

October 13, 2017

President Trump Announces Intent to “De-Certify” Iran’s Compliance with the Joint Comprehensive Plan of Action

New Policy Increases Potential for Sanctions Snapback and Related Compliance Risks

On October 13, 2017, President Trump announced that he will not certify Iran’s compliance with the Joint Comprehensive Plan of Action (JCPOA), the multi-lateral commitment under which the United States, European Union, and five other countries agreed to lift certain economic sanctions against Iran in exchange for Iran’s implementation of certain nuclear-related commitments.¹ Furthermore, the President announced that if a renegotiation of the JCPOA is unsuccessful, his administration will terminate the deal. The President’s announcement appears to be the culmination of his statements before and after his inauguration suggesting that he would “dismantle” or “renegotiate” the nuclear deal.²

Under the Iran Nuclear Agreement Review Act (INARA), the President’s failure to certify Iran’s compliance with the JCPOA triggers a 60-day window in which Congress could – but is not required to – enact “snapback” legislation that would quickly reimpose sanctions on Iran that were lifted pursuant to the JCPOA. In addition, even absent congressional action, the President has the authority to reimpose all or a subset of these sanctions.

We describe the implications of the President’s decision in more detail below, and outline its potential impact on U.S. and non-U.S. companies.

The JCPOA and the De-Certification Decision

As described in more detail in a prior Paul, Weiss memorandum,³ the United States lifted most of its nuclear-related secondary sanctions against Iran on JCPOA Implementation Day (January 16, 2016), allowing non-U.S. entities to engage in a wide variety of business activities (not involving a U.S. nexus) with Iran without the threat of being sanctioned by the United States. The Treasury Department’s Office of Foreign Assets Control (OFAC) also provided limited relief under primary sanctions, including the issuance of General License H, which authorizes non-U.S. companies owned or controlled by U.S. companies to engage in Iranian business under certain conditions.⁴ OFAC further adopted a favorable licensing policy toward requests for specific licenses for the export or re-export to Iran of commercial passenger aircraft and related parts and services.⁵ Additionally, OFAC authorized by general license the importation of Iranian carpets and food into the United States.⁶

The JCPOA provides for a multi-step resolution process should any of the participants determine that Iran has failed to meet its commitments under the JCPOA. This multi-lateral resolution process allows for the reimposition of previous United Nations Security Council resolutions — a snapback to the previous multilateral sanctions regime. In the United States, Congress's means of snapping back unilateral (U.S.) sanctions is largely governed by INARA.⁷ INARA — otherwise known as the Corker-Cardin bill — was enacted in 2015, before JCPOA negotiations concluded.

The President's decertification announcement came two days before a periodic deadline under the INARA to certify Iran's compliance with the JCPOA. Among other requirements, INARA requires the President to certify every 90 days that four conditions have been met:

1. Iran "is transparently, verifiably, and fully implementing the agreement";
2. Iran "has not committed a material breach with respect to the agreement or, if Iran has committed a material breach, Iran has cured the material breach";
3. Iran has not taken any action, including covert activities, that could significantly advance its nuclear weapons program"; and
4. "suspension of sanctions related to Iran pursuant to the agreement is (I) appropriate and proportionate to measures taken by Iran with respect to terminating its illicit nuclear program and (II) vital to the national security interests of the United States[.]"

Although the Trump administration previously certified Iran's compliance pursuant to INARA in April 2017 and July 2017, this time President Trump refused to certify Iran's compliance under the fourth certification requirement, stating that he would no longer certify that the suspension of sanctions under the JCPOA was "appropriate and proportionate" to measures taken by Iran with respect to terminating its illicit nuclear program. The President also accused Iran of multiple violations of the JCPOA, including a failure to meet expectations related to advanced centrifuges and intimidating international inspectors.

Standing alone, the President's failure to certify Iran's compliance does not impact the JCPOA. Instead, it triggers a 60-day period during which Congress is authorized — but not required — to consider the expedited re-imposition, or "snapback," of the sanctions previously lifted by the Obama Administration to fulfill the U.S.'s obligations under the JCPOA.⁸ If Congress chooses to introduce legislation to snapback sanctions within this 60-day review period, such legislation would be subject to expedited consideration procedures. These procedures include bypassing the Senate's traditional cloture vote requirements and allowing for snapback to proceed with only 50 votes. Such legislation would then need to be presented to the President for signature.

At this time, it is not clear whether Congress will pursue snapback legislation, though it is worth noting that even the most ardent opponents of the JCPOA have not committed to introducing such legislation, but rather view the 60-day period as providing the President increased leverage in negotiations with Iran.⁹ Senate Foreign Relations Committee Chairman Bob Corker and Senator Tom Cotton have announced their intention to introduce a bill that would reimpose sanctions if Iran comes within one year of obtaining a nuclear weapon. The bill would go through the regular committee process in which members of both parties would be able to offer amendments.

President Trump stated that if Congress does not reimpose sanctions, he himself will act to “terminate the JCPOA.” Even if Congress does not consider or pass snapback legislation pursuant to INARA, the President retains authority to snap back sanctions, partially or entirely, in other ways. For example, the President could simply decline to continue to waive the suspension of certain sanctions, as required by the JCPOA and as twice waived by the Obama Administration – with the first upcoming waiver deadline coming on January 12, 2018. Alternately, the President could re-designate all or some of the Iranian persons whose sanctioned status was lifted pursuant to the JCPOA, or otherwise broadly re-impose previously lifted nuclear-related sanctions on new, “non-nuclear” grounds. He could also direct OFAC to rescind General License H and/or the other JCPOA-related activities licensed by OFAC under the Obama Administration. In effect, the President has a number of means to reimpose sanctions without the cooperation of Congress, should he choose to use them.

Additional Actions Targeting Iran

In addition to the de-certification announcement regarding the JCPOA, President Trump also announced the Treasury Department’s designation of the Islamic Revolutionary Guard Corps (IRGC) in its entirety as a terrorist organization, pursuant to Executive Order 13224,¹⁰ as well as the statutory requirement imposed by the recently passed Countering America’s Adversaries Through Sanctions Act (“CAATSA”).¹¹

From a pure compliance perspective, the new designation of the IRGC is not a game-changer, as the IRGC is already an SDN designated under Weapons of Mass Destruction and human rights-related sanctions authorities. Additionally, even post Implementation Day, significant transactions with the IRGC have continued to subject non-U.S. persons to potential secondary sanctions.¹² However, the new designation serves as yet another warning to both U.S. and non-U.S. companies regarding the need to conduct enhanced due diligence on Iran-related transactions, as the IRGC is known to penetrate or control front companies in many key sectors of Iran’s economy.

Moreover, prior to today’s announcement, reports of the possibility of the designation of the IRGC as a terrorist organization – under the same sanctions authority targeting terrorist groups like al Qaeda and the Islamic State – had already inspired a furious reaction from Iranian authorities. Today’s designation will likely significantly ratchet up diplomatic tension between the U.S. and Iran; in this sense, like the de-

certification decision, the IRGC designation heightens the risk of a broader deterioration in U.S.-Iran relations that could lead to the collapse of the JCPOA.

Implications

The reaction to President Trump's new Iran policy remains to be seen – from Congress, from Iran, and from the other countries that are party to the JCPOA. While it is possible that the JCPOA continues to survive in the near or medium term, it appears increasingly likely that the deal may fall apart, resulting in the “snapback” of the sanctions relief that went into effect on Implementation Day.

During this period of increased uncertainty, companies currently conducting Iran-related business – or contemplating new such business – may want to seriously consider the risk that the prior U.S. sanctions will snapback into place (among others risks). While some companies have contractual provisions in their business arrangements designed to help address this risk, the practical operation of those provisions remains to be seen and may require increased diligence.

On December 15, 2016, under the Obama Administration, OFAC issued guidance that, in the event of snapback, it intends to work with U.S. and non-U.S. companies to minimize the impact of re-imposed sanctions on legitimate activities undertaken prior to snapback.¹³ Specifically, OFAC provided the following guidance:

- The U.S. government would provide non-U.S., non-Iranian persons a 180-day period to wind down operations in or business with Iran that was consistent with U.S. commitments under the JCPOA and undertaken pursuant to a written contract or agreement entered into prior to snapback;
- In the event that a non-U.S., non-Iranian person is owed payment at the time of snapback for goods or services fully provided or delivered to an Iranian counterparty prior to snapback pursuant to a written contract or written agreement entered into prior to snapback and such activities were consistent with U.S. sanctions in effect at the time of delivery or provision, the U.S. government would allow the non-U.S., non-Iranian person to receive payment for those goods or services according to the terms of the written contract or written agreement;¹⁴
- If a non-U.S., non-Iranian person is owed repayment for loans or credits extended to an Iranian counterparty prior to snapback pursuant to a written contract or written agreement entered into prior to snapback and such activities were consistent with U.S. sanctions in effect at the time the loans or credits were extended, the U.S. government would allow the non-U.S., non-Iranian person to receive repayment of the related debt or obligation according to the terms of the written contract or written agreement;¹⁵

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- To the extent that snapback results in the revocation of general or specific licenses issued by OFAC, the U.S. government would, consistent with the conditions described above, provide U.S. persons and U.S.-owned or -controlled foreign entities a 180-day period to wind down operations in or business involving Iran conducted pursuant to an OFAC authorization, and to receive payments according to the terms of the written contract or written agreement entered into prior to snapback for goods or services fully provided or delivered pursuant to an OFAC authorization prior to snapback;¹⁶

Moreover, OFAC's guidance cautioned that, outside of specified wind-down operations, the provision or delivery of additional goods or services and/or the extension of additional loans or credits to an Iranian counterparty after snapback, including pursuant to written contracts or written agreements entered into prior to snapback, may result in the imposition of U.S. sanctions unless such activities are exempt from regulation, authorized by OFAC, or not otherwise sanctionable.¹⁷

Under this guidance, it appears that, if snapback occurs, companies would need to act precipitously to wind down any provision of services or goods under existing contracts with Iranian counterparties, or seek specific licenses from OFAC to continue to engage in any activities that cannot be wound down within the requisite period. Note that this Obama Administration-era guidance is not binding on the Trump Administration.

Snapback of U.S. sanctions would likely cause considerable political tension with key U.S. allies (who continue to strongly support the JCPOA). Additionally, it could lead to disputes with U.S. allies regarding whether companies based in or operating within their territories should continue to do business with Iran in line with those countries' policies — despite the threat of U.S. penalties or sanctions. This may create additional compliance challenges for companies operating in multiple jurisdictions.

We will continue to monitor sanctions developments and look forward to providing you with further updates.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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¹ The full text of the JCPOA is available [here](#). The JCPOA is not a treaty or an executive agreement and does not carry the force of U.S. law. A Paul, Weiss memorandum describing the JCPOA and its implications is available [here](#).

² See Donald J. Trump, Speech to the American Israel Public Affairs Committee (Mar. 21, 2016), available [here](#).

³ We discuss sanctions relief under the JCPOA in a previous Paul, Weiss memorandum, available [here](#).

⁴ GL No. H, available [here](#).

⁵ See Statement of Licensing Policy for Activities Related to the Export or Re-Export to Iran of Commercial Passenger Aircraft and Related Parts and Services, Department of the Treasury (Jan. 16, 2016), available [here](#). OFAC subsequently issued general licenses authorizing the re-exportation of certain civil aircraft to Iran on Temporary Sojourn and Related Transactions (see GL No. J-1, available [here](#)) and 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 Services (see GL No. I, available [here](#)).

⁶ 15 C.F.R. 560.534.

⁷ See 42 U.S.C § 2160(e). The full text of the Iran Nuclear Agreement Review Act of 2015 is available [here](#).

⁸ The 60-day period is measured in calendar days. *Id.* § 2160(e)(1)(A).

⁹ For example, in a widely reported October 3, 2017 speech on Iran policy, Senator Tom Cotton (R-AR.) stated:

I have no intention right now to introduce snapback sanctions legislation on October 16th. That 60-day window is a relatively short period in which we can do what we already have the power to do, which is impose sanctions at any time. But the president doesn't need Congress to do that either. He holds in his hands, still, the power to reimpose all waived sanctions under both U.S. law and U.N. Security Council resolutions. Now, I'm not sure that 60 days is long enough to conduct the kind of coercive diplomacy I've mentioned. If it's obvious by the end of that 60-day period that the course of action I've recommended will not work, then perhaps we will have to reimpose sanctions then. But I'm also willing to give the administration and our allies in Europe and the Middle East more time than just 60 days to try to get a better deal.

See, Council on Foreign Relations, "A Conversation on the Iran Nuclear Deal with Senator Tom Cotton," (Oct. 3, 2017), available [here](#).

¹⁰ Executive Order 13224 prohibits transactions with (and blocks the assets of) persons who commit or threaten to commit international terrorism.

¹¹ We describe CAATSA's Iran-related provisions in a previous Paul, Weiss memorandum, available [here](#). While CAATSA directed the President to designate the IRGC as a terrorist organization by October 30, 2017, it also included waiver authority allowing the President to refuse to do so.

¹² For example, the IRGC was already designated under Executive Order 13382, which targets proliferators of weapons of mass destruction and their supporters. This came on top of the 2007 designation of the IRGC-Qods Force (a subset of the IRGC) as a terrorist organization pursuant to Executive Order 13224.

¹³ See FAQ M.5, available [here](#). It bears remembering that OFAC's guidance was issued under the prior Administration and there is a possibility that it could be revised.

¹⁴ Any payments would need to be consistent with U.S. sanctions, including that payments could not involve U.S. persons or the U.S. financial system, unless the transactions are exempt from regulation or authorized by OFAC.

¹⁵ FAQ M.5.

¹⁶ *Id.*

¹⁷ *Id.*