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International Trade Alert

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Key Point

- The U.S. government has withdrawn from the Iran Nuclear Deal and reverted sanctions to the *status quo ante* by re-imposing secondary sanctions that restrict non-U.S. persons from engaging in a broad range of business in Iran.
- Over the next 90 or 180 days, depending on the type of business, non-U.S. persons subject to these secondary sanctions must wind-down their business operations in Iran or else face risk of secondary sanctions.
- The other parties to the deal—China, France, Germany, Russia and the United Kingdom—may take action in the coming days or weeks to keep the deal intact. It remains to be seen how the re-imposed U.S. sanctions will square with the policies in these other countries, which remain committed to the deal.

President Trump Announces U.S. Withdrawal from JCPOA; U.S. Sanctions on Iran will be Re-imposed Following Wind-Down Periods

On May 8, 2018, President Trump announced that the United States would cease its participation in the Joint Comprehensive Plan of Action (JCPOA). The JCPOA, often referred to as the "Iran Nuclear Deal," was implemented in January 2016 between the P5+1 (i.e., the five permanent members of the U.N. Security Council—China, France, Russia, the United States and the United Kingdom—plus Germany) and Iran. The agreement brought sanctions relief to Iran in exchange for Iran's compliance with key nuclear-related commitments.

In making this announcement, President Trump issued a National Security Presidential Memorandum (NSPM) that instructs relevant agencies responsible for administering U.S. sanctions on Iran to "re-impose sanctions lifted or waived in connection with the JCPOA as expeditiously as possible."[1] The Treasury Department's Office of Foreign Assets Control (OFAC) has issued guidance on the implications of U.S. withdrawal from the JCPOA, including the specific sanctions that will be re-imposed, their timing, and general and specific licensing policies with respect to Iran.

As detailed further in this alert, this decision will have significant implications for businesses that benefited from U.S. sanctions relief under the JCPOA.

Background

On January 16, 2016, the group of nations called the P5+1 (*i.e.*, the five permanent members of the U.N. Security Council—China, France, Russia, the United States and the United Kingdom—plus Germany) implemented the JCPOA with Iran. Pursuant to the agreement, Iran was required to dismantle much of its nuclear program and grant 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 secondary sanctions that had been crippling the Iranian economy.

Sanctions relief by the United States through the JCPOA was largely limited to what are known as "secondary sanctions"—a series of measures codified in U.S. laws that authorized the U.S. government to impose sanctions on foreign companies engaging in certain activities involving Iran, even when such activities have no U.S. jurisdictional nexus. The nuclear-related secondary sanctions implemented with the JCPOA included those that targeted activities key sectors of the Iranian economy, including Iran's financial, energy, petrochemical, shipping, shipbuilding and automotive sectors. The United States also revoked several executive orders authorizing sanctions on Iran and took action to remove more than 400 individuals and entities that had been previously designated for their involvement with Iran's nuclear program from OFAC's List of Specially Designated Nationals and Blocked Persons ("SDN List").

The United States, however, preserved the core U.S. embargo on Iran administered by OFAC pursuant to the Iran Transactions and Sanctions Regulations (ITSR). This embargo retained U.S. "primary sanctions" on Iran, which restrict U.S. persons (and non-U.S. entities owned or controlled by U.S. persons) from engaging in virtually all business involving Iran unless authorized pursuant to an OFAC license or through a statutory exemption.

As a candidate, President Trump ran on a platform in opposition to the Iran Nuclear Deal. He described the JCPOA as "one of the worst deals [he had] ever seen" and stated that he would "rip it up" if elected. However, following the election, the Trump administration did not take action to renegotiate or otherwise undermine the JCPOA. Rather, President Trump maintained the status quo by waiving secondary sanctions at required 120- and 180-day intervals, and preserved several key authorizations to conduct Iran-related business pursuant to general and specific licenses, such as General License H (GL-H), which authorized non-U.S. persons owned or controlled by U.S. persons to engage in Iran-related business otherwise restricted by the ITSR.

In October 2017, however, the Trump administration revived its hardline stance in opposition to the JCPOA. During that month, President Trump refused to certify that the JCPOA was in the national interest of the United States[2] and charted a new U.S. strategy toward Iran, which called on Congress and U.S. allies to "fix" the "terrible flaws of the Iran nuclear deal."[3] The President identified the following areas that needed to be addressed by Congress and U.S. allies: (1) a requirement that Iran allow immediate inspections at all sites requested by international inspectors; (2) Iran's development and testing of missiles; and (3) elimination of the "sunset clause" of the JCPOA. The President has also called on U.S. allies to "take stronger steps with us to confront Iran's other malign activities" (e.g., support for terrorist groups, Iran's cyber threats, human rights violations and threats to international shipping). President Trump also threatened to "terminate" the agreement if this did not occur—a decision that he said could be made unilaterally by him "at any time."[4] For more information, see our November 2017 alert available here.

On January 12, 2018, President Trump faced a decision on whether to renew waivers of secondary sanctions for the fourth time under his presidency, and continue U.S. sanctions relief pursuant to the JCPOA. President Trump issued the waivers, but said he was doing so "in order to secure our European allies' agreement to fix the terrible flaws of the Iran nuclear deal."[5] He went on to say that this would be the "last chance" for the Iran Nuclear Deal and threatened to cease U.S. participation in the JCPOA if a supplemental agreement was not reached by the next waiver deadline on May 12, 2018.[6] For more information, see our January 2018 alert available here.

Between January and May 2018, representatives from the U.S. State Department and political directors from the United Kingdom, France and Germany ("the E3") met on numerous occasions to address the three issues above; however, the parties were unable to reach consensus on a supplemental agreement acceptable to the Trump administration. In addition, major shake-ups in the Trump administration—most notably the resignation of Secretary of State Rex Tillerson (who favored staying in the JCPOA) and the appointments of Mike Pompeo and John Bolton, two Iran hawks who favored withdrawing from the JCPOA, as Secretary of State and National Security Advisor, respectively—were likely key contributing factors to this outcome. Several commentators have speculated that the Trump administration post-Tillerson had no intent to engage in bona fide negotiations with the E3.

Announcement and International Reaction

On May 8, 2018, President Trump announced that he was withdrawing the United States from the JCPOA following a wind-down period. This announcement was coupled with the issuance of a NSPM directing the Secretary of State and the Secretary of the Treasury to prepare for the re-imposition of all U.S. sanctions lifted or waived in connection with the JCPOA, "as expeditiously as possible and in no case later than 180 days from the date of the NSPM."[7]

In making the announcement, President Trump called the JCPOA a "disastrous deal" and a "great embarrassment."[8] He stated that a supplemental agreement had "not materialized" and was thus "making good on [his] pledge to end U.S. participation in the JCPOA."[9] He further stated that the United States "will be instituting the highest level of economic sanction" on the Iranian regime and stated that "[a]ny nation that helps Iran in its quest for nuclear weapons could also be strongly sanctioned by the United States."[10] In addition, the President remarked that while exiting the JCPOA, his administration would work with "allies to find a real, comprehensive, and lasting solution to the Iranian nuclear threat."[11]

International reaction to the announcement by President Trump was swift. Shortly after, the leaders of the United Kingdom, France and Germany emphasized their continued commitment to the JCPOA and stated that their countries intend to remain parties to the agreement.[12] The United Kingdom, for example, stated that it fully supports expanding its trade relationship with Iran and encouraged businesses to take advantage of the commercial opportunities that arise.[13] High Representative of the European Union for Foreign Affairs and Security Policy Federica Mogherini also stated 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."[14] Finally, Iran's President Hassan Rouhani issued a statement that the United States was in breach of the JCPOA, but that it would seek to remain in the deal.[15]

Summary of Changes

The announcement to cease U.S. participation in the JCPOA will be accompanied by the re-imposition of sanctions that were lifted or waived in connection with that agreement. Pursuant to OFAC guidance, these sanctions will be imposed following either a 90-day or 180-day wind-down period depending on the activities subject to sanctions. The FAQs also provide guidance with respect to implications on certain specific and general licenses, activities authorized during the wind-down periods and potential future measures.

Sanctions Re-Imposed After 90-day Wind-Down Period

On August 6, 2018, the U.S. government will re-impose several bases for secondary sanctions that were waived pursuant to the JCPOA. These secondary sanctions target the activities by non-U.S. persons in the following areas:

- transactions involving the Iranian automotive sector
- trading in Iranian gold or precious metals
- sale, supply or transfer 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 Iran denominated in the Iranian rial
- purchase, subscription to, or facilitation of the issuance of Iranian sovereign debt
- transactions involving the purchase or acquisition of U.S. dollar banknotes by the government of Iran.

Sanctions Re-Imposed After 180-day Wind-Down Period

On November 4, 2018, the U.S. government will re-impose several bases for secondary sanctions that were waived pursuant to the JCPOA. These secondary sanctions target the activities by non-U.S. persons in the following areas:

- transactions targeting the Iranian energy sector
- transactions involving Iranian port operators, and shipping and shipbuilding sectors, including those involving 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 (NDAA of FY 2012)
- provision of specialized financial messaging services to the Central Bank of Iran and Iranian financial institutions
- provision of underwriting services, insurance or reinsurance.

Implications for Certain Specific and General Licenses

In addition to re-imposing sanctions as discussed above, OFAC will also take action with respect to specific and general licenses that were issued in connection with the JCPOA.

- **GL-H:** OFAC intends to revoke GL-H, which authorized foreign companies owned or controlled by U.S. persons to engage in certain activities involving Iran. While OFAC has not yet revoked the license, it says that it will do so via notice published in the *Federal Register*. That notice will further provide a wind-down period for activities under GL-H that must be completed by November 4, 2018. OFAC states that any activities engaged in after November 4 in violation of the ITSR will be subject to enforcement action, and any such action will take into account efforts to wind down business operations prior to this date.[16]
- **JCPOA SLP:** OFAC states that it is revoking 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 ("JCPOA SLP"). All non-expired licenses issued in accordance with the JCPOA SLP will be revoked following a wind-down period that ends on August 6, 2018. Persons with pending license applications will have their license applications returned. OFAC states that these may be resubmitted under the safety of flight statement of licensing policy to the extent applicable.[17] OFAC also intends to revoke General License I ("GL-I"), which authorizes transactions ordinarily incident to the negotiation and entry into contingent contracts for activities eligible pursuant to the JCPOA SLP. Activities authorized pursuant to GL-I will benefit from a wind-down period through August 6, 2018.[18]
- **Imports of Iranian-origin Carpets and Foodstuffs:** OFAC intends to amend general licenses in the ITSR authorizing the importation into the United States of Iranian carpets and foodstuffs. Notice will be published separately in the *Federal Register* and will be subject to a wind-down period that concludes on August 6, 2018. OFAC states that activities by U.S. persons **and** U.S.-owned or controlled foreign entities after the wind-down period in violation of the ITSR may be subject to OFAC enforcement.[19]

Activities Authorized During Wind-Down Periods

The U.S. government has issued waivers necessary "to provide for an appropriate wind-down period." OFAC states in its FAQ that it plans to keep these waivers in place during the duration of the applicable (90- or 180-day) wind-down periods and states that "non-U.S., non-Iranian persons are advised to use these time periods to wind-down their activities with or involving Iran that will become sanctionable at the end of the applicable wind-down period."

Notably, OFAC does not foreclose the possibility that non-U.S. companies could continue engaging in business, or even enter into new business, during the applicable wind-down periods. Instead, OFAC states that "when considering a potential enforcement or sanctions action with respect to activities engaged in *after* August 6, 2018, or November 4, 2018, as applicable, OFAC will evaluate efforts and steps taken to wind down activities and will assess whether any new business was entered into involving Iran during the applicable wind-down period." This implies that OFAC would look unfavorably upon new business that may be conducted during the applicable wind-down period, and such new business would be an aggravating factor in the event that an independent basis exists after the applicable wind-down period to pursue a potential enforcement or sanctions action.

OFAC also clarified that non-U.S. and non-Iranian persons are authorized to receive payment **after** the applicable wind-down period for goods or services fully provided or delivered to Iranian counterparties before the applicable wind-down period ends. This also applies to receipt of repayments for loans or credits extended to an Iranian counterparty. In order to receive payment, the transaction at issue must be pursuant to a written contract entered into before May 8 and consistent with U.S. sanctions at the time into which it was entered (including exclusion of U.S. persons or the U.S. financial system, unless otherwise authorized).

Sanctions Designations

On November 5, 2018, OFAC intends to re-designate on the SDN List all persons listed pursuant to Executive Order 13599 who meet the definition of "government of Iran" or "Iranian financial institution" ("EO 13599 List").[20] Notably, with respect to secondary sanctions, OFAC states that activity involving persons removed from the SDN List on January 16, 2016 "could be sanctionable to the extent they are outside the scope of the wind-down waivers issued by the State Department."[21]

Other Measures

In addition to the above, the U.S. government intends to re-impose sanctions pursuant to Executive Orders 13574, 13590, 13622, 13628 and 13645 that were lifted via Executive Order 13716. These sanctions target activity by non-U.S. persons and foreign financial institutions involving sanctioned persons and the energy sector of Iran. OFAC states that when these sanctions are re-imposed, they will be subject to a wind-down period that expires either on August 6, 2018 or November 4, 2018, depending on the activity.[22]

Authorizations Not Affected by the May 8 Announcement

The announcement on May 8, 2018 **does not** revoke or amend the scope of the following frequently used general licenses authorizing Iran-related business:

- **General License J-1:** Authorizing the re-exportation by non-U.S. persons of certain "Eligible Aircraft" to Iran on temporary sojourn

- **General License D-1:** Authorizing exports and re-exports to Iran of certain services, software and hardware incident to personal communications
- **AG/Med General License:** Authorizing sales, exports and re-exports of most low-level agricultural commodities, medicines and medical devices to Iran, provided such sales, exports and re-exports do not involve restricted end-users (e.g., designated parties, and Iranian military, law enforcement and intelligence).

It is important to note that OFAC may choose to revoke or amend these authorizations in the future.

Practical Implications for U.S. and Non-U.S. Companies

The decision by the United States to re-impose sanctions on Iran that were waived or lifted pursuant to the JCPOA will have far-reaching impact on U.S. and non-U.S. persons that have benefited from sanctions relief over the course of the prior two years. This decision also drastically changes the risk calculus for all companies contemplating new opportunities that potentially intersect with Iran or Iranian parties.

- **Non-U.S. Companies with Current Operations in Iran.** Non-U.S. companies presently in Iran are likely to be the hardest hit by the U.S. decision to re-impose sanctions. This is due to the fact that much of the sanctions relief relies on the waiver of certain secondary sanctions pursuant to the JCPOA. Companies in this situation must first assess whether their activity is subject to secondary sanctions. If this is the case, they will have either a 90-day or 180-day wind-down period to cease operations, or else risk the imposition of sanctions.
- **Non-U.S. Subsidiaries of U.S. Companies with Current Operations in Iran.** OFAC has stated that it intends to revoke GL-H by November 5, 2018. This will directly impact non-U.S. subsidiaries of U.S. companies that rely on GL-H to conduct business operations in Iran. Until this date, these companies must proceed to wind-down Iran-related business that is not otherwise authorized. Any activity outside the scope of wind-down authorization, or any activity in Iran that occurs after November 5, 2018, is prohibited under the ITSR, unless authorized by OFAC pursuant to a general or specific license or exemption from restrictions.
- **U.S. Companies Conducting Business in Iran Under Specific or General Licenses.** U.S. companies relying on a specific license issued in accordance with JCPOA SLP, or relying on GL-I, are directly impacted by the May 8 announcement. These persons will likely see their authorization revoked by OFAC in the near future and will be required to wind-down operations through August 6, 2018. The same will apply to U.S. companies importing Iranian-origin carpets and foodstuffs into the United States (and engaging in finance-related transactions for such products) pursuant to 31 C.F.R. §§ 560.534 and §§ 560.535.

It remains to be seen how the E3, Russia and China will respond to the United States' clear challenge of their decision to adhere to the JCPOA, and, particularly, whether these countries will take any concrete action—such as through blocking statutes, trade disputes or otherwise—to attempt to protect their nation's companies that are doing business with Iran under JCPOA-based sanctions relief.

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[1] 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), https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/ (NSPM).

[2] This is required by the Iran Nuclear Agreement Review Act of 2015 (INARA). INARA, which was enacted on May 22, 2015, 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.

[3] White House, Statement by the President on the Iran Nuclear Deal. January 12, 2018.

[4] *Id.*

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

[6] *Id.* ("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.").

[7] *See* NSPM, Section 3; FAQ 1.1. 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), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf.

[8] Press Release, White House, *Remarks by President Trump on the Joint Comprehensive Plan of Action* (May 8, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action/. ("May 8 Trump JCPOA Remarks").

[9] *See* NSPM, Introduction.

[10] *See* May 8 Trump JCPOA Remarks.

[11] *Id.*

[12] Press Release, The 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), https://www.gov.uk/government/news/joint-statement-from-prime-minister-may-chancellor-merkel-and-president-macron-following-president-trumps-statement-on-iran.

[13] Department for International Trade*, Doing Business in Iran: Trade and Export Guide* (May 8, 2018), https://www.gov.uk/government/publications/doing-business-with-iran/frequently-asked-questions-on-doing-business-with-iran#challenges-and-risks-of-doing-business-in-iran.

[14] 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), https://eeas.europa.eu/headquarters/headquarters-homepage/44238/remarks-high-representativevice-president-federica-mogherini-statement-us-president-trump_en.

[15] Erin Cunningham & Bijan Sabbagh, *Iran to Negotiate with Europeans, Russia and China about Remaining in Nuclear Deal,* Wash. Post (May 8, 2018), https://www.washingtonpost.com/world/middle_east/iran-prepared-for-all-scenarios-if-trump-nixes-nuclear-deal-officials-say/2018/05/08/531047a0-5241-11e8-a6d4-ca1d035642ce_story.html?noredirect=on.

[16] FAQ 4.4.

[17] FAQs 4.1-4.2.

[18] FAQ 4.3.

[19] FAQ 4.5.

[20] FAQ 3.1.

[21] FAQ 3.2.

[22] FAQ 1.4.