

May 10, 2018

## United States Withdraws from Iran Nuclear Deal and Reinstates Iranian Sanctions

On May 8, 2018, President Trump announced that the United States will withdraw from the Joint Comprehensive Plan of Action (“JCPOA”) and impose sweeping sanctions against Iran. Forthcoming regulations will reinstate the sanctions in existence prior to the implementation of the JCPOA.<sup>1</sup> These sanctions will become effective on August 7 or November 5, 2018, depending on the type of activity involved.

### Background

While the United States has levied sanctions against Iran for decades, it greatly increased its sanctions pressure during the Obama administration. Congress passed the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (“CISADA”), the Iran Freedom and Counter-Proliferation Act of 2012 (“IFCA”), and the Iran Threat Reduction and Syria Human Rights Act of 2012 (“ITSR”). The National Defense Authorization Act for Fiscal Year 2012 (“NDAA”) added additional sanctions to the Iran Sanctions Act of 1996 (“ISA”). President Obama signed nine separate executive orders implementing Iran sanctions between 2010 and 2013.<sup>2</sup>

These sanctions placed substantial economic pressure on Iran.<sup>3</sup> As a result, Iran negotiated with the United States, Russia, China, the United Kingdom, France and Germany (the “P5+1 Group”).<sup>4</sup> On July 14, 2015, the parties finalized the agreement that became the JCPOA.<sup>5</sup> Under the JCPOA, the P5+1 Group agreed to lift or waive numerous sanctions against Iran. In exchange, Iran agreed to curtail its nuclear program.<sup>6</sup> The International Atomic Energy Agency (“IAEA”) was tasked with confirming that Iran was in compliance with its commitments under the JCPOA. On January 16, 2016, the IAEA verified Iran’s compliance, and the JCPOA was implemented.<sup>7</sup>

The JCPOA does not include a clear framework for any party to exit the agreement.<sup>8</sup> Yet, given that the JCPOA was not signed by any party, was not ratified by the U.S. Senate, and consists of a series of voluntary commitments, the United States has held that the JCPOA is a non-binding “political commitment.”<sup>9</sup>

### Operation of Prior U.S. Sanctions

Prior to the implementation of the JCPOA, the U.S. utilized both primary and secondary sanctions to target Iran. As a general matter, primary sanctions apply to any “U.S. person,” which is defined in regulations promulgated by the Department of the Treasury’s Office of Foreign Assets Control (“OFAC”) as “any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States.”<sup>10</sup> The Iran primary

sanctions created a sweeping embargo that prohibited U.S. persons from engaging in transactions or dealings directly or indirectly with Iran or its government.<sup>11</sup>

Secondary sanctions apply worldwide, even to persons and entities not subject to U.S. jurisdiction. Secondary sanctions render every person and entity anywhere in the world subject to U.S. sanctions for engaging in certain activities or transactions with (or for the benefit of) specified individuals or entities, or with (or through) specified countries or regions. The mechanism by which the U.S. government enforces secondary sanctions is by restricting or excluding a violator's access to the U.S. economic system.

A principal sanctions tool used by the U.S. government is designation of a targeted individual or entity as a Specially Designated National ("SDN"). U.S. persons are prohibited from transacting with or for the benefit of any SDN, and must block any property or interest in property in their possession or under their control in which an SDN has an interest. Prior to the implementation of the JCPOA, the United States had designated hundreds of Iranian individuals and entities as SDNs.

Separately, the United States targeted multiple sectors of the Iranian economy with secondary sanctions, including the financial, energy, insurance, shipping, automotive, precious metals, and industrial metals sectors. These secondary sanctions evolved over a number of years. While a detailed discussion of these multifaceted sanctions is beyond the scope of this alert, the following examples from the energy sector illustrate some of the secondary sanctions levied against sectors of the Iranian economy.

The IFCA allowed the United States to "block" — meaning freeze — the assets that are in the United States or in the possession or control of a U.S. person of anyone who "knowingly provides significant financial, material, technological, or other support to, or goods or services in support of any activity or transaction on behalf of or for the benefit of" a "person determined . . . to" (i) "be a part of the energy, shipping, or shipbuilding sectors of Iran" or to "operate a port in Iran."<sup>12</sup> The IFCA also required the President to impose various types of exclusionary and blocking sanctions on any person found to have provided goods or services "used in connection with" the energy sector of Iran.<sup>13</sup>

As another example, under Executive Order 13590, non-U.S. persons were subject to various types of exclusionary and blocking sanctions for engaging in transactions with a fair market value of greater than \$5,000,000 in a single year "that could significantly contribute to the maintenance or enhancement of Iran's ability to develop petroleum resources in Iran."<sup>14</sup> The same applied to individuals who engaged in transactions with a fair market value of over \$1,000,000 "that could directly and significantly contribute to the maintenance or expansion of Iran's domestic production of petrochemical products."<sup>15</sup>

## Sanctions Lifted Under the JCPOA

On January 16, 2016, the U.S. government began implementing its commitments under the JCPOA. Those commitments were chiefly focused on easing most secondary sanctions.<sup>16</sup> The United States eased these sanctions by taking actions with respect to each of the underlying statutes and orders. Many of the Obama-era executive orders were revoked.<sup>17</sup> The U.S. government waived sanctions under certain programs and committed not to exercise its discretion to impose sanctions under others.<sup>18</sup>

The primary sanctions were left in place for the most part, but the United States committed to licensing foreign subsidiaries of U.S. entities to do business in Iran.<sup>19</sup> OFAC accomplished this through the issuance of General License H (“GL H”). With certain exceptions, GL H authorized foreign subsidiaries of U.S. companies to transact with Iranian entities, including the Iranian government.<sup>20</sup>

Finally, the United States agreed to remove numerous specified individuals and entities from the SDN List,<sup>21</sup> as well as from other lists of wrongdoers maintained by the U.S. government, namely the list of Foreign Sanctions Evaders (“FSEs”) and the Non-SDN Iran Sanctions Act List.<sup>22</sup>

## Actions Taken on May 8

On May 8, President Trump announced that the U.S. is withdrawing from the JCPOA, and stated that the United States will implement the “highest level of economic sanctions” against Iran.<sup>23</sup> All sanctions in place prior to January 16, 2016 will be reinstated.<sup>24</sup> In conjunction with the President’s announcement, OFAC has published Frequently Asked Questions that explain in more detail how and when the sanctions will be reinstated.<sup>25</sup>

President Trump did not issue any executive orders on May 8 that would “snap back” the sanctions at once. To ease the burden of transitioning out of existing engagements with Iran, the U.S. government has provided for a wind-down period of either 90 or 180 days, depending on the type of transaction or sector involved. The wind-down periods allow activities needed to exit existing relationships and contracts.

Although nothing announced on May 8 would appear, on its face, to prohibit entry into new short-term contracts to be completed within the wind-down period, such actions should be avoided based on strong signals from the U.S. government. In his May 8 press conference, National Security Advisor John Bolton stated that “the decision that the President signed today puts sanctions back in place that existed at the time of the deal; it puts them in place immediately. Now, what that means is that within the zone of economics covered by the sanctions, *no new contracts are permitted.*”<sup>26</sup> Moreover, OFAC stated in its FAQs that entry into contracts after May 8, 2018 will be taken into

account in any future sanctions determinations.<sup>27</sup> While the legal status of this issue is therefore somewhat muddled, the reasonable take-away is that, regardless of whether it is technically prohibited to enter into such contracts, it is ill-advised because, at a minimum, it will be taken into account in any future sanctions determinations.

OFAC has advised that payments for pre-existing debts can be collected by non-U.S., non-Iranian persons after the end of the applicable wind-period, but only for contracts entered into prior to May 8, 2018. So long as the agreement under which the debt arises existed prior to that date, if moneys are owed for goods or services provided before the end of the wind-down period, non-U.S., non-Iranian persons will be permitted to receive payment after the wind-down period according to the terms of the agreement.<sup>28</sup> The same applies for payments related to loans extended prior to the end of the wind-down period under financing agreements entered into prior to May 8.<sup>29</sup> These allowances will also be extended to U.S.-owned or -controlled foreign entities under a new general license, which will be issued in the near future.<sup>30</sup>

### Applicable Wind-Down Periods

OFAC has stated that sanctions related to the following activities will be subject to a 180-day wind-down period, ending on November 4, 2018:

- i. Sanctions on Iran's port operators, and shipping and shipbuilding sectors, including on the Islamic Republic of Iran Shipping Lines (IRISL), South Shipping Line Iran, or their affiliates;
- ii. Sanctions on 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;
- iii. Sanctions on transactions by foreign financial institutions with the Central Bank of Iran and designated Iranian financial institutions under Section 1245 of the [NDAA];
- iv. Sanctions on 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 [CISADA];
- v. Sanctions on the provision of underwriting services, insurance, or reinsurance; and
- vi. Sanctions on Iran's energy sector.<sup>31</sup>

OFAC also announced that it will take two additional steps in November 2018. First, it will re-designate all those removed from the SDN List and FSE list “no later than November 5, 2018.”<sup>32</sup> Second, “OFAC intends to revoke GL H,” and therefore any operations under this general license “must be completed by November 4, 2018.”<sup>33</sup>

The following activities will be subject to a 90-day wind-down period, ending on August 6, 2018, after which secondary sanctions will be reinstated:

- i. Sanctions on the purchase or acquisition of U.S. dollar banknotes by the Government of Iran;
- ii. Sanctions on Iran’s trade in gold or precious metals;
- iii. Sanctions on 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;
- iv. Sanctions on 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;
- v. Sanctions on the purchase, subscription to, or facilitation of the issuance of Iranian sovereign debt; and
- vi. Sanctions on Iran’s automotive sector.<sup>34</sup>

Finally, the following primary sanctions will also be reinstated as of August 7:

- i. The importation into the United States of Iranian-origin carpets and foodstuffs and certain related financial transactions pursuant to general licenses under the [ITSR];
- ii. Activities undertaken pursuant to specific licenses issued in connection with 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); and
- iii. Activities undertaken pursuant to General License I relating to contingent contracts for activities eligible for authorization under the JCPOA SLP.<sup>35</sup>

### What Non-U.S. Companies Must Start Doing Immediately

Given the relatively short authorized wind-down periods, non-U.S. companies engaged in transactional or investment activities in, through, or for the benefit of Iran or an Iranian company must immediately assess whether those activities are now, or will soon



be, prohibited. In some cases, the answer will be manifest, while in other cases the answer may require careful analysis of the complex secondary sanctions laws that pre-date the JCPOA.

If an investment or the continued performance of a contract will be prohibited at the end of the applicable wind-down period, the non-Iranian party will need to determine the least costly means of withdrawing from the investment or terminating the contract, whether by exercising a put option, invoking a *force majeure* clause, or by other means.

The U.S. government is not likely to be sympathetic to anyone who refuses to comply with the sanctions on the grounds that compliance would be too costly or economically detrimental. Being sanctioned by the U.S. government for non-compliance is likely to be far more costly and detrimental, and could result in complete exclusion from the U.S. economic system.

Individuals and entities should also ensure that they are not engaging in business with any of the entities listed on the SDN or other sanctions lists. The U.S. government has already started restoring persons and entities to the SDN List, and is expected to continue to do so on an ongoing basis. It is therefore critical to regularly monitor the SDN and other OFAC lists. Depending on the specifics, impacted parties may need to block the assets of re-designated individuals and entities. This requirement will also extend to entities at least 50% owned by designated individuals and entities.<sup>36</sup>

## About Curtis

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<sup>1</sup> See *Fact Sheets: President Donald J. Trump is Ending United States Participation in an Unacceptable Iran Deal*, White House (issued on May 8, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-ending-united-states-participation-unacceptable-iran-deal/>.

<sup>2</sup> Exec. Order No. 13553 (Oct. 1, 2010); Exec. Order No. 13574 (May 23, 2011); Exec. Order No. 13590 (Nov. 21, 2011); Exec. Order No. 13599 (Feb. 8, 2012); Exec. Order No. 13606 (Apr. 24, 2012); Exec. Order No. 13608 (May 3, 2012); Exec. Order No. 13622 (Jul. 30, 2012); Exec. Order No. 13628 (Jan. 1, 2013); Exec. Order No. 13645 (Jun. 5, 2013).

<sup>3</sup> See, e.g., Uri Berliner, *Crippled By Sanctions, Iran's Economy Key in Nuclear Deal*, NPR (Nov. 25, 2013), <https://www.npr.org/2013/11/25/247077050/crippled-by-sanctions-irans-economy-key-in-nuclear-deal>; Thomas Erdbring, *Iran Staggered as Sanctions Hit Economy*, N.Y. Times (Sept. 30, 2013), <https://www.nytimes.com/2013/10/01/world/middleeast/iran-staggered-as-sanctions-hit-economy.html>.

<sup>4</sup> See, e.g., Kenneth Katzman et al., *Options to Cease Implementing the Iran Nuclear Deal*, CONGRESSIONAL RESEARCH SERVICE, at 1 (Apr. 30, 2018), <https://fas.org/sgp/crs/nuke/R44942.pdf>.

<sup>5</sup> Kenneth Katzman & Paul K. Kerr, *Iran Nuclear Agreement*, CONGRESSIONAL RESEARCH SERVICE (Sept. 15, 2017), <https://fas.org/sgp/crs/nuke/R43333.pdf>.

<sup>6</sup> See JCPOA ¶¶ 4-7; JCPOA Packet, White House, *The Iran Nuclear Deal: What You Need to Know About the JCPOA* (July 14, 2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/jcpoa\\_what\\_you\\_need\\_to\\_know.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/jcpoa_what_you_need_to_know.pdf) (“Iran has agreed to reduce its current stockpile of about 12,000 kg of low-enriched uranium (LEU) to 300 kg of 3.67 percent LEU for 15 years.”).

<sup>7</sup> *Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions Under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day* (“JCPOA FAQ”), DEP’T OF TREASURY, at 2 (Dec. 15, 2016), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa\\_faqs.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_faqs.pdf).

<sup>8</sup> Nevertheless, U.S. legal commentators have argued for some time that the United States could exit the JCPOA unilaterally. *See generally* Stephen P. Mulligan, *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement*, CONGRESSIONAL RESEARCH SERVICE (Feb. 9, 2017), <https://fas.org/sgp/crs/row/R44761.pdf>.

<sup>9</sup> *Id.* at 20.

<sup>10</sup> United States person; U.S. person, 31 C.F.R. § 560.314 (2018).

<sup>11</sup> JCPOA FAQ, *supra* 7, at 7. *See generally* Iranian Transactions and Sanctions Regulations, 31 C.F.R. 560 (2012).

<sup>12</sup> IFCA, § 1244(c)(2)(C).

<sup>13</sup> *Id.* at § 1244(d) (requiring the President to impose five sanctions from the list provided in ISA §6(a)).

<sup>14</sup> Exec. Order No. 13590, § 1(a).

<sup>15</sup> *Id.* at § 1(b).

<sup>16</sup> *See* JCPOA FAQ, *supra* 7, at 53 (“the nuclear-related sanctions that are the subject of U.S. commitments in Annex II of the JCPOA are secondary sanctions that are directed toward the activity of non-U.S. persons occurring outside of the United States”).

<sup>17</sup> Exec. Order No. 13716 (Jan. 16, 2016).

<sup>18</sup> *See, e.g.*, JCPOA FAQ, *supra* 7, at 8.

<sup>19</sup> JCPOA Annex II-Sanctions Related Commitments, ¶ 5.1.2.

<sup>20</sup> *See* General License H, 31 C.F.R. 560 (2016), available at [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran\\_glh.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran_glh.pdf).

<sup>21</sup> JCPOA Annex II-Sanctions Related Commitments, *supra* note 20, at ¶ 4.8.1.

<sup>22</sup> *Id.*

<sup>23</sup> 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/>.

<sup>24</sup> *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 Wind-down FAQ”), DEP’T OF TREASURY, at FAQ 1.1 (May 8, 2018), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa\\_winddown\\_faqs.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf) (“In conjunction with this 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 . . .”).

<sup>25</sup> *See generally id.*

<sup>26</sup> *See generally id.*

<sup>26</sup> Press Briefing, White House, *Press Briefing by National Security Advisor John Bolton on Iran* (May 8, 2018), <https://www.whitehouse.gov/briefings-statements/press-briefing-national-security-advisor-john-bolton-iran/> (emphasis added).

<sup>27</sup> *See* JCPOA Wind-Down FAQ, *supra* note 25, at FAQ 2.2.

<sup>28</sup> *See* JCPOA Wind-Down FAQ, *supra* note 25, at FAQ 2.1.

<sup>29</sup> *See id.*



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<sup>30</sup> *See id.*

<sup>31</sup> JCPOA Wind-Down FAQ, *supra* note 25 at FAQ 1.3.

<sup>32</sup> *Id.* The complete list of individuals and entities that were removed from the blocked persons lists on January 16, 2016 is published in Attachment 3 to Annex II of the JCPOA. *See* JCPOA Annex II-Attachments, *available at* <https://www.state.gov/documents/organization/245319.pdf>.

<sup>33</sup> JCPOA Wind-Down FAQ, *supra* note 25, at FAQ 4.4

<sup>34</sup> *Id.* at FAQ 1.2.

<sup>35</sup> *Id.*

<sup>36</sup> *See* JCPOA FAQ, *supra* 7, at 17.