

Sanctions Guidance Calms a Few Iran Business Worries

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Earlier this week, the Office of Foreign Assets Control (OFAC)—the Treasury Department agency that administers most U.S. sanctions—released long-awaited guidance concerning business with Iran. Answers to new “Frequently Asked Questions” (FAQs) remove some uncertainties about how lawful Iran business would work in practice, especially with respect to multinational banking and a U.S. company’s foreign holdings.^[1] Yet, there are many outstanding questions, and more guidance from OFAC would be helpful.

In January, the United States implemented the so-called “Iran nuclear deal” (officially, the Joint Comprehensive Plan of Action or JCPOA). This action lifted most “secondary sanctions,” eliminating certain penalties that had been designed to dissuade non-U.S. companies from doing business with Iran. OFAC also granted some authority to the non-U.S. subsidiaries of U.S. parent companies, allowing them to engage in some Iran commerce (General License H or GL H).

Despite this formal removal of legal barriers, commercial re-engagement with Iran since January has been slow. Some reluctance to take advantage comes from uncertainty about how General License H and other legal authorities will operate in real-world settings. Companies are right to worry, as Iran sanctions violations have famously generated mega-penalties, and active enforcement continues.

Banking Guidance

OFAC’s new FAQs provide some clarity concerning correspondent banking relationships, which are a backbone for international trade. The agency clarified that U.S. banks can transact, and open

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correspondent banking relationships, with non-U.S., non-Iranian banks that in turn transact with Iranian banks (as long as Iranian banks are not Specially Designated Nationals). U.S. sanctions risks reportedly have kept many multinational banks from supporting Iran-related commerce that is consistent with U.S. sanctions regulations and the JCPOA. OFAC's recent guidance confirms that no sanctions barrier prevents the re-establishment of banking channels, as long as Iran-related transactions do not impermissibly traverse the U.S. financial system.

Recusal Guidance for U.S. Citizens

U.S. citizens and permanent residents have long understood that they can manage sanctions risks, when they sit on corporate boards or help manage a non-U.S. company, by recusing themselves from involvement with Iran-related business. This week, OFAC confirmed recusal as a valid compliance approach. The presence of a U.S. citizen on a corporate board or in a managerial position does not itself preclude a non-U.S. company from engaging in Iran business. The agency favors a "blanket recusal policy" over "case-by-case abstentions."

Guidance for Non-U.S. Companies with U.S. Ownership

Prior to January 16, 2016, foreign subsidiaries of U.S. companies were subject to the same Iran-related prohibitions as their U.S. parents. When the United States implemented the JCPOA, OFAC issued a new, broad authorization—General License H—that allows foreign subsidiaries to conduct business with Iran, as long as certain conditions are satisfied. GL H also permits a U.S. parent company to 1) change its operating policies to allow for its foreign subsidiaries to do business in Iran consistent with GL H, 2) conduct training on the new policies, and 3) allow its foreign subsidiaries to continue to use automated and globally integrated business support systems, like email and accounting systems. However, OFAC's initial guidance on Implementation Day left many critical questions unanswered, which limited the usefulness of GL H, particularly for U.S. multinational companies that exercise a fair level of control over their foreign subsidiaries.

OFAC's new FAQs provide much-needed guidance on the scope of activities authorized under the general license, including greater clarity on day-to-day management of a foreign subsidiary operating in Iran, establishing a physical presence in Iran, and corporate policies and procedures.

- **Day-to-Day Management:** Under the Iran sanctions program, U.S. companies are prohibited from "facilitating" transactions by their foreign subsidiaries or any other parties with Iran, such as by approving contracts or projects with Iran, providing parental guarantees for such projects, referring Iran business to a non-U.S. entity, providing financing for or investing in Iran-related transactions, or providing insurance for such transactions. Traditionally, in order to avoid potential facilitation liability, a U.S. company's foreign subsidiary doing business in Iran generally would need to be operationally "independent" from its U.S. parent.

OFAC does not define "independence," and since the issuance of GL H, this issue has resulted in significant uncertainty for U.S. multinational companies. Under one view, a foreign subsidiary availing itself of GL H would have needed to exercise substantial day-to-day managerial control and operate

primarily from its own capital; in order to limit its risk of facilitation liability, the U.S. parent company would have needed to take a “hands off” approach to all of its foreign subsidiary’s dealings, not just Iran-related business. Under a second, more liberal interpretation, a foreign subsidiary could have utilized GL H if it were acting independently with regard to Iranian business but was not otherwise independent from its U.S. parent (e.g., the U.S. parent may generally review and approve the subsidiary’s non-Iran-related contracts or provide guarantees for the subsidiary’s non-Iran-related projects, but would be explicitly “walled off” from any of the subsidiary’s Iranian dealings).

In its new guidance, OFAC has taken the second, more favorable position regarding the meaning of operational independence, such that a non-U.S. subsidiary of a U.S. parent can benefit from GL H if it is acting independently with regard to Iranian transactions but is not otherwise independent from its U.S. parent with regard to business in non-sanctioned countries. In addition to the U.S. parent company, any U.S. persons employed by or serving on the board of directors of a foreign entity operating in Iran must be recused, generally through a blanket recusal policy, from all Iran-related business of that entity. While U.S. companies and their foreign subsidiaries still need to work out how, from a practical standpoint, to isolate Iran-related business, this new guidance offers a good deal of added flexibility.

- **Establishing a Physical Presence in Iran:** In its new FAQs, OFAC also clarified that U.S. persons are authorized under GL H to alter policies and procedures to permit a foreign subsidiary to establish a physical presence in Iran. Prior to this guidance, this was another issue on which many in industry had sought greater clarity.
- **Changes to Operating Policies and Procedures:** As noted above, U.S. companies are allowed to establish or alter corporate operating policies to permit foreign subsidiaries to do business in Iran consistent with GL H and to conduct training on these new policies. However, based on OFAC’s initial guidance, it was unclear whether U.S. companies had but one opportunity to make such changes, or whether multiple rounds of revisions to policies and procedures could occur over time. In its new FAQs, OFAC explicitly stated that U.S. companies can make additional changes to operating policies and procedures over time as long as such changes are not designed to facilitate any particular Iran-related transaction(s) by the foreign subsidiary.

Although OFAC’s new GL H guidance is helpful, it nonetheless leaves open some substantial issues. For example, while OFAC confirmed that U.S. companies can receive reports from their foreign subsidiaries detailing transactions conducted via GL H, including for purposes of required disclosures to the U.S. Securities and Exchange Commission, it did not address the proper handling of Iran-related revenues earned by a foreign subsidiary. This presents a considerable compliance concern, particularly when the foreign subsidiary’s revenues are predominantly or exclusively drawn from Iran-related business, as opposed to such funds being merely part of a larger pool of revenue from business in many countries.

Uncertainty Still Clogs Business Channels

Sanctions risk plays a large role in U.S. and multinational companies' decisions not to pursue Iran business when OFAC authorizations and JCPOA relief nonetheless appear to apply. OFAC's FAQs help reduce such risk, but more guidance is needed to clarify how sanctions rules and agency interpretations will operate in practice. In the meantime, business must continue weighing sanctions risk against Iran opportunities.

[1] Available at: <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20160608.aspx>