

July 2, 2018

TRUMP ADMINISTRATION REVOKES PRIMARY SANCTIONS RELIEF PROVIDED BY THE IRAN NUCLEAR AGREEMENT AND SIGNALS STRICT SANCTIONS ENFORCEMENT

To Our Clients and Friends:

On June 27, 2018, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") announced it was taking further steps to implement the U.S. withdrawal from the Iran nuclear deal—the Joint Comprehensive Plan of Action ("JCPOA").^[1] Specifically, OFAC revoked general licenses authorizing U.S. persons and their foreign subsidiaries to undertake certain Iran-related activities and, in their place, issued wind-down authorizations for those activities, effectively putting all of the sanctions relief provided under JCPOA on equal footing—all covered transactions have now entered a formal wind-down process.

Alongside its revocation and replacement of these licenses, OFAC provided additional guidance regarding the requirements of the wind-down period. The Trump administration also offered further clarity regarding the enforcement of sanctions following their re-imposition. Policy statements from U.S. regulators confirm that the administration plans to wage a "maximum pressure economic campaign" against Iran.^[2] Among other targets, the announcement that the U.S. will adopt an absolute prohibition on the importation of Iranian crude oil by non-U.S. countries indicates that the Trump administration seeks not just to re-impose Obama-era secondary sanctions, but may also abandon prior interpretations that granted significant leeway in enforcement. The administration's stated inclination towards strict enforcement will likely mean that it will enforce and narrowly interpret the wind-down authorizations, and that U.S. companies should expect little relief in the form of specific licenses from OFAC if wind-down activities extend beyond the time allotted.

Background

In prior alerts we provided overviews of the sanctions relief granted pursuant to the JCPOA and President Trump's May 8, 2018 announcement that the U.S. would abandon the JCPOA and re-impose its nuclear-related sanctions.^[3] As we noted in that guidance, rather than immediately re-imposing sanctions, the Trump administration allowed activities authorized under the JCPOA to continue for a specified "wind-down" period which, depending upon the activity involved, expires in August and November of this year.^[4]

Consistent with the May 8 announcement, OFAC amended the Iranian Transactions and Sanctions Regulations ("ITSR") on June 28 to revoke JCPOA-related authorizations that had permitted U.S. persons to negotiate contingent contracts related to commercial passenger aviation, to import and deal in Iranian-origin carpets and foodstuffs, and to facilitate the engagement of their non-U.S. subsidiaries

operating in Iran. These general licenses have been replaced by more limited authorizations permitting engagement only in transactions ordinarily incident and necessary to the wind-down of the previously authorized activity.[5] As a result of these changes and prior guidance, essentially all sanctions relief provided by the JCPOA is now in a wind-down period.

Revocation and Replacement of Iran-Related Authorizations

OFAC's June 28 amendments to the ITSR revoked general licenses that had authorized U.S. companies and their U.S. subsidiaries to engage in several types of transactions involving Iran.

General License H: Non-U.S. Subsidiaries of U.S. Companies Engaging in Iran

In a substantial concession to Iranian demands in the JCPOA, OFAC issued General License H on January 16, 2016, permitting non-U.S. entities owned or controlled by U.S. persons (*e.g.*, foreign subsidiaries of U.S. companies) to generally engage in business operations in and with respect to Iran. To support the engagement of U.S. person affiliates, OFAC also allowed numerous dispensations from broader Iranian sanctions. For example, U.S. persons were permitted to establish or alter operating policies and procedures necessary to permit the non-U.S. entities they owned or controlled to engage in transactions in Iran, and U.S. persons were allowed to provide their non-U.S. affiliates with access to automated, globally integrated business support systems.[6] Such measures allowed for the potential of meaningful trade between entities owned by U.S. companies and Iran. While most financial institutions continued to refuse to assist General License H operations, this was one of the most significant aspects of the U.S. offer to Iran under the JCPOA.

The ITSR amendments of June 28, 2018 revoke this authorization. In its place, OFAC has provided narrower authorizations permitting U.S. companies and their foreign subsidiaries to engage only in those transactions ordinarily incident to and necessary for the wind-down of the previously authorized transactions. These authorizations require U.S. companies and their foreign subsidiaries to return their operations to their pre-JCPOA status, in which neither were generally permitted to engage in Iran. These wind-down transactions are only authorized through November 4, 2018. After that date, U.S. companies and their foreign subsidiaries may face enforcement action for engaging in these transactions involving operations in Iran.[7]

General License I: Contingent Contracts for Commercial Passenger Aviation

Pursuant to the JCPOA, OFAC released a licensing policy indicating that it would issue on a case-by-case basis licenses for U.S. persons to sell and lease commercial passenger aircraft to Iran and to provide associated spare parts, components, and services.[8] Following the issuance of this licensing policy, OFAC issued General License I, permitting U.S. persons to negotiate and enter into contracts related to such activities involving Iranian civil aviation, provided that the contracts were contingent upon the receipt of a specific license from OFAC under the previously announced licensing policy.[9] OFAC revoked the specific licensing policy on May 8, 2018.[10] As OFAC will no longer issue specific licenses pursuant to the prior licensing policy, OFAC has revoked the general license authorizing the negotiation of contracts contingent on their issuance.[11]

Along with its revocation of General License I, OFAC added a new section to the ITSR permitting U.S. companies only to engage in activities ordinarily incident and necessary to the wind-down of transactions related to the negotiation of contingent contracts for Iranian commercial passenger aviation.[12] Pursuant to this section, such wind-down transactions are only authorized through August 6, 2018. As such, U.S. persons are now prohibited from engaging in transactions related to the negotiation of such contingent contracts and, after August 6, will also be prohibited from winding down such negotiations-related transactions. Importantly, General License J-1, which authorizes non-U.S. persons to fly U.S.-origin civil aircraft into Iran, remains in effect.[13] This license was not related to the JCPOA, but rather was a recognition that almost any aircraft that flies into Iran is "U.S.-origin" under U.S. law.[14] Without this license such flights would be violations. With the license still in effect, it will still be possible for non-U.S. air carriers to fly U.S.-origin civil aircraft into and out of Iran, subject to the conditions in the license and the U.S. Export Administration Regulations.

Sections 560.534 and 560.535: Iranian-Origin Foodstuffs, Carpets, and Related Financial Transactions

On January 21, 2016, OFAC amended the ITSR to generally license U.S. persons to import and deal in certain Iranian-origin foodstuffs and carpets from Iran or a third country. In addition, OFAC authorized the issuance of letters of credit and the provision of brokering services related to such imports and dealings.[15] These sanctions were not significant from a financial perspective, especially in comparison with the civil aviation deals. They were, however, meaningful for Iran and U.S. policy with respect to Iran given the centrality of Iranian food (such as pistachios) and carpets in Iranian culture and the fact that these products are produced by some of Iran's most marginalized communities. Removing these provisions, as much as the reintroduction sanctions on Iranian oil, is further recognition of the wide divergence between the Trump and Obama administration Iran policies.

As with General Licenses H and I, OFAC has amended these provisions, narrowing their scope to permit only those transactions ordinarily incident to and necessary for the wind-down of the previously authorized activities through August 6, 2018.[16]

Re-Imposing Sanctions as a Maximum Pressure Economic Campaign

Prior to the JCPOA, the U.S. was authorized to impose secondary sanctions on entities (including foreign central banks) that engaged in transactions for the purchase of Iranian petroleum or petroleum products. Under a complicated formula that balanced actual purchases of Iranian fuel with economic, political and diplomatic equities, foreign banks were exempted from these secondary sanctions if the president determined that a country was significantly reducing the volume of Iranian crude oil purchased.[17] These secondary sanctions were waived as a result of the JCPOA.[18]

In its May 8 guidance on the re-imposition of Iran sanctions, OFAC indicated that these secondary sanctions against foreign financial institutions would be re-imposed after November 4, 2018 and that the State Department would continue to waive their application where countries significantly reduced their imports of Iranian crude oil.[19] However, recent statements from the State Department have called into question the availability of these exceptions for countries that only reduce, rather than eliminate, their Iranian oil imports.

Specifically, in a call with reporters on June 26, 2018, immediately prior to the release of the general license revocations discussed above, the State Department conducted a "no-name" briefing and explained that the U.S. would not be granting exemptions from the imposition of these secondary sanctions for countries that significantly reduced their Iranian crude oil imports. Instead, the official stated repeatedly that the State Department has been asking foreign governments to eliminate entirely their Iranian crude oil imports no later than November 4, 2018 and that the Department would likely not grant exceptions, as indicated in OFAC's prior guidance. He emphasized that the decision not to provide such exemptions was a deliberate element of the Trump administration's "maximum pressure economic campaign" against Iran.^[20] On July 2, Brian Hook, the U.S. State Department's Director of Policy Planning, clarified this policy in a press briefing; he underlined that the U.S. Government would not be looking to allow waivers as that would reduce the pressure; he did say, however, that the U.S. Government might be willing to work on a "case-by-case" basis with certain countries who are committed to reducing their imports from Iran but he would not commit to doing so.^[21]

These statements—and recent promises that the re-imposed sanctions would be the "strongest sanctions in history"—again suggest that the Trump administration is preparing to take a more hardline approach on Iran sanctions than previous administrations.^[22] If it comes to fruition (and is not just rhetoric or a negotiating tactic to pressure countries to comply with the U.S. approach), the approach would defy the expectations of many observers (and apparently even some members of his own administration), who previously assessed it as highly unlikely that President Trump would reject the JCPOA on a wholesale basis. In many ways, the unique policy approaches of the Obama administration and Congress' attempts to constrain it set the stage for President Trump's more extreme re-implementation of sanctions. With an eye on encouraging negotiations that eventually led to the JCPOA, the Obama administration provided for interpretations and exceptions to what would otherwise have been blanket restrictions on certain types of activities involving Iran (for example, the decision to allow certain non-U.S. countries to continue to import Iranian crude). Because this interpretative guidance was accomplished by executive action, the Trump administration is not bound to adopt identical interpretations or enforcement strategies as it would have been if the interpretations were a product of statutes passed by Congress.

As noted above, there are several areas, including the sanctions targeting crude oil imports, in which the Trump administration may take a stricter enforcement approach. For example, where the Obama administration declined to designate certain Iranian financial institutions, the Trump administration may target a broader array of entities in the Iranian financial sector, adding a wider range of institutions to the Specially Designated Nationals ("SDN") and Blocked Person List, and even imposing secondary sanctions on non-U.S. parties who choose to engage with them. This could include private sector Iranian banks that had been among the preferred means for non-Iranians to transact in the country. Additionally, the Trump administration may more readily enforce secondary sanctions against foreign entities engaged in transactions with designated Iranian parties (in the Obama era secondary sanctions were frequently threatened but rarely imposed). Vague language in the regulations that provide for secondary sanctions authorities (including uncertain terms such as "materially support" or "significant transaction") leaves considerable room to interpret provisions broadly or narrowly as the administration would like.

Remaining Actions for Re-Imposition and Remaining Authorizations

As noted in previous guidance, in addition to the June 28 revision of the ITSR, the Trump administration plans to take several further steps to achieve the full re-imposition of sanctions announced on May 8, 2018. OFAC has indicated that no later than November 5, it will re-impose sanctions that applied to persons who had been removed from the SDN List pursuant to the JCPOA.^[23] Additionally, entities designated pursuant to Executive Order 13599 as "Government of Iran" entities or "Iranian financial institutions" will be moved from the List of Persons Blocked Solely Pursuant to E.O. 13599 to the SDN List, in some cases exposing non-U.S. persons who engage in activity with these entities to secondary sanctions risks.^[24] Finally, the U.S. Government will re-impose provisions of several executive orders that had previously provided the authority for the implementation of secondary sanctions against non-U.S. persons engaging in numerous transactions involving Iran.^[25] At a minimum, companies engaged in activities involving Iran should prepare for these actions to return the U.S. to its pre-JCPOA sanctions posture—indeed, depending upon how far the administration goes they may be returning the U.S. to the sanctions posture that it had even prior to any negotiations whatsoever.

Despite these continuing steps to roll back authorizations to engage in transactions with Iran, certain licenses remain in effect, and the Trump administration has given no indication these authorizations are scheduled for revocation. As mentioned above, General License J-1, which authorizes non-U.S. persons to temporarily fly U.S.-origin civil aircraft in Iran, remains in effect, as does General License D-1, which authorizes U.S. persons to export or reexport to Iran certain hardware, software and services related to Internet communications.^[26] Other authorities continue to permit the provision of food and medical devices to Iran.^[27] These authorities will likely remain in effect both because they were not provided pursuant to the JCPOA (and thus do not need to be removed in order to withdraw from the JCPOA) and because they may be provided by statute (such as the Trade Sanctions Relief Act), or are otherwise consistent with the policy that U.S. sanctions should target only the Iranian regime and not the Iranian people. President Trump has also indicated his continuing support for this policy and Director of Policy Planning Hook repeated this in his July 2 briefing.^[28] However, in the absence of any guidance regarding the current or future status of these general licenses, and in particular how they will operate in a situation in which all or most Iranian counterparties become sanctioned, non-U.S. persons operating in these areas continue to face uncertainty regarding the extent to which they are subject to the restrictions of the wind-down period and how OFAC may view their activities after November 4, 2018.

Conclusion

These recent steps taken to re-impose Iran sanctions confirm that the Trump administration likely intends a full reversal of the sanctions relief provided for under the JCPOA and, in some instances, is prepared to go further to exert maximum pressure against Iran. The revocations of the general licenses discussed above indicate that the Trump administration intends—at a minimum—to return to the pre-JCPOA sanctions status quo ante. Furthermore, the recent statements from the State Department suggest that, in some instances, the Trump administration may choose to implement sanctions targeting Iran more strictly than they had been implemented prior to the JCPOA. These statements also indicate that wind-down authorizations will be narrowly interpreted and strictly enforced—both during the wind-down period and after it lapses.

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While the recent actions and statements provide some hints as to the Administration's strategy and direction, they nonetheless leave many questions unanswered. This is especially the case for the vast majority of companies that had entered Iran and are active in sectors that are not scheduled for the resumption of secondary sanctions. They understandably remain uncertain as to whether they are or will be subject to the same or similar wind-down restrictions. Admittedly, the financial sector may force the hand of many such companies by refusing to process transactions associated with Iran business (either immediately or on a wind-down basis). We will provide additional analysis and clarity regarding any subsequent guidance and statements in the coming weeks and months.

[1] U.S. Dep't of the Treasury, *Revocation of JCPOA-Related General Licenses; Amendment of the Iranian Transactions and Sanctions Regulations; Publication of Updated FAQs* (Jun. 27, 2018), available at <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20180627.aspx>.

[2] Special Briefing, U.S. Dep't. of State, *Senior State Department Official on U.S. Efforts to Discuss the Re-Imposition of Sanctions on Iran With Partners Around The World* (Jun. 26, 2018), available at <https://www.state.gov/r/pa/prs/ps/2018/06/283512.htm>.

[3] Press Release, White House, *Remarks by President Trump on the Joint Comprehensive Plan of Action* (May 8, 2018), available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action>.

[4] Presidential Memorandum, *Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon* (May 8, 2018), available at <https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-maligninfluence-deny-iran-paths-nuclear-weapon>; U.S. Dep't of Treasury, *Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA)* (May 8, 2018), available at https://www.treasury.gov/resourcecenter/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf.

[5] *Iranian Transactions and Sanctions Regulations*, 83 Fed. Reg. 30335 (Jun. 28, 2018) (to be codified at 31 C.F.R. pt. 560), available at <https://www.federalregister.gov/d/2018-13939>.

[6] OFAC, *General License H: Authorizing Certain Transactions Relating to Foreign Entities Owned or Controlled by a United States Person* (Jan. 16, 2016), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran_glh.pdf.

[7] See OFAC FAQ No. 4.4.

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- [8] OFAC, *Statement of Licensing Policy for Activities Related to the Export or Re-Export to Iran of Commercial Passenger Aircraft and Related Parts and Services* (Jan. 16, 2016), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/lic_pol_statement_aircraft_jcpoa.pdf
- [9] OFAC, *General License I: Authorizing Certain Transactions Related to the Negotiation of, and Entry into, Contingent Contracts for Activities Eligible for Authorization Under the Statement of Licensing Policy for Activities Related to the Export or Re-export to Iran of Commercial Passenger Aircraft and Related Parts and Services* (Mar. 24, 2016­), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran_gli.pdf.
- [10] U.S. Dep't of Treasury, *Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA)* (May 8, 2018, updated Jun. 27, 2018), available at https://www.treasury.gov/resourcecenter/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf, FAQ No. 4.1.
- [11] See OFAC FAQ No. 4.3.
- [12] 31 C.F.R. § 560.536.
- [13] OFAC, *General License J-1: Authorizing the Reexportation of Certain Civil Aircraft to Iran on Temporary Sojourn and Related Transactions* (Dec. 15, 2016), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran_glj_1.pdf.
- [14] Foreign-made items incorporating more than 10 percent U.S.-origin content by value, including civilian aircraft, may not be reexported by non-U.S. persons to Iran without authorization (31 C.F.R. § 560.205). Most civilian aircraft—even those produced by non-U.S. manufacturers outside the United States—exceed this threshold.
- [15] Iran Transactions and Sanctions Regulations, 81 Fed. Reg. 3330 (Jan. 21, 2016) (codified at 31 C.F.R. pt. 560), available at <https://www.federalregister.gov/documents/2016/01/21/2016-01227/iranian-transactions-and-sanctions-regulations>.
- [16] See OFAC FAQ No. 4.5.
- [17] 22 U.S.C. § 8513a(d)(4).
- [18] U.S. Dep't. of the Treasury & U.S. Dep't. of State, *Guidance Relating to the Lifting of Certain U.S. Sanctions Pursuant to the Joint Comprehensive Plan of Action on Implementation Day* (Jan. 16, 2016) available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/implement_guide_jcpoa.pdf.
- [19] OFAC FAQ Nos. 5.1 and 5.2.

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- [20] Special Briefing, *supra* note 2.
- [21] Brian Hook, Director of Policy Planning, U.S. State Department, Press Briefing, July 2, 2018.
- [22] *See, e.g.*, Press Release, U.S. Dep't. of State, *After the Iran Deal: A New Iran Strategy* (May 21, 2018), *available at* <https://www.state.gov/secretary/remarks/2018/05/282301.htm>.
- [23] OFAC FAQ No. 1.3.
- [24] OFAC FAQ No. 3.1.
- [25] OFAC FAQ No. 1.4.
- [26] OFAC, *General License D-1: General License with Respect to Certain Services, Software, and Hardware Incident to Personal Communications* (February 7, 2014), *available at* https://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran_gld1.pdf.
- [27] 31 C.F.R. § 560.530.
- [28] Brian Hook, *supra* note 21.



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