

INTERNATIONAL TRADE

SOME SANCTIONS RELIEF FOR IRAN, BUT MOSTLY STATUS QUO FOR THE U.S. AUTO INDUSTRY

by Bruce C. Thelen

On January 16, 2016, the International Atomic Energy Agency (IAEA) declared that Iran had implemented its commitments to ensure that its nuclear program will be limited to peaceful purposes. With that, the United States announced that it was lifting its nuclear-related sanctions on Iran. But what does that mean for the U.S. auto industry? The short answer is “not much”. Here’s why.

First, a bit of history

For decades, the United States has maintained a broad embargo on nearly all trade and investment involving Iran. This has its basis in a number of laws enacted by the U.S. Congress and many related regulations and executive orders of the President. The U.S. Treasury Department’s Iranian Transactions and Sanctions Regulations (ITSR) are the primary regulation governing commercial transactions involving Iran. But dealings with Iran are also subject to the Iranian Assets Control Regulations, the Iranian Financial Sanctions Regulations and the Iranian Human Rights Abuses Sanctions Regulations, as well as other recordkeeping, reporting and licensing requirements. Broadly applicable rules also play a role, such as the U.S. Commerce Department’s Export Control Regulations and the State Department’s International Traffic in Arms Regulations. Differing foreign policy and national security considerations may result in differing interpretations of similar language in the applicable laws and regulations and a license or authorization granted under one law or regulation will not relieve the involved parties from complying with any other applicable laws and regulations.

With very few exceptions, the ITSR prohibit U.S. persons from investing in Iran, importing Iranian goods or services, and exporting, reexporting, selling or supplying, directly or indirectly, any goods, technology or services to Iran or its government. The term “U.S. person” includes not only U.S. citizens, but also permanent resident aliens, U.S. entities and their foreign branches, and even foreign persons while in the United States.

Other provisions of the ITSR close potential loopholes by prohibiting any transaction or conspiracy to evade or avoid any of the ITSR’s prohibitions. For example, the ITSR bar U.S. persons from approving, financing, facilitating, or guaranteeing any transaction by a foreign person that would be prohibited if performed in the United States or by a U.S. person. Among other things, prohibited facilitation or approval of a foreign person’s transaction occurs when a U.S. person, in order to permit or facilitate a transaction that would be prohibited if performed by a U.S. person or from the United States, alters its operating policies or procedures or those of a foreign affiliate or when it refers Iranian purchase orders, bids and similar business opportunities to a foreign person.

Previous versions of the ITSR included a *de minimis* exception that allowed the export of goods or technology for transformation or incorporation into a foreign made end product if, among other things, the value of U.S. origin goods, software and technology was less than 10 percent of the total value of the end product. But this exception was removed from the ITSR in 2012. In addition, revisions of the ITSR in 2012 prohibited foreign entities owned or controlled by U.S. persons from engaging in any transaction that would be prohibited if engaged in by a U.S. person or in the United States. Sanctions in the automotive sector were further tightened in June 2013 by Executive Order 13645 that authorized the imposition of sanctions on any person that knowingly engaged in the sale, supply or transfer of goods or services used in the Iranian automotive sector, including all persons in a corporate group that knowingly participated in those transactions.

Joint Comprehensive Plan of Action

Several years of negotiations among Iran, Germany and the five UN Security Council members (P5+1) led to the Joint Plan of Action (JPOA) among those parties in November 2013. Under the JPOA, the United States agreed, among other things, to a temporary suspension of some so-called “secondary” sanctions, including those targeting the Iranian automotive sector under Executive Order 13645. “Secondary” sanctions are generally those directed toward non-U.S. persons for specified conduct involving Iran that occurs entirely outside the United States and does not involve any U.S. person.

The temporary suspension of secondary sanctions was continued under the Joint Comprehensive Plan of Action (JCPOA) reached on July 14, 2015 between Iran and the P5+1. The JCPOA became effective on October 18, 2015, which is referred to as “Adoption Day” in the agreement. After Adoption Day, the parties began to take steps to implement their commitments under the JCPOA. “Implementation Day” occurred on January 16, 2016, when the IAEA confirmed that Iran’s commitments had been met.

What Does Implementation Day Mean for the U.S. Auto Industry?

The focus of the JCPOA is Iran’s nuclear program. Under the JCPOA, the United States agreed that, upon Iran’s compliance with its obligations, it would lift nuclear-related sanctions. The U.S. commitments were generally limited to secondary sanctions, with “primary” sanctions affecting U.S. persons remaining in place.

To fulfill its commitments under the JCPOA, the United States, among other things, lifted nuclear-related secondary sanctions affecting Iran’s trade in precious metals and some materials and software, and on Iran’s ports operators and on its energy, petrochemical, shipping and shipbuilding sectors, as well as on related trade in financial, insurance and other associated services. The United States also revoked Executive Order 13645, lifting the secondary sanctions applicable to non-U.S. persons on the direct or indirect sale, supply, or transfer to Iran of goods or services used in connection with Iran’s automotive sector. The lifted sanctions are however subject to “snap-back” if Iran fails to

comply with the terms of the JCPOA, with the effect that the sanctions would again restrict previously permitted dealings with Iran. The U.S. government has indicated that actions permitted before “snap-back” would not be subject to sanctions. But transactions after “snap-back” will not be “grandfathered” if they implicate activity for which sanctions have been re-imposed, notwithstanding any contractual commitment made before “snap-back”.

Primary sanctions relief is limited to three narrow categories. The United States took steps to allow exports and reexports to Iran for its commercial passenger aviation sector, as well as imports of Iranian-origin carpets and foodstuffs, including pistachios and caviar. And non-U.S. entities owned or controlled by a U.S. person were granted limited ability to engage in some transactions involving Iran that are consistent with the JCPOA and U.S. laws and regulations, notwithstanding the general prohibition in the ITSR. With the exception of these three categories, U.S. persons will continue to be broadly prohibited from engaging in transactions or dealings involving Iran or the Government of Iran.

OFAC’s General License H

The measures taken to grant limited authorization for U.S. owned or controlled foreign entities to engage in some transactions with Iran are outlined in General License H, issued by the Treasury Department’s Office of Foreign Assets Control (OFAC). General License H permits a U.S. person to alter operating policies and procedures to accommodate permitted transactions and to make its automated, globally integrated communication and support systems available to foreign entities involved in permitted transactions, provided that the systems operate passively and without human intervention and are not used for any transfer of funds involving the U.S. financial system. Notably, the direct or indirect export, reexport, sale or supply of any goods, technology or services from the United States or by any U.S. person, wherever located, in connection with these transactions remains prohibited, effectively barring the supply of U.S. origin automotive goods, technology or services directly to Iran or to third countries for incorporation into other items destined for Iran. General License H also expressly confirms that the prohibitions on facilitation by U.S. persons remain in effect except for the narrow exceptions under the license. This means that U.S. persons may not be involved in the ongoing Iran-related operations or decision making of a U.S. owned or controlled foreign entity.

The license enumerates several categories of transactions that are not authorized for non-U.S. persons, such as those subject to sanctions regulations other than the ITSR, transactions subject to U.S. export control regulation, funds transfers involving the U.S. financial system, transactions involving designated entities or persons or any Iranian military, paramilitary, intelligence or law enforcement entity, any sanctionable activity related to terrorism, Syria, Yemen, human rights abuse or weapons of mass destruction or their means of delivery, and any activity involving unapproved nuclear procurement channels.

Nor have all other secondary sanctions been lifted. For example, non-U.S. persons remain subject to sanctions for transactions or support involving persons or entities on OFAC’s List of Specially Designated Nationals and Blocked Persons. General License H also confirms that non-U.S. persons remain subject to the prohibition on the direct or indirect reexport to Iran from a third country of goods, technology or services of U.S. origin that are subject to export control license requirements if the non-U.S. person knows or has reason to know that the reexportation is intended specifically for Iran or the Government of Iran and the goods or technology constitute ten percent or more of the end product’s total value.

Where are we now?

Despite the publicity surrounding the implementation of the JCPOA, very little has changed for the U.S. automotive sector. Existing sanctions will continue to impose broad prohibitions on Iranian transactions and the approval, facilitation and evasion provisions of the ITSR will continue to carry substantial risk for corporate groups that include U.S. persons. The possibility that sanctions may “snap back” further limits long term planning. Considering the broad scope of the Iran sanctions regulations and the limited relief provided, opportunities for U.S. persons will remain severely limited and any proposed transactions involving U.S.-owned or controlled entities must be evaluated with caution and appropriate due diligence and with awareness that strict compliance procedures will be required to avoid violations by U.S. persons.

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