

International Trade Alert

November 1, 2017

Key Points:

- Effective October 13, 2017, President Trump declined to provide certification that the JCPOA is in the United States' national interest. Following this "decertification," the U.S. Congress has 60 days in which to introduce expedited, filibuster-proof legislation to reinstate nuclear sanctions against Iran, and it remains to be seen what Congress will do by mid-December.
- President Trump and key members of Congress have called for legislative amendments to provide a basis for automatic snapback of U.S. sanctions that are currently suspended under the JCPOA under certain circumstances and unilateral U.S. elimination of sunset provisions in the Iran nuclear deal.
- In conjunction with nonrecertification of the JCPOA, the President also announced his administration's new policy on Iran, which emphasizes aggressive enforcement of established U.S. sanctions and implementation of additional measures against Iran. Consistent with this policy, on October 13, 2017, OFAC announced the imposition of new sanctions designations against the IRGC and four other Iranian entities under U.S. antiterrorism-related sanctions measures.
- These actions signal the Trump administration's implementation of a more confrontational U.S. posture toward Iran, aligned with the President's election campaign rhetoric, and indicates a greater U.S. willingness to enforce and increase U.S. sanctions against the country.



Iran: Following President Trump's "Decertification," New U.S. Sanctions on Iranian Entities and All Eyes on the U.S. Congress

Introduction

On October 13, 2017, President Trump announced a **new policy** toward Iran that includes not recertifying the 2015 Joint Comprehensive Plan of Action (JCPOA or the Iran Nuclear Deal), seeking amendments to domestic U.S. legislation providing congressional oversight over the JCPOA, i.e., the Iran Nuclear Agreement Review Act of 2015 (**INARA**), and imposing new sanctions on the Iranian Revolutionary Guard Corps (IRGC) and related parties. The President's determination to not recertify alignment of the JCPOA

with broader U.S. interests now allows either house of Congress to “fast-track” legislation to re-impose nuclear-related sanctions against Iran that were suspended in conjunction with U.S. ratification of the JCPOA. In addition, the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC) has designated the IRGC under terrorism-related sanctions and blacklisted four other entities under weapons proliferation-related sanctions. While this action against the IRGC is more symbolic than substantive, given that core OFAC sanctions already generally prohibited U.S. persons from engaging in activities involving the IRGC, it clearly reflects the more confrontational approach to Iran articulated by President Trump.

It is important to note that President Trump has not asserted that Iran has violated the agreement, which would trigger an international dispute resolution process by a joint commission consisting of the JCPOA members. Moreover, President Trump has not terminated, or withdrawn the United States from, the JCPOA, or otherwise re-imposed sanctions. Officials in the Trump administration assert that the JCPOA is a nonbinding political commitment. On this basis, the President could act to reinstate suspended sanctions while claiming that he is not violating an international commitment. However, such action would be expected to trigger a significant and critical reaction from U.S. allied countries in Europe and other parties to the JCPOA, including China and Russia, as well as Iran, who view the JCPOA as a binding agreement subject to the Vienna Convention disciplines, which would complicate other areas of priority in U.S. trade, national security and foreign policy.

Background on the Iran Nuclear Deal

In July 2015, following years of negotiations, the so-called P5+1 (the five permanent members of the U.N. Security Council—China, France, Russia, the United Kingdom and United States—plus Germany) and Iran signed the **JCPOA**. The agreement, which went into effect in January 2016, required Iran to dismantle much of its nuclear program and allow international inspectors access to its nuclear-related facilities. In exchange, the United States, European Union and United Nations agreed to lift nuclear-related sanctions that had crippled the Iranian economy. The implementation of the complex deal has been tied to the International Atomic Energy Agency’s (IAEA) periodic evaluations of Iran’s adherence to its JCPOA obligations.

Importantly, the JCPOA contains a sanctions “snapback” provision to reverse and terminate U.S., U.N., and EU sanctions relief in the event that Iran violates the agreement. If any member of the P5+1 believes that Iran has not met its commitments under the JCPOA, that party can refer the matter to a joint commission, consisting of all members to the agreement, to resolve the matter over a 30-day period. If the joint commission fails to resolve the issue, the complaining party may re-impose sanctions, as well as notify the U.N. Security Council that Iran has failed to perform its commitments under the JCPOA. Such action would trigger the automatic reimposition of U.N. sanctions against Iran after 30 days, unless the U.N. Security Council passes a resolution blocking the reimposition of sanctions. In this regard, it is worth noting that, given its veto power, the United States could block a U.N. Security Council resolution that would continue the lifting of sanctions.

U.S. Implementation of the JCPOA

As part of its JCPOA sanctions relief, the United States lifted most of its extraterritorial sanctions targeting non-U.S. individuals and entities that are not owned or controlled by U.S. persons. It also removed more than 400 individuals and entities from the Specially Designated Nationals and Blocked Persons List (“SDN List”). Significantly, the United States suspended sanctions related to Iran’s nuclear program only while preserving the core U.S. embargo administered by OFAC. U.S. sanctions against Iran related to activities involving terrorism, human rights abuses, and weapons proliferation activities were generally unaffected and remain in place.

The Obama administration negotiated and entered into the JCPOA at the international level. Congress oversees U.S. commitments under the JCPOA through INARA, which was enacted on May 22, 2015. Among other provisions, INARA requires the President to certify every 90 days that Iran is in compliance with the JCPOA and that continued suspension of sanctions is vital to U.S. national security interests. The most recent 90-day period ended on Sunday, October 15, 2017.

Consequences of Noncertification by the Trump Administration

On October 13, 2017, the President announced that he would not certify that the JCPOA was in the national interest of the United States. Under INARA, this decision not to recertify the deal triggers a 60-day period (running through mid-December) in which either house of Congress may propose “qualifying legislation” under “expedited consideration.” INARA defines qualifying legislation as a bill reinstating statutory sanctions related to Iran’s nuclear program. Only congressional leadership (the House majority or minority leader, or the Senate majority or minority leader) can initiate the process for reimposition of sanctions under the expedited procedures. The expedited procedures limit the timeline for congressional review and disallow procedural motions and filibusters that might otherwise stall passage of legislation.

Following this determination by President Trump, congressional leaders now face a choice as to whether to introduce and pass legislation reimposing nuclear-related sanctions. Despite President Trump’s decision not to recertify and claim that “the Iran deal was one of the worst and most one-sided transactions the United States has ever entered into,” a number of key officials in the administration have stated that they are not seeking to re-impose nuclear sanctions at this time. In close proximity to the administration’s announcement of its decision, U.S. Ambassador to the U.N. Nikki Haley **said** on *Meet the Press* that “I think, right now, you’re going to see us stay in the deal.” Secretary of State Rex Tillerson also **stated** “We’re going to stay in,” but added that “we’re going to work with our European partners and allies to see if we can’t address these concerns.” In his speech, however, President Trump raised questions and concerns regarding what future actions his administration might take by stating that this could change at any time, saying that the JCPOA “is under continuous review, and our participation can be canceled by me, as president, at any time.”

The Trump administration appears to be signaling that the intention of declining to certify that the JCPOA is in U.S. national security interest was to set in motion a process to possibly renegotiate the terms of the deal. Specifically, President Trump directed the administration “to work with our allies to fully enforce the agreement while addressing the deal’s many flaws.”

The international ramifications of a potential U.S. repudiation are unclear. Other members of the P5+1 have stated that they will not re-impose sanctions if the United States breaks the accord. Immediately after the President's October 13 remarks, the leaders of France, Germany and the United Kingdom **issued** a joint statement of concern regarding President Trump's decision, noting that they "stand committed to the JCPOA and its full implementation by all sides." Additionally, key leaders of the EU have **announced** their intention to continue complying with the terms of the JCPOA. This includes **statements** by the EU Foreign Ministers, as well as EU Foreign Affairs Chief Federica Mogherini. Mogherini intends to **visit** Washington, D.C., in early November to address the sharp disagreement between European countries and President Trump over Iran's compliance with the deal.

Further, if the United States re-imposes nuclear sanctions without following the JCPOA protocols (described above), the U.N. procedures for a snapback of sanctions would not be triggered, and the United States' reimposition of suspended sanctions could be interpreted as a basis on which Iran would no longer be bound by the agreement and could cease performing its commitments under the terms of the JCPOA. Ultimately, Iran's response to any act by the United States to re-impose sanctions will likely depend very much on whether the U.S. acts in isolation; whether or not the EU and U.N. re-impose sanctions; and, importantly, whether non-U.S. companies cease doing business with Iran as a result of the threat or reality of reinstated U.S. extraterritorial sanctions.

Proposed Legislation in the U.S. Congress

In addition to not recertifying the agreement, President Trump called on Congress to amend INARA. Specifically, the administration is seeking to amend the legislation to include the imposition of sanctions related to Iranian ballistic missile development, as well as alleged support for terrorist groups if certain "trigger points" are met. While Secretary Tillerson stated that the trigger points would draw lines for Iran separate from the nuclear deal, he did not specify what the actual trigger points would be. In addition, the White House would like to address sunset clauses that allow Iran to begin engaging in certain nuclear activities beginning eight years after the deal went into effect in 2015.

Senate Foreign Relations Committee Chairman Sen. Bob Corker (R-TN) and Sen. Tom Cotton (R-AK) have released a **summary** of their goals for INARA amendment. These include the automatic snap back of sanctions if Iran comes within one year of nuclear weapons capability, bolstering IAEA oversight, and preventing the United States from recognizing the sunset provisions of the JCPOA. Sen. Corker **stated** that he plans to introduce the bill as early as this week and **intends** to "develop a legislative strategy to address bipartisan concerns about the JCPOA without violating U.S. commitments." Nevertheless, the administration may face an uphill battle, since this legislation would not be subject to fast-track authority, and, as such, the bill would need at least some Democratic support in the Senate and would be susceptible to filibuster.

Additionally, **reports** indicate that Secretary Tillerson is considering alternatives to having the administration certify that Iran is meeting its technical commitments under the deal. One option is that the administration would report to Congress regularly about broader Iranian behavior, such as support for

terrorism and its ballistic missile program, and what the administration is doing to counter it. This approach would allow the JCPOA to remain intact but eliminate the requirement for the President to affirmatively recertify that the agreement is aligned with U.S. interests every 90 days. On October 4, 2017, Secretary Tillerson **added** that the State Department will recommend “a couple of options” to the President regarding a workaround to certification, noting that the relationship between the United States and Iran should not be “defined solely by that nuclear agreement.”

New Iran-Related Sanctions Designations

Section 105 of the Countering America’s Adversaries Through Sanctions Act (CAATSA) requires the imposition of sanctions pursuant to the global terrorism Executive Order (EO) 13224 on the IRGC and non-U.S. persons that are officials, agents or affiliates of the IRGC. Consistent with that requirement of CAATSA, on October 13, 2017, OFAC designated the IRGC and four other entities under EO 13224. According to the Treasury Department **press release**, the IRGC was designated for “activities it undertakes to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, the [IRGC-Qods Force].” While the IRGC was already designated under sanctions related to weapons proliferation and human rights abuses, the new designation carries additional consequences. Specifically, the IRGC may not avail itself of the so-called “Berman exemptions” under the International Emergency Economic Power Act, which generally exempt transactions related to personal communications, humanitarian donations, information and informational materials, and travel from regulation.

OFAC also designated three Iran-based entities—Shahid Alamolhoda Industries, Rastafann Ertebat Engineering Company and Fanamoj Company— and China-based Wuhan Sanjiang Import and Export Co. LTD, pursuant to EO 13382 (weapons proliferation-related sanctions) for their activities related to Iran’s military.

In addition, President Trump has authorized the Treasury Department to take additional action against IRGC officials, agents and affiliates. In a **speech** on October 16, 2017, Undersecretary of the Treasury for Terrorism and Financial Intelligence Sigal Mandelker stated that “as part of the new Iran policy, Treasury will use its executive authority to place additional sanctions on the Iranian government, targeting its financing of terrorism and other destabilizing activity.” This signals that the United States will aggressively apply its secondary sanctions authority to designate non-U.S. parties engaging in sanctionable conduct under the various existing authorities that were not waived under the Iran Nuclear Deal.

Consistent with this stated policy and approach of the Trump administration, effective October 31, 2017, OFAC **amended the Global Terrorism Sanctions Regulations**, pursuant to Section 105(b) of CAATSA, to block the property and interests in property of foreign persons that have been identified by OFAC as officials, agents or affiliates of the IRGC. It remains to be seen what additional actions of this kind will be taken by the administration in the months ahead, but further action of this kind would be consistent with President Trump’s general rhetoric and stated approach to Iran.

Practical Implications

While the decision by the Trump administration not to certify consistency of the JCPOA with U.S. national interest does not have any immediate consequences as a matter of U.S. adherence to the agreement, in terms of the continuation of corresponding U.S. sanctions relief, it creates greater uncertainty for companies with existing or potential business interests in Iran. Even with nuclear sanctions suspended, and prior to the President's statements, many commercial lenders and companies in other sectors have been wary of engaging in business activities associated with Iran for fear of incurring fines or being barred from dealing with the United States and based on related business risk concerns.

Given President Trump's continued combative rhetoric regarding Iran, and based on stated priorities of U.S. officials at key agencies charged with U.S. sanctions enforcement, it is foreseeable that investigations and enforcement of established U.S. sanctions on Iran will continue and can be expected to only increase in the months ahead, regardless of whether the U.S. Congress takes action to re-impose extraterritorial U.S. nuclear-related sanctions on Iran that have been suspended under the JCPOA. Separately, the U.S. Congress is considering enactment of new U.S. sanctions, focusing on concerns regarding Iran's ballistic missile capabilities, support for international terrorism and human rights concerns, which could impose additional new U.S. sanctions challenges even while the United States does not walk away from the JCPOA. A snapback of the suspended sanctions measures that would result from termination of U.S. adherence to the JCPOA would result in a greater divergence between the sanctions regimes of the United States and other countries, including U.S. allies in Europe, the Middle East and Asia, posing even more substantial challenges for companies with Iran-related interests that span this geography.

In this context, it will be increasingly important for companies with a global footprint and interests in Iran to carefully evaluate the potential intersection of their interests and operations with U.S. jurisdiction, including related business and legal risk exposure, in evaluating and managing Iran-related opportunities and activities. To the extent that potential changes in U.S. sanctions could impact operational, financial or other dimensions of Iran-related activities, these are factors that should be built into related contingency planning, strategy, business projections, and the development and implementation of effective sanctions compliance safeguards necessary to protect related commercial interests.

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