May 9, 2018

THE TRUMP ADMINISTRATION PULLS THE PLUG ON THE IRAN NUCLEAR AGREEMENT

To Our Clients and Friends:

On May 8, 2018, President Donald Trump announced his decision to abandon the 2015 Iran nuclear deal—the Joint Comprehensive Plan of Action (the "JCPOA")—and re-impose U.S. nuclear-related sanctions on the Iranian regime.[1] Though it came as no surprise, the decision went further than many observers had anticipated. Notably, under the terms of the JCPOA, U.S. sanctions were held in abeyance through a series of waivers that were periodically renewed by both the Obama and Trump administrations. Many commentators expected the current administration to discontinue only waivers of sanctions on the Iranian financial sector that were set to expire on May 12, 2018, leaving other sanctions untouched.[2] Instead, the Trump administration re-imposed all nuclear related sanctions on Iran, staggering the implementation over the course of the next six months. As described in an initial volley of frequently asked questions ("FAQs") set forth by the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC"), the re-imposition of nuclear sanctions will be subject to certain 90 and 180 day wind-down periods that expire on August 6, 2018 and November 4, 2018, respectively.[3]

Background

The JCPOA

The JCPOA was a purposefully limited accord focusing only on Iran's nuclear activities and the international community's nuclear-related sanctions. Prior to the JCPOA, the international community, including the United Nations, the European Union, and the United States imposed substantial sanctions on Iran of varying scope and severity. The European Union had implemented an oil embargo and U.S. nuclear sanctions had included the "blacklisting" of more than 700 individuals and entities on OFAC's list of Specially Designated Nationals and Blocked Persons ("SDN List"), as well as economic restrictions imposed on entities under U.S. jurisdiction ("Primary Sanctions") and restrictions on entities outside U.S. jurisdiction ("Secondary Sanctions"). Secondary Sanctions threatened non-U.S. entities with limitations on their access to the U.S. market if they transacted with various Iranian entities. Broadly, Secondary Sanctions forced non-U.S. entities to decide whether they were going to deal with Iran or with the United States. They could not do both.

The JCPOA, signed between Iran and the five permanent members of the United Nations Security Council (the United States, the United Kingdom, France, Russia, and China) and Germany (the "P5+1") in 2015, committed both sides to certain obligations related to Iran's nuclear development.[4] Iran committed to various limitations on its nuclear program, and in return the international community (the P5+1 alongside the European Union and the United Nations) committed to relieving substantial portions of the sanctions that had been placed on Iran to address that country's nuclear activities. This relief included the United States' commitment to ease certain Secondary Sanctions, thus opening up the Iranian economy for non-U.S. persons without risking their access to the U.S. market to pursue Iranian deals. This sanctions relief came into effect in January 2016 (on "Implementation Day") when the IAEA determined that Iran was compliant with the initial nuclear components of the JCPOA.

Criticism of the Deal

Donald Trump made his opposition to the JCPOA a cornerstone of his presidential campaign. On occasions too numerous to count, then candidate and now President Trump criticized the deal and indicated his intent to withdraw from the JCPOA unless it was "fixed" to address his concerns, including the deal's silence on Iran's ballistic missile development and the existence of certain "sunset provisions" (after which any remaining sanctions would be permanently lifted).[5]

There were at least two challenges built into the JCPOA that critics—including President Trump—have seized upon. First, in an effort to reach an agreement to limit Iran's nuclear capabilities, the Obama administration and other JCPOA parties not only included "sunset" provisions in the accord after which certain restrictions on Iran would be lifted, but also drew a distinction between Iran's compliance with the nuclear deal and its conduct in other areas (including its support for groups the United States deems terrorists, its repression of its citizens, its support for Syrian President Bashar al-Assad, and its conventional weapons development programs). Supporters of the deal argued that addressing the immediate nuclear weapons risk was paramount—this necessitated both the sunset provisions and the absence of addressing other troubling activities. Critics of the deal, however, including some powerful Congressional leaders and President Trump, derided these compromises and claimed not only that the sunset periods were too brief to be meaningful, but also that by ignoring non-nuclear issues Iran was given both a free pass to continue its bad behavior and indeed the ability to fund that bad behavior out of proceeds received from the nuclear-related sanctions relief.

A second challenge to the deal came from the fact that while the other parties to the JCPOA agreed to remove almost all of their sanctions on Iran, U.S. relief was far more surgical and reversible. This was recognized by all parties to the JCPOA but so long as President Obama (or a successor with similar political views) was in office, it was thought to be a manageable limitation. One of the key limits to the U.S. relief was that U.S. persons—including financial institutions and companies—have remained broadly prohibited from engaging with Iran even after the JCPOA was implemented in 2016. Instead, the principal relief the U.S. offered was on the sanctions risks posed to non-U.S. parties pursuant to Secondary Sanctions and related measures. As a consequence, it has remained a challenge for non-U.S. persons to fully engage with Iran due to the continued inability to leverage U.S. banks, insurance and other institutions that remain central to the bulk of cross-border finance and trade.

Changes to U.S. Sanctions Regarding Iran

Wind-Down Periods

In conjunction with the May 8, 2018 announcement, the President issued a National Security Presidential Memorandum ("NSPM") directing the Secretary of State and the Secretary of the Treasury to prepare immediately for the re-imposition of all of the U.S. sanctions lifted or waived in connection with the JCPOA, to be accomplished as expeditiously as possible and in no case later than 180 days from the date of the NSPM.

According to FAQs published by OFAC, the 90-day wind-down period will apply to sanctions on:[6]

- The purchase and acquisition of U.S. dollar banknotes by the Government of Iran;
- Gold and precious metals;
- Graphite, raw or semi-finished metals such as aluminum and steel;
- Coal;
- Software for integrating industrial processes;
- Iranian rials;
- Iranian sovereign debt; and
- Iran's automobile sector.

At the end of the 90-day wind-down period, the U.S. government will also revoke authorizations to import into the United States Iranian carpets and foodstuffs and to sell to Iran commercial passenger aircraft and related parts and services.[7]

The longer 180-day wind-down period will apply to sanctions on:[8]

- Iranian port operators, shipping and shipbuilding;
- Petroleum-related transactions;
- Transactions by foreign financial institutions with the Central Bank of Iran and designated Iranian financial institutions;
- Provision of specialized financial messaging services to the Central Bank of Iran and certain Iranian financial institutions;
- Underwriting services, insurance and reinsurance; and
- Iran's energy sector.

At the end of the 180-day wind-down period, the U.S. government will also revoke General License H, which authorizes foreign entities of U.S. companies to do business with Iran, and the U.S. government will re-impose sanctions against individuals and entities removed from the SDN List on Implementation Day.[9]

The nature and scope of the "wind-down" period resulted in immediate, and significant, concerns from companies seeking to comply with U.S. sanctions. OFAC has clarified that, in the event a non-U.S. non-Iranian person is owed payment after the conclusion of the wind-down period for goods or services that were provided lawfully therein, the U.S. government would allow that person to receive payment according to the terms of the written contract or written agreement.[10] Similarly, if a non-U.S., non-Iranian person is owed repayment after the expiration of the wind-down periods for loans or credits extended to an Iranian counterparty prior to the end of the 90-day or 180-day wind-down period, as applicable, provided that such loans or credits were extended pursuant to a written contract or written agreement entered into prior to May 8, 2018, 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.[11] These allowances are designed for such parties to be made whole for debts and obligations owed or due to them for goods or services fully provided or delivered or loans or credit extended to an Iranian party prior to the end of the wind-down periods. Notably, 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.[12]

Changes to the SDN List

In assessing the impact of the "re-designations" under the SDN List, it is useful to note the restrictions that remained in place after the JCPOA was implemented. For example, although they were not classified as SDNs, the property and interests in property of persons of the Government of Iran and Iranian financial institutions remained blocked if they are in or come within the United States or if they are in or come within the possession or control of a U.S. person, wherever located. As a result, U.S. persons were broadly prohibited from engaging in transactions or dealing with the Government of Iran and Iranian financial institutions, while non-U.S. persons could deal with them in non-dollar currencies.[13] But under the new policy, such persons will be moved to the SDN List, which means that non-U.S. persons who continue to deal with them will be subject to Secondary Sanctions.[14] OFAC indicated that it will not add such persons to the SDN List immediately, so as "to allow for the orderly wind down by non-U.S., non-Iranian persons of activities that had been undertaken" consistent with the prior regulations. This change will happen no later than November 5, 2018.[15]

Diplomatic Next Steps

Yesterday's announcement followed significant diplomatic efforts to save the deal. Trump's January 2018 announcement that he would extend existing waivers until May 2018 set off a feverish round of negotiations with European partners, culminating in recent visits by French President Emmanuel Macron and German Chancellor Angela Merkel to try to persuade the Trump administration to remain in the deal. Many expect those negotiations to continue, as the global community is significantly more exposed to the Iranian market than U.S. persons, who continued to be subject to sanctions post-JCPOA. Indeed, since sanctions were suspended in early 2016, Iran's oil exports have increased dramatically, reaching approximately two million barrels per day in 2017. European imports from Iran rose by nearly 800 percent between 2015 and 2017 (primarily imports of Iranian oil), while European exports to Iran rose by more than four billion euros ($5 billion) annually over the same period.[16] Major European companies have also resumed investing in Iran—France's Total has announced plans to invest $1 billion in one of Iran's largest offshore gas fields.[17] Early press reports following President Trump's May 2018 announcement, if accurate, suggest that Iran and the other JCPOA parties remain committed to the underlying deal and plan to begin prompt negotiations to salvage the JCPOA.[18]

Because full re-imposition of U.S. sanctions is not scheduled to take effect for another six months, it is entirely possible that the announcement by President Trump will serve as an impetus to negotiations that bring Iran and the rest of the P5+1 to the table. Such an approach could mirror the Trump administration's recent tactics with respect to steel and aluminum tariffs, where a splashy public announcement is followed by a series of repeated extensions as the administration seeks to extract further concessions. One point of leverage the EU may have in these negotiations is the possibility of extending the existing "Blocking Regulation,"[19] which makes it unlawful for EU persons to comply with a specific list of U.S. sanctions laws against Cuba, Libya and Iran as of 1996. That list could be extended to capture U.S. sanctions against Iran in respect of which the JCPOA offered relief. This possibility has been mentioned by senior EU officials a number of times since late last year, including by the EU ambassador to the United States in September 2017,[20] and the head of the Iranian Taskforce in the EU's External Action Service in February 2018.[21]

For now, the EU remains committed to the deal. On the same day that President Trump announced the change in Iran sanctions policy, European Union High Representative and Vice-President Federica Mogherini remarked that "[a]s long as Iran continues to implement its nuclear related commitments, as it is doing so far, the European Union will remain committed to the continued full and effective implementation of the nuclear deal. . . . The lifting of nuclear related sanctions is an essential part of the agreement. The European Union has repeatedly stressed that the lifting of nuclear related sanctions has not only a positive impact on trade and economic relations with Iran, but also and mainly crucial benefits for the Iranian people. The European Union is fully committed to ensuring that this continues to be delivered on."[22]

Notably, the Trump administration may be hard pressed to convince Iran's most significant trading partners —many of whom are mired in disputes with the United States—to add pressure on Tehran. China and India are Iran's largest importers, and China appears particularly unlikely to reduce its reliance on Iranian oil given heightened tensions between Beijing and Washington over bilateral trade and investment issues. Furthermore, the Trump administration would need to convince Russia to halt plans to invest potentially tens of billions of dollars in Iran's oil and gas sector, and the Trump administration's strained ties with Turkey make it far from clear that Turkey would cooperate with renewed U.S. pressure on Iran.[23] Furthermore, the expected rise in oil prices as a result of the withdrawal is seen as a boon to Russia, whose economy is heavily dependent on petroleum and natural gas exports.

Alternatively, U.S. allies in the Middle East, led by Israel and Saudi Arabia, support the Trump administration and have argued that Iran threatens their own national security. Last week Israeli Prime Minister Benjamin Netanyahu unveiled documents regarding Iran's covert nuclear weapons project from the 1990s as proof that Iran lied about the extent of its program, a move that was widely criticized as an effort to influence U.S. public opinion with information that was widely known and had provided the impetus for the negotiations in the first place. The U.S. intelligence community had confirmed the weapons program ended in 2003.

Furthermore, the Trump administration could have a difficult time persuading countries to cut commercial ties with Iran in the absence of any international legal basis for doing so. Although U.S. sanctions on Iran have more force than United Nations sanctions, the latter created an important international framework that the United States and other countries could expand on. Most of these sanctions were repealed with the passage of UN Security Council Resolution 2231 (2015), which endorsed the JCPOA. The "snapback" mechanism in UNSCR 2231 would enable the United States to unilaterally require the restoration of UN sanctions on Iran under international law. But as the UN's nuclear watchdog has repeatedly confirmed Iran's compliance with the JCPOA's nuclear terms, the diplomatic costs of unilaterally requiring UN sanctions' reactivation would likely outweigh any benefits.[24]

Although the JCPOA contains no provisions for withdrawal, Iran has long threatened to resume its nuclear program if the United States reneges on its obligations by reinstituting sanctions.[25] In the immediate aftermath of the Trump administration's May 8 announcement, however, Iranian President Hassan Rouhani said that his government remains committed to maintaining the nuclear deal with other world powers. The Iranian leader said he had directed his diplomats to negotiate with the deal's remaining signatories—including European countries, Russia and China—and that the JCPOA could survive without the United States. Rouhani, who had made the deal his signature achievement, faces stiff pressure from the hardline elements within Iran who objected to the deal. If Iran resumes uranium enrichment activities, that could move European parties to walk away from the negotiating table, thereby dooming the JCPOA on which President Rouhani has staked so much political capital and empowering more hardline elements within the Iranian regime.[26]

Conclusion

Although many expect negotiations regarding the fate of the JCPOA to continue over the next six months, the outcome of such deliberations is highly uncertain. Notably, it took the combined efforts of the Bush and Obama administrations to convince foreign governments and companies to join the United States in imposing sanctions on Iran, and such coordinated actions are unlikely to be replicated in the wake of leaving the JCPOA. As the Trump administration negotiates with the rest of the parties to the JCPOA, it is possible that the U.S. administration may exercise discretion and decline to bring enforcement actions against non-U.S. persons that continue to do business with Iran. That would mitigate the immediate impact of re-imposing sanctions.

The precise nature of any EU response remains to be seen. Although potential blocking regulations may serve as leverage in negotiations, the impact would be severe for European companies seeking to comply with both U.S. and European laws. Whether the position of the United Kingdom will remain aligned with its European partners once it has left the EU is another imponderable,[27] although the U.K., French and German governments have projected a united front in re-affirming their commitment to the JCPOA,[28] and the U.K. is a signatory to the JCPOA separate from its status as an EU member state. Further strains to the U.S.–EU relationship are likely if the U.S. were to bring enforcement actions against EU persons for alleged breaches of re-imposed sanctions. The EU has stated that "it is determined to act in accordance with its security interests and to protect its economic investments."[29] However, what this might mean in practice remains unclear.

---

[1] Press Release, White House, *Remarks by President Trump on the Joint Comprehensive Plan of Action* (May 8, 2018), *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action; *see also* Presidential Memorandum, *Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon* (May 8, 2018), *available at* https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon.

[2] These sanctions were enacted on the last day of 2011, when President Obama signed into law the National Defense Authorization Act for Fiscal Year 2012 ("NDAA"). Included within the NDAA is a measure that designated the entire Iranian financial sector as a primary money laundering concern, which effectively required the President to freeze the assets of Iranian financial institutions and prohibit all transactions with respect to Iranian financial institutions' property and interests in property if the property or interest in property comes within the United States' jurisdiction or the possession and control of a United States person. In addition, the measure broadly authorized the President to impose sanctions on the Central Bank of Iran.

[3] Press Release, U.S. Dep't of Treasury, *Statement by Secretary Steven T. Mnuchin on Iran Decision* (May 8, 2018), *available at* https://home.treasury.gov/news/press-releases/sm0382.

[4] U.S. Dep't of State, *Joint Comprehensive Plan of Action* (July 14, 2015), *available at* https://www.state.gov/documents/organization/245317.pdf.

[5] Press Release, White House, *Statement by the President on the Iran Nuclear Deal* (Jan. 12, 2018), *available at* https://www.whitehouse.gov/briefings-statements/statement-president-iran-nuclear-deal.

[6] U.S. Dep't of Treasury, *Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA)* (May 8, 2018), *available at* https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf, FAQ No. 1.2.

[7] *Id.*

[8] OFAC FAQ No. 1.3.

[9] *Id.*

[10] OFAC FAQ No. 2.1.

[11] *Id*.

[12] *Id*.

[13] E.O. 13599, 77 Fed. Reg. 6659 (Feb. 5, 2012); U.S. Dep't of Treasury, Resource Center, OFAC, *JCPOA-related Designation Removals*, *JCPOA Designation Updates*, *Foreign Sanctions Evaders Removals, NS-ISA List Removals; 13599 List Changes* (Jan. 16, 2016), *available at* https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/updated_names.aspx.

[14] OFAC FAQ No. 3.

[15] *Id*. ("Beginning on November 5, 2018, activities with most persons moved from the E.O. 13599 List to the SDN List will be subject to secondary sanctions. Such persons will have a notation of "Additional Sanctions Information – Subject to Secondary Sanctions" in their SDN List entry.")

[16] Peter Harrell, *The Challenge of Reinstating Sanctions Against Iran*, Foreign Affairs (May 4, 2018), *available at* https://www.foreignaffairs.com/articles/iran/2018-05-04/challenge-reinstating-sanctions-against-iran?cid=int-fls&pgtype=hpg.

[17] *Id.*

[18] *See, e.g.*, Erin Cunningham & Bijan Sabbagh, *Iran to Negotiate with Europeans, Russia and China about Remaining in Nuclear Deal*, Wash. Post (May 8, 2018), *available at* https://wapo.st/2HWaI9w?tid=ss_tw&utm_term=.ed12421ad6a6; James McAuley, *After Trump Says U.S. Will Withdraw from Iran Deal, Allies Say They'll Try to Save It*, Wash. Post (May 8, 2018), *available at* https://wapo.st/2rokYfI?tid=ss_tw&utm_term=.291cd9490f2e.

[19] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.

[20] Jessica Schulberg, *Europe Considering Blocking Iran Sanctions if U.S. Leaves Nuclear Deal, EU Ambassador Says*, Huffington Post (Sept. 26, 2017), *available at* https://www.huffingtonpost.co.uk/entry/europe-iran-sanctions-nuclear-deal_us_59c9772ce4b0cdc77333e758.

[21] John Irish & Parisa Hafezi, *EU could impose blocking regulations if U.S. pulls out of Iran deal*, Reuters, (Feb. 8, 2018), *available at* https://uk.reuters.com/article/uk-iran-nuclear-eu/eu-could-impose-blocking-regulations-if-u-s-pulls-out-of-iran-deal-idUKKBN1FS2F0.

[22] Press Release, European Union External Action Service, *Remarks by HR/VP Mogherini on the statement by US President Trump regarding the Iran nuclear deal (JCPOA)* (May 8, 2018).

[23] Harrell, *see supra* n. 16.

[24] *Id.*

[25] The last sentence of the JCPOA expressly provides: "Iran has stated that if sanctions are reinstated in whole or in part, Iran will treat that as grounds to cease performing its commitments under this JCPOA in whole or in part."

[26] *See* Erin Cunningham & Bijan Sabbagh, *Iran to Negotiate with Europeans, Russia and China about Remaining in Nuclear Deal*, Wash. Post (May 8, 2018), *available at* https://wapo.st/2HWaI9w?tid=ss_tw&utm_term=.ed12421ad6a6; James McAuley, *After Trump Says U.S. Will Withdraw from Iran Deal, Allies Say They'll Try to Save It*, Wash. Post (May 8, 2018), *available at* https://wapo.st/2rokYfI?tid=ss_tw&utm_term=.291cd9490f2e.

[27] While the U.K. is currently in the EU, it will be leaving the EU shortly, at which time it may seek to negotiate trade deals with a variety of governments. Particularly if negotiations over the U.K.'s exit from the EU were to become fractious, it is possible a post-Brexit U.K. could use its stance on the JCPOA as a bargaining counter in negotiations with the Trump administration over a new U.K.–U.S. trade deal.

[28] Press Release, U.K. Prime Minister's Office, *Joint statement from Prime Minister May, Chancellor Merkel and President Macron following President Trump's statement on Iran* (May 8, 2018), *available at* https://www.gov.uk/government/news/joint-statement-from-prime-minister-may-chancellor-merkel-and-president-macron-following-president-trumps-statement-on-iran.

[29] Press Release, EU External Action Serv., *Remarks by HR/VP Mogherini on the statement by US President Trump regarding the Iran nuclear deal (JCPOA)* (May 8, 2018.

■ ■ ■ ■ ■

The following Gibson Dunn lawyers assisted in preparing this client update: Judith Alison Lee, Adam Smith, Patrick Doris, Mark Handley, Stephanie Connor, Richard Roeder, and Scott Toussaint.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the above developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders and members of the firm's International Trade Group:

United States:
Judith Alison Lee - Co-Chair, International Trade Practice, Washington, D.C. (+1 202-887-3591, jalee@gibsondunn.com)
Ronald Kirk - Co-Chair, International Trade Practice, Dallas (+1 214-698-3295, rkirk@gibsondunn.com)
Jose W. Fernandez - New York (+1 212-351-2376, jfernandez@gibsondunn.com)
Marcellus A. McRae - Los Angeles (+1 213-229-7675, mmcrae@gibsondunn.com)
Daniel P. Chung - Washington, D.C. (+1 202-887-3729, dchung@gibsondunn.com)
Adam M. Smith - Washington, D.C. (+1 202-887-3547, asmith@gibsondunn.com)

Christopher T. Timura - Washington, D.C. (+1 202-887-3690, ctimura@gibsondunn.com)
Stephanie L. Connor - Washington, D.C. (+1 202-955-8586, sconnor@gibsondunn.com)
Kamola Kobildjanova - Palo Alto (+1 650-849-5291, kkobildjanova@gibsondunn.com)
Courtney M. Brown - Washington, D.C. (+1 202-955-8685, cmbrown@gibsondunn.com)
Laura R. Cole - Washington, D.C. (+1 202-887-3787, lcole@gibsondunn.com)
Scott R. Toussaint - Palo Alto (+1 650-849-5320, stoussaint@gibsondunn.com)

Europe:
Peter Alexiadis - Brussels (+32 2 554 72 00, palexiadis@gibsondunn.com)
Attila Borsos - Brussels (+32 2 554 72 10, aborsos@gibsondunn.com)
Patrick Doris - London (+44 (0)207 071 4276, pdoris@gibsondunn.com)
Penny Madden - London (+44 (0)20 7071 4226, pmadden@gibsondunn.com)
Mark Handley - London (+44 (0)207 071 4277, mhandley@gibsondunn.com)
Benno Schwarz - Munich (+49 89 189 33 110, bschwarz@gibsondunn.com)
Richard W. Roeder - Munich (+49 89 189 33-160, rroeder@gibsondunn.com)