

Client Update

OFAC Provides Additional Iran Sanctions Guidance

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On June 8, 2016, the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") added 11 new questions and answers to its Frequently Asked Questions ("FAQs") regarding the scope of U.S. sanctions on Iran after the Joint Comprehensive Plan of Action, under which Iran agreed to limit its nuclear program in exchange for certain sanctions relief.¹ A number of the FAQs seek to clarify the scope of Iran General License H ("GL H"), which authorizes foreign entities owned or controlled by U.S. persons to engage in certain Iran-related activities, and to outline how U.S. persons who sit on the boards or serve as senior managers of non-U.S., non-Iranian entities should conduct themselves.

Below, we summarize the key points highlighted in these FAQs. We have reproduced all of the new FAQs in an Appendix for ease of reference.

- *Correspondent Accounts for Third-Country Banks.* The updated FAQs clarify that U.S. financial institutions may transact with non-U.S., non-Iranian financial institutions that conduct business with Iranian financial institutions not found on the Specially Designated Nationals List. U.S. financial institutions, however, remain prohibited from processing Iran-related transactions for foreign financial institutions.
- *Clarifications to the Scope of General License H.* A number of the FAQs provide clarifications on the scope of GL H. One FAQ notes that GL H authorizes U.S.-owned or -controlled foreign entities to engage in transactions with individuals or entities identified as controlled by the Government of Iran and found on the Executive Order 13599 List. Another FAQ explains that U.S. parent companies and U.S.-owned or -controlled

¹ For more information on the Joint Comprehensive Plan of Action, please see our Client Update of January 19, 2016, available at <http://www.debevoise.com/thesanctionsresource>.

foreign entities may alter their policies and procedures to allow the foreign entity to establish a physical presence inside Iran.

- *Determination of When a Foreign Company Is Owned or Controlled by a U.S. Person for Purposes of GL H.* In one of the new FAQs, OFAC clarifies that an entity established or maintained outside the United States is generally considered owned or controlled by a U.S. person (for purposes of GL H) if, in the aggregate, one or more U.S. persons hold 50% or greater equity interest by vote or value in the entity or if one or more U.S. persons hold a majority of seats on the entity's board. OFAC would not, however, regard a non-U.S. company that is publicly traded or whose ownership interests are widely dispersed to be owned or controlled by a U.S. person merely because U.S. persons, in the aggregate, passively hold more than 50 percent of the shares of such entity but no one U.S. person holds a controlling share in the company.
- *U.S. Persons Serving on the Board or in a Senior Management Capacity of a Non-U.S., Non-Iranian Entity.* The FAQs affirm that U.S. persons may serve on the board or as a senior manager of a non-U.S., non-Iranian entity, even if the entity transacts with Iranian persons that are not on the SDN List. U.S. persons generally must be walled off or "ring-fenced" from Iran-related business, and OFAC recommends that such institutions consider instituting a "blanket recusal policy" (as opposed to relying on case-by-case abstentions) to segregate U.S. persons from Iran-related business. This generally confirms what many companies have regarded as best practices for avoiding U.S. director and officer involvement with Iran-related transactions.

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Please do not hesitate to contact us with any questions.

APPENDIX

C. FINANCIAL AND BANKING MEASURES

C. 15. Can U.S. financial institutions transact with, including by opening or maintaining correspondent accounts for, non-U.S., non-Iranian financial institutions that maintain correspondent banking relationships with Iranian financial institutions that are not on the SDN List?

Yes. U.S. financial institutions can transact with, including by opening or maintaining correspondent accounts for, non-U.S., non-Iranian financial institutions that maintain correspondent banking relationships or otherwise transact with Iranian financial institutions that are not on the SDN List. It remains prohibited, however, for non-U.S. financial institutions to route Iran-related transactions through U.S. financial institutions or involve U.S. persons in such transactions, unless the transactions are exempt from regulation or authorized by OFAC. Non-U.S., non-Iranian financial institutions should have appropriate systems and controls to ensure that they do not route Iran-related transactions through U.S. financial institutions, unless the transactions are exempt from regulation or authorized by OFAC.

C. 16. Can a non-U.S., non-Iranian entity (including a non-U.S., non-Iranian financial institution) engage in transactions with Iranian persons not on the SDN List even though one or more U.S. persons serve on that entity's Board of Directors or as senior managers (e.g., Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Chief Compliance Officer)? Must these U.S. persons be recused or "walled off" from the entity's Iran-related business?

The presence of one or more U.S. persons on the Board of Directors or serving as a senior manager of a non-U.S., non-Iranian entity does not necessarily preclude that entity from transacting with Iranian persons that are not on the SDN List. Unless authorized by OFAC, however, U.S. persons must be walled off or "ring-fenced" from Iran-related business because, with limited exceptions, U.S. persons continue to be broadly prohibited from engaging in or facilitating transactions or dealings with Iran or its government. The prohibitions on the exportation or reexportation of services to Iran and facilitation have been in place for decades, and are consistent with prohibitions applied across a range of U.S. sanctions programs administered by OFAC.

Non-U.S., non-Iranian entities establishing policies regarding how to wall off the U.S. persons from the institution's Iran-related business should consider instituting a blanket recusal policy (as opposed to case-by-case abstentions,

which, depending on the facts and circumstances, could be considered a prohibited facilitation and/or export of services under the ITSR) for U.S. person directors, senior managers and other employees with respect to Iran-related matters. The institution of a blanket recusal policy requiring that all U.S. person employees of a non-U.S., non-Iranian entity not be involved in Iran-related activities would not be considered prohibited activity under the ITSR. In instances where national laws prohibit the recusal of a U.S. person executive from the decision-making processes of his or her non-U.S. employer, including those involving Iran-related business, the executive or employer should consult with their counsel and/or approach OFAC for additional guidance.

K. FOREIGN ENTITIES OWNED OR CONTROLLED BY U.S. PERSONS

K. 14. Does GL H authorize a U.S. person to alter its policies and procedures, or the policies or procedures of its owned or controlled foreign entity, to allow the U.S.-owned or -controlled foreign entity to establish a physical presence inside Iran?

Yes. GL H authorizes a U.S. parent to alter its policies and procedures, and/or the policies and procedures of its owned or controlled foreign entity, to allow the U.S.-owned or -controlled foreign entity to establish a physical presence inside Iran. U.S.-owned or -controlled foreign entities, however, continue to be prohibited from the exportation, reexportation, sale or supply, directly or indirectly, from the United States of any goods, technology or services if the items are destined for Iran or the Government of Iran at the time they leave the United States (see FAQs K.13 and M.9).

K. 15. Are U.S.-owned or -controlled foreign entities considered U.S. persons?

No. The term United States person or U.S. person, as it is defined in section 560.314 of the ITSR, means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States. Although U.S.-owned or -controlled entities are subject to the prohibitions of the ITSR pursuant to section 560.215 (and eligible for the authorizations of GL H), they are not considered U.S. persons under the ITSR.

K. 16. Does GL H authorize U.S.-owned or -controlled foreign entities to engage in transactions with individuals and entities on the E.O. 13599 list?

Yes. GL H authorizes U.S.-owned or -controlled foreign entities to engage in

transactions with individuals and entities on the E.O. 13599 List that are within the scope of the general license (see FAQ I.2 for additional information on the E.O. 13599 List).

K. 17. Does OFAC aggregate the interests of multiple U.S. persons in determining whether an entity established or maintained outside the United States is a U.S.-owned or -controlled foreign entity for purposes of GL H and section 560.215 of the ITSR?

Yes, with certain exceptions. As a general matter, an entity established or maintained outside the United States is considered owned or controlled by a U.S. person if, in the aggregate, one or more U.S. persons hold(s) a 50 percent or greater equity interest by vote or value in the entity or if one or more U.S. persons hold(s) a majority of seats on the board of directors of the entity. A determination as to whether one or more U.S. persons otherwise control(s) the actions, policies or personnel decisions of a foreign entity is a fact-specific, case-by-case determination, but in making such a determination, OFAC would look to the aggregated ownership interests held, and indicia of control exercised, by all relevant U.S. persons. In the specific case of companies organized under the laws of a country other than the United States 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 U.S. persons, in the aggregate, passively hold more than 50 percent of the shares of such entity but no one U.S. person holds a controlling share in the company. However, such a company could still be considered a U.S.-owned or -controlled foreign entity to the extent one or more of the other criteria for ownership or control are met.

K. 18. In cases where multiple U.S. persons, in the aggregate, own or control a foreign entity, are U.S. persons authorized under GL H to amend the policies and procedures of stakeholding U.S. companies and the policies and procedures of the U.S.-owned or -controlled foreign entity?

Yes. In cases where U.S. persons, in the aggregate, own or control a foreign entity, U.S. persons are permitted to amend the policies and procedures of U.S. entities that own a portion of the U.S.-owned or -controlled foreign entity, as well as the policies and procedures of the U.S.-owned or -controlled foreign entity, to the extent necessary to allow the U.S.-owned or -controlled foreign entity to engage in transactions with Iran that are authorized under GL H (see FAQ K.6 for additional details on the extent to which U.S. persons can engage in altering policies and procedures related to transactions with Iran).

K. 19. Does GL H authorize a U.S. person to establish or alter the operating policies and procedures of a United States entity or a U.S.-owned or -controlled foreign entity more than once?

Yes. A U.S. person can undertake additional changes to such operating policies and procedures so long as the changes are not with respect to, or for the purpose of facilitating, any particular Iran-related transaction(s) by the U.S.-owned or -controlled foreign entity.

K. 20. Must U.S. persons employed by or serving on the Board of Directors of a U.S.-owned or -controlled foreign entity be recused or “walled off” from all Iran-related business of that entity? Can U.S. person employees simply abstain from voting on Iran-related matters?

In general, unless authorized by OFAC, U.S. persons employed by or serving on the board of directors of a U.S.-owned or -controlled foreign entity (or any other foreign entity) must be recused or “walled off” from all Iran-related business of that entity, except for certain limited activities with respect to Iran that are authorized under section (a) of that GL (see FAQs K.8 and K.9).

U.S. persons are authorized under GL H to allow for such a recusal through the establishment or alteration of policies and procedures of their owned or controlled foreign entities. U.S.-owned or -controlled foreign entities (and other foreign entities) should consider instituting a blanket recusal policy (as opposed to case-by-case abstentions, which, depending on the facts and circumstances, could be considered a prohibited facilitation and/or export of services under the ITSR) for U.S. person directors, managers and other employees with respect to Iran-related matters (see FAQ C.16).

K. 21. Must the U.S. parent company of a U.S.-owned or -controlled foreign entity engaging in transactions with Iran pursuant to GL H remove itself from all day-to-day operations of its owned or controlled foreign entity, or just those related to Iran?

If a U.S. parent company’s owned or controlled foreign entity engages in transactions with Iran pursuant to GL H, and also conducts transactions with other non-sanctioned jurisdictions, the U.S. parent company and its board members, senior management and employees may continue to be involved in the U.S.-owned or -controlled foreign entity’s day-to-day operations with non-sanctioned jurisdictions.

K. 22. Can a U.S. person receive reports from its owned or controlled foreign entities that detail transactions conducted pursuant to GL H, including

reporting on transactions that the U.S. person is required to disclose to the Securities and Exchange Commission?

Yes. A U.S. person may receive reports from its owned or controlled foreign entities that include details on transactions the foreign entity conducted with Iran pursuant to GL H. However, U.S. persons remain prohibited from engaging in Iran-related activities of U.S.-owned or -controlled foreign entities and cannot attempt to influence Iran-related business decisions of such entities based on such reports.