October 18, 2023 or the International Atomic Energy Agency reporting that all nuclear material in Iran remains in peaceful activities (described in the JCPOA as “Transition Day”). Entities which remain listed until Transition Day include Ansar Bank and Bank Saderat. Provision of financial messaging services (i.e., SWIFT) to persons who remain designated is only permitted from Transition Day.

EU Sanctions Related to Iran’s Human Rights Record and Support for Terrorism (i.e., Sanctions Which Do Not Relate to the JCPOA’s Subject Matter of “Nuclear”-Related Sanctions) Remain in Place and Will Continue to be Enforced by EU Member States. Sanctions May “Snap Back”

As noted above, the JCPOA provides for a “snap back” of sanctions so that participants may reinstate sanctions targeting Iran individually or in conjunction with other JCPOA participants in the event that there is “significant non-performance” by Iran of its commitments under the deal. Similar to the US approach, the EU relief also provides no comfort that contracts signed during any relief period are not protected for that period. Although the EU has not provided any guidance, EU companies would likely find it prudent to include a termination clause in the event of “snap back.”

Practical Measures when Conducting Business with Iran

Given the nuances of the sanctions on Iran after Implementation Day, businesses should continue to tread carefully when dealing with Iran to avoid violating any sanctions which remain in place. To do so, businesses can consider taking a range of steps:

- Frequently checking OFAC, Her Majesty’s Treasury, the UK Department for Business Innovation & Skills, and relevant EU Member State websites for further guidance on implementation of sanctions and various SDN lists
- Revising policies and training materials to reflect the sanctions regime in place after Implementation Day, and ensuring that there are recusal policies in place for US citizens (including dual-nationals) at EU businesses, as these persons are required to comply with US rules notwithstanding their location outside of the US
- Updating filters and internal controls to reflect changes to the SDN List after Implementation Day
- For US persons, ensuring that agreements with Iranians include a termination clause in case of “snap back” following OFAC guidance to do so

Final Thoughts

Implementation Day is only the latest change in the evolving Iran sanctions landscape. As the international community continues to engage with Iran, we expect more changes to the Iran sanctions program in the coming days and further guidance from regulators on the implementation of sanctions relief. In the meantime, non-US persons should keep in mind the jurisdictional reach of the US sanctions that continue to limit business with Iran, as well as enforcement risks of proposed activity in Iran that may lead to significant penalties as seen in recent OFAC enforcement actions.

For more specific information and resources on changes to sanctions against Iran, please feel free to contact any of the listed partners and our Iran sanctions [website](#).

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