

## UNITED STATES CEASES PARTICIPATION IN IRAN NUCLEAR DEAL AND WILL IMPLEMENT PRE-DEAL SANCTIONS REGIME – PRACTICAL CONSIDERATIONS

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### U.S. International Trade Alert

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On May 8, 2018, President Trump formally announced that the United States would cease participation in the Iran nuclear deal, also called the Joint Comprehensive Plan of Action ("JCPOA"). In accordance with a Presidential Memorandum signed the same day, the Department of the Treasury's Office of Foreign Assets Control ("OFAC") issued a statement and accompanying FAQs explaining the impact of this decision on the sanctions relief that the United States instituted in connection with the JCPOA's implementation in January 2016.

Although there are some narrow exceptions, broadly speaking, U.S. sanctions will revert to the measures in place prior to adoption of the JCPOA on January 16, 2016. The administration's decision will largely impact (i) foreign/non-U.S. Persons, who will once again be subject to the risk of a broad spectrum of "secondary" sanctions for a wider range of Iran-related activity (which have been periodically waived in accordance with the JCPOA), and (ii) non-U.S. entities owned or controlled by U.S. Persons, who have been able to engage in Iran transactions, with certain exceptions, under an OFAC general authorization that was issued in conjunction with the JCPOA ("General License H"). The JCPOA did not roll back "primary" sanctions barring transactions from the United States or by "U.S. Persons" (i.e., U.S. companies, U.S. citizens and permanent residents wherever located or employed, and non-U.S. persons/entities while in or operating within the United States) involving Iran, which remained in effect after entry into the JCPOA. However, the administration's decision will result in rescission of certain general authorizations and favorable licensing policies that have allowed U.S. Persons to engage in narrowly targeted types of Iran transactions.

Entities that are engaged in Iran-related transactions and activities should carefully study the potential impact of withdrawal from the JCPOA to determine whether those activities will become prohibited or could expose them to risk of secondary sanctions.

OFAC is expected to provide additional guidance as well as general authorizations that will address the wind-down of transactions that will now be prohibited or sanctionable. The following is our initial analysis regarding the effect of the U.S. decision to cease participating in the JCPOA.

### REIMPLEMENTATION PROCESS

The United States will restore nearly all of the sanctions that were in effect prior to the implementation of the

JCPOA in January 2016, based on a 90- or 180-day timeline depending upon the specific measure, with this process to be completed by November 4, 2018. To facilitate this process, OFAC will issue general authorizations to permit activities necessary to wind down soon-to-be prohibited or sanctionable activities within the relevant time period. These authorizations will likely cover the wind-down of contracts and agreements already in place prior to May 8, but will not authorize entry into new contracts or agreements.

## Secondary Sanctions

The United States will reauthorize the imposition of secondary sanctions for additional Iran-related activities by ceasing the periodic waiver of those sanctions that had been granted by President Obama and then President Trump in accordance with the waiver provisions in the relevant sanctions legislation. Upon adoption of the JCPOA, the United States had substantially limited the range of Iran related activities that could lead to secondary sanctions. Secondary sanctions are sanctions that can be imposed at the discretion of the U.S. government on non-U.S. Persons for certain Iran-related transactions, even if those transactions do not involve the United States, U.S. Persons, or U.S. goods, technology, or services. In general, the U.S. government has discretion to impose a broad spectrum of measures, from relatively limited restrictions, such as barring a sanctioned entity from U.S. government contracting and Export-Import Bank financing, to severe blocking-type sanctions, such as a bar on dealings in the U.S. financial sector.

The Iran secondary sanctions will be restored after a 90- or 180-day wind-down period, as follows:

After a 90-day period (i.e., after August 6, 2018), secondary sanctions can be imposed for transactions that involve the following, including associated services:

- The purchase or acquisition of U.S. dollar banknotes by the Iranian government;
- Iranian trade in gold or precious metals;
- The direct or indirect sale, supply, or transfer to or from Iran of graphite, raw, or semi-finished metals such as aluminum and steel, coal, and software for integrating industrial processes;
- Significant transactions related to the purchase or sale of Iranian rials, or the maintenance of significant funds or accounts outside the territory of Iran denominated in the Iranian rial;
- The purchase, subscription to, or facilitation of the issuance of Iranian sovereign debt; and
- The Iranian automotive sector.

After a 180-day period (i.e., after November 4, 2018), secondary sanctions can be imposed for transactions that involve the following, including associated services:

- Iranian port operators and shipping and shipbuilding sectors, including on the Islamic Republic of Iran Shipping Lines ("IRISL"), South Shipping Line Iran, or their affiliates;
- Petroleum-related transactions with, among others, the National Iranian Oil Company ("NIOC"), Naftiran Intertrade Company ("NICO"), and National Iranian Tanker Company ("NITC"), including the purchase of petroleum, petroleum products, or petrochemical products from Iran;

- Transactions by foreign financial institutions with the Central Bank of Iran and designated Iranian financial institutions under Section 1245 of the National Defense Authorization Act for Fiscal Year 2012;
- The provision of specialized financial messaging services to the Central Bank of Iran and Iranian financial institutions described in Section 104(c)(2)(E)(ii) of the Comprehensive Iran Sanctions and Divestment Act of 2010;
- The provision of underwriting services, insurance, or reinsurance; and
- The Iranian energy sector.

As noted above, not all Iran secondary sanctions were waived with the JCPOA. The United States has continued to apply secondary sanctions against persons who, inter alia, conduct business with Iranian persons designated on the OFAC-enforced Specially Designated Nationals and Blocked Persons List ("SDN List"), including the Islamic Revolutionary Guard Corps and its designated agents and affiliates, as well as other persons designated on the SDN List for activities in connection with Iran's proliferation of weapons of mass destruction or Iran's support for international terrorism. These secondary sanctions will continue to be imposed.

## Primary Sanctions

While the United States did not lift its "primary" sanctions affecting U.S. Persons with implementation of the JCPOA, it did issue certain general authorizations and favorable licensing policies that will also now be rescinded, as follows:

Following a 90-day wind-down period (i.e., after August 6, 2018), OFAC will revoke the following JCPOA-related authorizations:

- All specific licenses that OFAC issued pursuant to the Statement of Licensing Policy for Activities Related to the Export or Re-export to Iran of Commercial Passenger Aircraft and Related Parts and Services ("Commercial Aircraft Licensing Policy") (OFAC will, however, continue to consider license applications related to flight safety);
- General License "I," which permits the negotiation of contingent contracts eligible for authorization under the Commercial Aircraft Licensing Policy; and
- The general licenses incorporated in the Iranian Transactions and Sanctions Regulations ("ITSR"), 31 C.F.R. Part 560, that permit the importation into the United States of certain Iranian-origin carpets and foodstuffs and related financial transactions.

As noted above, General License H will also be revoked. General License H has permitted non-U.S. entities that are "owned or controlled" by U.S. Persons (e.g., subsidiaries of U.S. companies legally established and located outside the United States) to engage in Iran-related transactions under certain restrictions. General License H's revocation will put non-U.S. owned/controlled entities back under the U.S. Person-type prohibitions that were imposed with the Iran Threat Reduction and Syria Human Rights Act of 2012. OFAC will issue authorizations to cover permitted wind-down operations, including the receipt of payments. The wind-down authorization is expected to be effective for 180 days (i.e., until November 4, 2018).

## Restricted Parties



In addition to the reimplementation of sanctions, the United States' decision to cease participation in the JCPOA also triggers the redesignation of certain restricted parties associated with Iran as SDNs. No later than November 5, 2018, OFAC expects to redesignate on the SDN List certain Iranian government entities and persons who had been removed from the SDN List with the adoption of the JCPOA in 2016 (these persons have been put on a list called the "E.O. 13599 List"). This will reapply SDN restrictions to approximately 250 Iranian individuals and entities, including major Iranian banks, shipping companies, and other businesses. As U.S. Persons have been prohibited from dealing with E.O. 13599 List persons under the primary Iran sanctions, this development will primarily affect non-U.S. Persons, as secondary sanctions can be imposed for dealing with Iranian SDNs.

## **EUROPEAN REACTIONS TO PRESIDENT TRUMP'S DECISION TO WITHDRAW FROM THE JCPOA**

On May 8, 2018, UK's Prime Minister Theresa May, Germany's Chancellor Angela Merkel, and France's President Emmanuel Macron issued a joint statement expressing regret regarding President Trump's decision to pull out of the JCPOA. They collectively emphasized their continuing commitment to the deal and to maintaining the sanctions relief to Iran, so long as Iran remains in compliance with the terms of the deal.

The three leaders stressed that the JCPOA remains important for the shared security of their countries and was unanimously endorsed by UN Security Council Resolution 2231. As a result, they urged all the parties involved to remain committed to the full implementation of that resolution, which "remains the binding international legal framework for the resolution of the dispute about the Iranian nuclear programme," and to act in a spirit of responsibility.

On May 9, 2018, in a declaration on behalf of the European Union ("EU"), the EU's High Representative for Foreign Policy and Security and Commission Vice-President, Federica Mogherini, also expressed regrets about President Trump's May 8 announcement and confirmed that the EU will remain committed to the full and effective implementation of the JCPOA as long as Iran continues to implement its nuclear-related commitments.

In addition, several politicians, diplomats, and businessmen expressed concerns about the potential impact of the secondary sanctions on EU businesses and on their existing trade deals with Iran. EU countries plan to use the time before the U.S. sanctions are fully reinstated to obtain exemptions for EU companies, but it is unclear whether they will be successful.

In response to the United States' decision to exit the JCPOA, some have suggested that the EU adopt specific countermeasures against the extraterritorial application of the U.S. sanctions by applying the so-called EU Blocking Regulation of 1996. Under this regulatory programme, the EU would prohibit EU entities and courts from applying or taking actions to comply with the U.S. sanctions. Such blocking measures have been used before, specifically in relation to the U.S. sanctions against Cuba, and would have the effect of putting political pressure on the U.S. administration against exercising the application of secondary sanctions. However, it would also force EU companies to decide between noncompliance with either the United States' sanctions regime or the EU Blocking Regulation. Although this avenue would be legally feasible, it is not yet clear whether EU member states will agree to adopt these measures. Also, it is uncertain how such a blocking measure would operate in this context because U.S. secondary sanctions are not per se prohibitions or restrictions imposed against non-U.S.

Persons that purport to sanction certain conduct considered illegal trade under U.S. law. Rather, the secondary sanctions are unilaterally imposed measures reflecting U.S. disapproval of such trade.

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The International Trade practice group of K&L Gates is available to assist with these developments and with questions regarding compliance with other international trade laws.

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