

## International Trade Alert

January 31, 2018

### Key Points

On January 12, 2018, the U.S. administration took three actions relating to Iran:

- First, President Trump waived again the application of certain nuclear sanctions while making clear that the United States will refuse to renew the waivers and will withdraw from the JCPOA, unless the United States and its European allies reach a supplemental agreement to impose additional sanctions and eliminate the JCPOA's sunset clauses.
- Second, the President declined to certify that the JCPOA is in the United States' national interest. This determination, which follows President Trump's refusal to certify the JCPOA on October 13, 2017, ostensibly triggers another 60-day period in which either house of Congress may propose legislation to reinstate nuclear sanctions against Iran.
- Third, OFAC sanctioned 14 individuals and entities from Iran, China and Malaysia in connection with serious human rights abuses and censorship in Iran, as well as support to designated Iranian weapons proliferators.



These actions by President Trump are consistent with the strategy that the President announced in October 2017, which he describes as designed to counter the full range of aspects of Iran's sponsorship of terrorism, human rights abuses and proliferation activities. For multinational companies operating in both Europe and the United States, this presents increasing compliance challenges going forward if a further divergence of sanctions develops between the United States and the European parties to the Joint Comprehensive Plan of Action (JCPOA).

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## Iran: President Trump Gives the Iran Nuclear Deal a “Last Chance” While Pressuring European Allies to Act

### Executive Summary

On January 12, 2018, President Trump **announced** that he was waiving the application of certain nuclear sanctions under the JCPOA “in order to secure our European allies’ agreement to fix the terrible flaws of

the Iran nuclear deal.” The JCPOA, an agreement between Iran and the so-called P5+1 (the five permanent members of the U.N. Security Council—China, France, Russia, the United States and United Kingdom—plus Germany) went into effect on January 16, 2016. The deal required Iran to dismantle much of its nuclear program and allow international inspectors access to its nuclear-related facilities. In exchange, the United States, the European Union and the United Nations agreed to lift nuclear-related sanctions that were crippling the Iranian economy.

This announcement follows the strategy that President Trump outlined on October 13, 2017, when he threatened to cease implementing the JCPOA, unless Congress and European allies successfully address the agreement’s weaknesses. Thus far, the administration has continued to implement the agreement by exercising waivers of sanctions laws suspended in accordance with the JCPOA while continuing to impose sanctions on parties that are supporting Iran’s ballistic missile program, affiliated with, or supporting the Islamic Revolutionary Guard Corps (IRGC), or are violating human rights.

President Trump has now called on key European allies to secure a “supplemental agreement” that would impose new multilateral sanctions if Iran undertakes certain activities, while he also urges Congress to work with him on bipartisan legislation. If European allies cannot reach a supplemental agreement that meets the conditions outlined by President Trump by the next waiver deadline on May 12, 2018, the President stated that he will “not again waive sanctions in order to stay in the JCPOA.”

In conjunction with this announcement, the U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) designated 14 individuals and entities in connection with serious human rights abuses and censorship in Iran, and support to designated Iranian weapons proliferators. Among the designated individuals is Ayatollah Sadeq Amoli Larijani, the head of Iran’s judiciary.

Reaching a supplemental agreement before the next waiver deadline, May 12, 2018, may prove to be a challenge, particularly given European allies’ previous statements regarding their full commitment to the JCPOA and its full implementation by all parties. If the administration were to decide to end U.S. participation in the JCPOA outright, the administration could either revoke waivers, decline to renew waivers or act under the Iran Nuclear Agreement Review Act (INARA) to facilitate a decision by Congress on whether to reimpose sanctions.

The President’s announcement to continue waivers under the JCPOA, but to announce that this is the last time, forces parties that are intending to conduct business in Iran into a holding pattern as they wait to see if, upon expiration of the current waiver renewals in four to six months, there will be any additional renewals by President Trump. To the extent that a U.S. withdrawal from the JCPOA (with resulting potential changes in U.S. sanctions) may affect global business operations, those companies that may be affected should begin contingency planning now in case of a snapback of U.S. sanctions by mid-May. Should President Trump withdraw the United States from the JCPOA between now and May, he could unilaterally reimpose those U.S. sanctions that were lifted and terminate the waivers that were issued to implement the JCPOA. Doing so would render non-U.S. firms vulnerable to sanctions were they to enter into any of the multitude of transactions with Iranian entities that would again be subject to U.S. sanctions.

Companies with pending license applications with OFAC must also grapple with increased uncertainty on license decisions, including further delay and potential denial of their license applications. It is unclear how OFAC may treat pending license applications that request authorization under authorities provided for under the JCPOA as the next deadline approaches.

### **Background on the Waiver Requirements Under the Iran Nuclear Deal**

Under the JCPOA, the bulk of sanctions relief occurred on Implementation Day (January 16, 2016)—the day when the International Atomic Energy Agency (IAEA) certified that Iran had completed stipulated core nuclear tasks. The suspension of U.S. sanctions under the JCPOA required issuing waivers of statutory sanctions, and these waivers must be renewed every 120 or 180 days, depending on the statute. President Obama issued the relevant waivers on Implementation Day and renewed all waivers on January 18, 2017, for the maximum time period of waiver allowed under each law. President Trump renewed waivers again in September 2017 and on January 12, 2018.

If the Trump administration refuses to renew the sanctions waivers in May, the corresponding sanctions provided under each relevant statute would go back into effect. The first sanctions that would snap back are those imposed against the Central Bank of Iran and other Iranian financial institutions under Section 1245(d)(1) of the National Defense Authorization Act for FY2012 (NDAA). The sanctions waiver issued pursuant to the NDAA to implement the JCPOA suspends the prohibitions on opening correspondent accounts or a payable-through account by foreign financial institutions that the President determines have knowingly conducted or facilitated any significant financial transaction with the Central Bank of Iran or another Iranian financial institution designated by OFAC. Therefore, if President Trump does not issue more waivers, the first sanctions that would go back into effect would restrict foreign banks' ability to conduct business with the Central Bank of Iran and any other designated Iranian financial institution, although it is possible that President Trump could revoke all waivers simultaneously.

### **Continuation of Waivers by the Trump Administration**

On January 12, 2018, President Trump **announced** that he was waiving the application of certain nuclear sanctions. However, in the absence of a follow-on agreement with its European allies by the next waiver deadline in May 2018, Trump declared that he would not issue any further waivers and would withdraw from the agreement. He explained:

*This is a last chance. In the absence of such an agreement, the United States will not again waive sanctions in order to stay in the Iran nuclear deal. And if at any time I judge that such an agreement is not within reach, I will withdraw from the deal immediately.<sup>1</sup>*

President Trump stated that his administration has engaged with key European allies to secure “a new supplemental agreement” that would impose new multilateral sanctions if Iran develops or tests long-

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<sup>1</sup> The White House, “Statement by the President on the Iran Nuclear Deal” (January 12, 2018), available at <https://www.whitehouse.gov/briefings-statements/statement-president-iran-nuclear-deal/>.

range missiles, thwarts IAEA inspections or makes progress toward a nuclear weapon. The President also called for the provisions of any supplemental agreement to never expire, unlike the JCPOA, which includes a 10-year sunset clause. A senior administration official **added** that any supplemental agreement would not entail direct negotiations with the Iranians,” but “would be something the United States works out with our European partners only.”<sup>2</sup> A spokesman for the European Union **stated** that the EU will “jointly assess the statement [by President Trump] and its implications,” but that the EU remains “committed to the continued full and effective implementation” of the JCPOA. In previous statements, European leaders expressed their concern about the potential implications of President Trump’s October 13, 2017, decision to not certify the deal.

Furthermore, President Trump stated that he is open to working with Congress on amending INARA, which provides for congressional oversight of the JCPOA. His announcement received mixed reactions from members of Congress.

It will be a challenge for the U.S. and its European allies to reach a “supplemental agreement” consistent with the terms of the President’s announcement within 120 days. Europe’s appetite and prospects for complying with President Trump’s demands are uncertain at this time. However, Secretary of State Rex Tillerson announced on January 22, 2018, that “working groups” have been established between the United States, the United Kingdom, France and Germany to address Iran’s ballistic missile programs and “concerns over the expiry of the JCPOA and the provisions around the expiry.”<sup>3</sup> These working groups have begun to meet in an effort to agree on common principles, as well as how to engage Iran to address the issues described above.

If no agreement is reached and Trump withdraws the United States from the JCPOA in May 2018 or earlier, the suspended U.S. sanctions measures would “snap back” and would likely result in a greater divergence between the sanctions regimes of the United States and its allies in Europe, who have previously stated that they intend to remain in, and abide by, the terms of the JCPOA. In such a case, it is possible that the European Union may implement a blocking statute prohibiting European companies from complying with the snapped-back U.S. sanctions.

### **Noncertification Under INARA**

Separately from his waiver decision, President Trump did not certify Iran’s compliance with the JCPOA as required under INARA, which provides for congressional oversight of the JCPOA. Among other provisions, INARA requires that the President 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 January 13, 2017.

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<sup>2</sup> The White House, “Background Press Call on Iran Sanctions” (January 12, 2018), available at <https://www.whitehouse.gov/briefings-statements/background-press-call-iran-sanctions/>.

<sup>3</sup> U.S. Department of State, “Remarks With United Kingdom Foreign Secretary Boris Johnson at a Press Availability” (January 22, 2018), available at <https://www.state.gov/secretary/remarks/2018/01/277569.htm>.

As we discussed in a [prior client alert](#), 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 certify the deal triggered a 60-day period in which either house of Congress could have proposed “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.

INARA’s certification requirement is a domestic process between the President and Congress, and, unless further steps are taken by either the executive or legislative branches to terminate U.S. sanctions relief or withdraw from, or modify, the agreement, the President’s refusal to certify the deal will not alter U.S. participation in the JCPOA. Congress did not act on any qualifying legislation during the last 60-day period, which expired on December 12, 2017. INARA does not explicitly speak to recurring 60-day periods for fast-track legislation, so it is unclear whether a 60-day period has now opened during which Congress can consider qualifying legislation to reimpose nuclear sanctions. Regardless of this determination, President Trump’s January 12 statement suggests that Congress will focus on developing bipartisan legislation in the next 120 days, before the next statutory waiver deadlines, and not on passing qualifying legislation under INARA.

## **New Iran Sanctions Designations**

On January 12, 2018, OFAC also [added](#) 14 individuals and entities to its Specially Designated Nationals and Blocked Persons List in connection with serious human rights abuses and censorship in Iran, and support to designated Iranian weapons proliferators.

Most notably, OFAC designated Sadegh Amoli Larijani, who is the head of Iran’s judiciary and the brother of Ali Larijani, who is the speaker of the Iranian parliament, for human rights abuses. OFAC also sanctioned the Islamic Revolutionary Guard Corps Electronic Warfare and Cyber Defense Organization, as well as Iran’s Supreme Council of Cyberspace and National Cyberspace Center, entities that reportedly engage in widespread Internet censorship. Several Chinese nationals and Chinese companies, as well as Malaysia-based Green Wave Telecommunication, were sanctioned for providing procurement support to Iran.

These designations are not inconsistent with the JCPOA, in which the U.S. government only committed to waiving only sanctions related to Iran’s nuclear activities. The U.S. government has continued to impose sanctions addressing Iran’s support for terrorism, human rights abuses, and its ballistic missile program. These designations are not inconsistent with the JCPOA, in which the U.S. government only committed to waiving only sanctions related to Iran’s nuclear activities. The U.S. government has continued to impose sanctions addressing Iran’s support for terrorism, human rights abuses, and its ballistic missile program.

## Contact Information

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