

POTENTIAL SANCTIONS IMPOSITION PURSUANT TO US ADMINISTRATION'S ANNOUNCED NEW STRATEGY ON IRAN

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Legal Briefings

President Trump has repeatedly criticised the 'Iran deal', referring to it as an 'embarrassment' for the United States. On 13 October 2017, he laid out [new strategies](#) his administration is taking concerning Iran. In [a speech](#) delivered at the White House, he also announced that his administration will not certify Iran's compliance with the Joint Comprehensive Plan of Action ("JCPOA"). Such a step raises the spectre of sanctions being reimposed and may well disrupt foreign direct investment in Iran.

THE 'IRAN DEAL'

On 14 July 2015, China, France, Germany, the Russian Federation, the United Kingdom, the United States and the European Union entered into the JCPOA with Iran. The JCPOA is an international agreement on Iran's nuclear program under, which Iran agrees to abide by restrictions on nuclear activities and to open up its nuclear facilities for periodic inspection and monitoring by the International Atomic Energy Agency. In exchange for this undertaking, the other parties to the JCPOA agree to lift certain nuclear-related sanctions imposed on Iran, but not sanctions imposed for other reasons – for example, to counter alleged terrorism.

To date, the International Atomic Energy Agency has confirmed that Iran has been honouring its commitments under the JCPOA.

US SANCTIONS RELIEF

Pursuant to the JCPOA, the US has lifted numerous sanctions targeting non-US nationals and entities (usually referred to as 'secondary sanctions'). These sanctions related generally to:

- transactions with "Specially Designated Nationals"
- certain financial and banking services
- the provision of underwriting services, insurance or re-insurance
- transactions with Iran's shipping and shipbuilding sectors
- the sale, supply or transfer of goods and services used in connection with Iran's automotive sector
- transactions with Iran's energy and petrochemical sectors
- trade with Iran in graphite, raw or semi-finished metals such as aluminum and steel, coal and software for integrating industrial processes
- Iran's trade in gold and other precious metals

However, sanctions applying to US nationals and entities ('primary sanctions') have largely remained in place. In addition, there are remaining secondary sanctions applicable to non-US nationals and entities that target non-nuclear related activities by Iran, such as terrorism and human rights abuse, and dealings with the Iran-related SDNs who remain listed as such post-JCPOA.

CERTIFICATION PROCESS AND GROUND FOR WITHHOLDING CERTIFICATION UNDER IRAN NUCLEAR AGREEMENT REVIEW ACT (INARA)

INARA was passed to provide Congress with oversight power with respect to the JCPOA. It provided for an initial vote on whether to "disapprove" the agreement, followed by a requirement that the President issue a 'compliance certification' to Congress every 90 days. Most recently, the President issued such certifications on 18 April 2017 and 17 July 2017.

The purpose of this compliance certification is to show that Iran is largely in compliance with the JCPOA and that suspension of sanctions against Iran is appropriate and continues to be 'vital to the national security interest of the US'.

On 13 October 2017, the President has announced that he is not going to make this certification. In addition, he suggested that Congress has also started drafting legislation that could, he says, amend the INARA to strengthen enforcement, to add conditions intended to prevent Iran from developing an intercontinental ballistic missile and to make all restrictions on Iran's nuclear activity permanent under US law.

CONGRESS TO INTRODUCE 'SNAPBACK' LEGISLATION BY 14 DECEMBER 2017 UNDER THE INARA

Given that the President has refused to certify Iran's compliance with the JCPOA, under the INARA, minority or majority leaders in Congress have 60 days to introduce legislation reinstating sanctions on Iran, pursuant to an expedited timetable which disables most usual challenges to the bill. Both Houses then have a further 10 days to vote on that legislation.

Introduction of the legislation must therefore occur by 14 December 2017 and it must be voted on by 24 December 2017 at the latest. If such legislation is enacted, the JCPOA sanctions would likely be re-imposed without granting "waiver" authority to the President. If no such legislation is enacted, the President could, but is not required to, re-impose sanctions (or impose new, additional sanctions) through executive action.

However, it is not guaranteed that this approach provided under the INARA will necessarily be taken. For one thing, Congress might, following the President's announcement, amend the INARA to give the President more discretion to re-impose sanctions using his own administrative power. The President also indicated that he is pushing Congress to amend the INARA so that his emphasis on non-nuclear issues will be addressed properly.

Nevertheless, without further Congressional action, the announcement itself does not immediately alter the legal position with respect to Iran transactions which are permissible under the JCPOA and related US waivers, but the forthcoming dialogue between and among the Trump administration, the allies and Congress means that there is substantial uncertainty regarding the future of US-Iran sanctions policy.

It is important to note that barring the passage of legislation that reserves the sanctions authority to Congress only or limits the Trump administration's waiver authority, the Trump administration, as it has threatened, can, as a matter of US domestic law, unilaterally terminate the JCPOA. This is because the JCPOA was implemented through executive action and the sanctions relief it provided was delivered entirely through existing Presidential waiver authority under existing law and executive orders. There are a number of ways the President could re-impose sanctions, primarily through the non-renewal of the waivers upon which the JCPOA regime depends. The INARA does not, of its own force, constrain the President in this regard.

DIPLOMACY OPTION UNDER THE JCPOA

Given the withholding of certification by the President, Iran could claim that the US was in breach of the JCPOA.

Iran could then trigger the dispute resolution mechanism under the JCPOA, which provides that disputes must be resolved diplomatically over the course of 30 days. Failing a diplomatic solution, disputes are then escalated to the UN Security Council.

However, the only remedy contemplated under the JCPOA is a UN Security Council vote on whether to continue lifting UN sanctions against Iran. A failure to approve a continuation of the lifting of sanctions – for example, due to a US veto – would result in the automatic re-imposition of pre-JCPOA UN sanctions. Thus, short of ceasing to comply with the JCPOA in retaliation, from Iran's perspective there is no obvious remedy against a party in breach.

THE ROAD AHEAD

There is substantial divergence between France, Germany and the UK and the Trump administration on how to interpret the JCPOA.

France, Germany and the UK have emphasised the nuclear non-proliferation aspect of the deal, and claim it has met this objective. France, Germany and the UK have all voiced support for the JCPOA and have called on the US not to take steps that would undermine the deal.

Numerous European multinationals have sought to expand into Iran and they arguably have the most to lose from the reimposition of secondary sanctions by the US.

The Trump administration states that Iran has "displayed a disturbing pattern of behavior, seeking to exploit loopholes and test the international community's resolve." In addition, it emphasised that the US wants to target Iran's activities that go beyond the nuclear program, such as ballistic missile development, support for terrorism and human rights abuses.

As noted above, the US has maintained both 'primary sanctions' and 'secondary sanctions' against Iran in response to those alleged violations. The US primary sanctions - a virtual embargo against dealings with Iran by US persons - have not been significantly affected by the JCPOA.

Sanctions reinstatement by new legislation introduced under the INARA is not guaranteed. Either House of Congress could vote against such legislation (or it could fail to obtain the necessary supermajority in the US Senate). Given the process set forth by INARA, it is likely that Congress will consider such legislation in the near term, however. This conclusion is bolstered by the Trump Administration's suggestion that the US may withdraw entirely from the JCPOA if Congress fails to act.

However, the pro forma legislative text and expedited timetable means that passing this legislation may not require the same amount of organisational effort and political expenditure as a typical legislative proposal.

This increases the chances that a valid legislative proposal will be put to Congress, and also lowers the chances that the proposal could be challenged on procedural or technical grounds.

In addition, given the administration's announcement that it is seeking to terminate the JCPOA if no resolution can be reached with Congress and the US's allies, it is likely that Congress will be willing to consider amendment of existing legislation, including the INARA, and new legislation, to impose further sanctions on Iran in an expedited way.

At present, the US is the only JCPOA signatory looking to scuttle the deal and it is likely other UN Security Council members would vote against a resolution to change the status quo. However, their approval is not enough to prevent UN sanctions being effectively re-imposed.

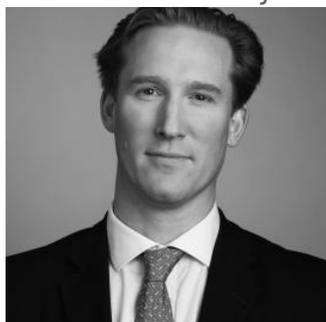
In addition, broad secondary sanctions on the part of the US may be enough to chill foreign direct investment into Iran – even for entities with no US nexus.

A decision by the US to reinstate secondary sanctions on Iran would add further unpredictability to a sanctions regime that is already highly complex and uncertain. Parties conducting business with Iran should exercise heightened caution and conduct appropriate due diligence to address any risk of being caught by the extensive extra-territorial reach of secondary sanctions.

Herbert Smith Freehills' offices in New York, London, Paris, Dubai and Melbourne continue to monitor developments in this area.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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