

OFAC PROVIDES FURTHER GUIDANCE ON RECUSAL POLICIES THROUGH UPDATED IRAN SANCTIONS FAQ

09 June 2016 | Doha, Dubai, Iran Group, London, New York
Legal Briefings

On June 8, 2016, the US Treasury Department's Office of Foreign Assets Control ("OFAC") updated the [Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions under the Joint Comprehensive Plan of Action](#) ("JCPOA FAQs").

Among other things, the updated JCPOA FAQs expressly affirms that non-U.S. companies, including those owned or controlled by U.S. companies, can adopt a general recusal policy to ensure that their U.S. person officers, directors or employees are not involved in Iran-related business. Non-U.S. companies acting in conformity with this guidance can, under U.S. law, conduct a broad range of transactions involving Iran, but it is essential to ensure that U.S. persons are not involved, directly or indirectly, in such business activities.

As we have discussed previously, on the Implementation Day of the JCPOA, OFAC issued a new general license ("**General License H**") authorizing U.S. owned or controlled foreign entities to engage in a broad range of transactions with Government of Iran and Iranian parties, subject to limited exceptions. In addition, General License H authorizes U.S. persons to establish or alter corporate policies and procedures to the extent necessary to allow U.S. owned or controlled foreign entities to engage in transactions involving Iran that are authorized under General License H. Despite the JCPOA and these authorizations under General License H, U.S. persons, including those working for U.S. owned or controlled foreign entities and other non-U.S. entities, are still generally prohibited from involvement with most transactions with Iran. Thus, it is necessary for foreign entities engaging with Iran to properly recuse U.S. persons from these activities.

The updated JCPOA FAQs further illustrates how such recusal policies and procedures should be designed. Important points to note include:

- Foreign entities, regardless whether they are U.S. owned or controlled, can generally conduct transactions with Iranian persons not on the Specially Designated National List ("**SDN List**") if U.S. persons, including U.S. senior managers and directors, are entirely recused or "ring-fenced" from Iran-related business.
- The recusal policy should be a blanket one. Using case-by-case abstentions might risk violating the facilitation prohibition (i.e., U.S. persons cannot facilitate a transaction taken by a non-U.S. person where the transaction would be prohibited if performed by a U.S. person under sanctions).
- OFAC recognizes that there are situations 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. It suggested that in these circumstances, the executive or employer should consult with their counsel and/or approach OFAC for additional guidance.
- The recusal policy only needs to recuse U.S. persons from Iran-related business. U.S. persons, especially U.S. parent companies and their U.S. employees, directors and senior managers, do not need to recuse from transactions with other non-sanctioned jurisdictions.
- For U.S. owned or controlled foreign entities, the change of operating policies and procedures under General License H can happen at both the parent U.S. company level and the foreign subsidiary level. These policies can also be established or altered by U.S. persons to enable a non-U.S. entity to establish a physical existence in Iran.
- As long as there is no prohibited facilitation, a U.S. person can rely on General License H to undertake changes to operating policies and procedures more than once.
- U.S. persons can receive reports about activities taken by a non-U.S. company in reliance on General License H, as long as the U.S. person does not take action that might facilitate the transaction.

The guidance aligns well with market practice for setting up operating policies and procedures for non-U.S. companies trying to engage with Iran. As it is common for multinational non-U.S. companies engaging in Iran to have a number of US persons as employees or directors, these companies should spend some time to establish an appropriate recusal policy and to identify U.S. persons accurately before engaging with Iran. This initial step will reduce significant administrative burdens and compliance risks stemming from any future Iran-related business.

In addition, the updated JCPOA FAQs re-emphasized that U.S. owned or controlled non-U.S. entities are not themselves “U.S. persons” under the U.S. sanctions regime, and therefore they are not subject to the blocking regulations, applicable only to dealings involving US persons, applicable to the Government of Iran and Iranian financial institutions.

The updated JCPOA FAQs also clarifies how multiple U.S. interests should be aggregated in order to decide whether a particular foreign entity is U.S. owned or controlled. As a general matter, if an entity has an aggregated 50% or greater U.S. equity interest, it will fall under the scope. However, OFAC's guidance clarifies that an exception exists where a non-U.S. company is publicly traded or has widely dispersed ownership, with an aggregated 50% or greater U.S. equity interest but no U.S. controlling shareholder. In these cases, if there is otherwise no control by U.S. persons, such a non-U.S. entity will not be considered U.S. owned or controlled.

In the banking sector, the updated JCPOA FAQs states that U.S. financial institutions are allowed to transact business with, and maintain 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. Nevertheless, Iran-related financial transactions cannot be routed through U.S. financial institutions.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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