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## Iran Sanctions Snapback: Practical Implications for International Business & Investors

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On May 8, 2018, President Donald Trump announced that the United States is preparing to reinstate the sanctions it waived as part of the Joint Comprehensive Plan of Action, and to impose additional sanctions targeting Iran. Widely anticipated, and highly controversial both domestically and internationally, President Trump's May 8 announcement represents a dramatic change in U.S. sanctions policy, with significant consequences for international business and investors.

### Existing U.S. Sanctions Targeting Iran

On Jan. 16, 2016, implementation day under the JCPOA, the United States and the European Union relaxed their Iranian sanctions programs. The EU lifted all of its nuclear-related Iran sanctions, including by (1) suspending restrictions on transferring funds between the EU and Iran; and (2) eliminating list-based sanctions targeting hundreds of Iranian entities and individuals.

By contrast, the United States made more modest changes to its sanctions targeting Iran. The United States waived nuclear-related secondary sanctions that prohibited non-U.S. persons from investing or engaging in transactions with sensitive Iranian industries, such as the Iranian energy industry. In addition, the U.S. Department of Treasury's Office of Foreign Assets Control issued General License H, which permitted foreign entities "owned or controlled" by U.S. persons to conduct certain business with Iran, subject to restrictions.

Under the Iranian Transactions and Sanctions Regulations, a foreign entity is "owned or controlled" by a U.S. person if a U.S. person (1) holds a 50 percent or greater equity interest by vote or value in the foreign entity; (2) holds a majority of the seats on the foreign entity's board; or (3) otherwise controls the actions, policies or personnel decisions of the foreign entity.<sup>1</sup> However, the United States continued to prohibit U.S. persons from engaging in most dealings with Iran, and did not lift non-nuclear secondary sanctions targeting Iran. These sanctions prohibit U.S. persons from engaging in virtually any business or dealings with individuals or entities located or organized in Iran and apply to both U.S. persons and foreign entities owned or controlled by U.S. persons.

### How We Got Here

In 2016, then-candidate Trump frequently criticized the JCPOA, at one point panning the agreement as "the worst deal ever negotiated," and threatened to withdraw the United States from the JCPOA if its terms were not renegotiated.<sup>2</sup> Following his election, President Trump reluctantly certified Iran's compliance with the nuclear deal twice, in May 2017 and July 2017.

In October 2017, President Trump declined to certify Iran's compliance with the JCPOA, opening the door for Congress to take action. Congress did not act to reimpose sanctions against Iran within the requisite 60-day window,

<sup>1</sup> 31 C.F.R. § 560.215(b)(1)(i)-(iii).

<sup>2</sup> Nilgun Salim, Donald Trump Might Endanger The Nuclear Deal Between Iran and Six World Powers, Stock News USA (Sept. 29, 2016), <https://stocknewsusa.com/2016/09/29/donald-trump-might-endanger-nuclear-deal-iran-six-world-powers/>.

and, on Jan. 12, 2018, President Trump announced that he would waive sanctions against Iran for a final time, effectively establishing a May 12 deadline for revisions to, or U.S. withdrawal from, the Iran nuclear accord.<sup>3</sup>

### The May 8 Announcement

On May 8, President Trump formally announced the United States' withdrawal from the JCPOA and signed a presidential memorandum to "begin reinstating nuclear sanctions" that were lifted pursuant to the JCPOA. President Trump also intimated that further, new sanctions were possible, asserting that the United States "will be instituting the highest level of economic sanction" and that "[a]ny nation that helps Iran in its quest for nuclear weapons could also be strongly sanctioned by the United States."

In a "Frequently Asked Questions" document published in connection with President Trump's announcement, OFAC announced that the U.S. government would "take steps necessary to establish a 90-day and a 180-day wind-down period for activities involving Iran that were consistent with the U.S. sanctions relief provided for under the JCPOA."<sup>4</sup> Accordingly, persons engaging in activities previously authorized under the JCPOA must "take steps necessary to wind down those activities by either August 6, 2018, or November 4, 2018, as applicable, to avoid exposure to sanctions or an enforcement action under U.S. law."<sup>5</sup>

After Aug. 6, 2018, sanctions involving the following activities will be reinstated: (1) the purchase or acquisition of U.S. dollar banknotes by the government of Iran; (2) Iran's trade in gold or precious metals; (3) the direct or indirect sale, supply or transfer to or from Iran of graphite, raw or semi-finished metals; (4) significant transactions related to the purchase or sale of Iranian rials; (5) the purchase, subscription to or facilitation of the issuance of Iranian sovereign debt; and (6) Iran's automotive sector.<sup>6</sup>

Additional authorizations also will be withdrawn at this time, including (1) the general license authorizing the importation of Iranian-origin carpets and foodstuffs; and (2) 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.<sup>7</sup>

After Nov. 4, 2018, secondary sanctions targeting Iran's shipping, energy and financial sectors will be reinstated.<sup>8</sup> Also after Nov. 4, newly reimposed Section 1245 of the National Defense Authorization Act will authorize the imposition of sanctions on foreign financial institutions that knowingly conduct or facilitate significant financial transactions for the purchase of Iranian petroleum or petroleum products with a U.S.-designated Iranian financial institution or with the Central Bank of Iran.<sup>9</sup> The U.S. Department of State may provide exemptions to foreign financial institutions based on whether their parent countries have significantly reduced purchases of oil from Iran.<sup>10</sup>

The Treasury Department advised that "OFAC intends to revoke GL H, which authorized U.S.-owned or -controlled foreign entities to engage in certain activities involving Iran, as soon as is administratively feasible" and to provide through Nov. 4, 2018, for such foreign entities to wind down any transactions pursuant to General License H.<sup>11</sup>

<sup>3</sup> By way of example, one analysis prepared on the eve of President Trump's decision described the odds of President Trump deciding not to reimpose any sanctions as "basically zero." Amanda Erickson, All the different ways Trump could go on the Iran deal, *The Washington Post* (May 7, 2018), [https://www.washingtonpost.com/news/worldviews/wp/2018/05/07/all-the-different-ways-trump-could-go-on-the-iran-deal/?utm\\_term=.e7bc5ef75c76](https://www.washingtonpost.com/news/worldviews/wp/2018/05/07/all-the-different-ways-trump-could-go-on-the-iran-deal/?utm_term=.e7bc5ef75c76).

<sup>4</sup> OFAC, 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) # 1.1, available at [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).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* # 1.2

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* #1.3.

<sup>9</sup> *Id.* # 5.1.

<sup>10</sup> *Id.* # 5.2.

<sup>11</sup> *Id.* #4.4.

OFAC emphasized that “any activities by U.S.-owned or -controlled foreign entities that continue after the wind-down period concludes on November 4, 2018, in violation of the ITSR may be subject to enforcement actions by OFAC.”<sup>12</sup>

No later than Nov. 5, 2018, the administration will also re-designate more than 400 individuals and entities that were “de-listed” under the JCPOA from OFAC’s specially designated nationals and blocked persons list, foreign sanctions evaders list and other restricted party lists.<sup>13</sup> Therefore, as a result of this week’s announcement, non-U.S. persons could be subject to secondary sanctions for conducting transactions with these individuals and entities.

## Key Takeaways

President Trump’s decision to exit the JCPOA, reimpose nuclear-related secondary sanctions and threaten additional economic penalties against Iran and other countries marks a major and dramatic shift in U.S. policy. The decision will have significant and immediate consequences for both U.S. and non-U.S. companies, and will also require companies to invest more resources in sanctions compliance on a going-forward basis.

### *Companies Will Face Immediate Challenges and Choices*

As a result of President Trump’s announcement, both U.S. and non-U.S. companies will need to promptly assess their potential Iran-related touchpoints to determine their potential exposure under new Iran-related sanctions. For example, if non-U.S. subsidiaries or portfolio companies conduct business with Iranian counterparties, whether directly or indirectly, or participate in joint ventures or other similar arrangements that have Iranian touchpoints, U.S. companies will need to develop a strategy for responding to the May 8 announcement and to wind down any such operations by Aug. 6 or Nov. 4, 2018, depending on the activities involved.

Among other steps, companies will need to develop communication strategies for informing affected employees, subsidiaries, portfolio companies and other business partners of new U.S. sanctions towards Iran, mindful of the fact that both the dramatic reversal from earlier U.S. policy and the divergence between U.S. and EU sanctions may result in confusion about new legal requirements and, foreseeably, resistance where new and restrictive practices will be commercially disruptive.

Along similar lines, companies should review existing agreements with Iranian counterparties, or that involve Iran-related activities, and assess what steps may be required to terminate the agreements (i.e., determine whether the agreements have exercisable provisions that allow termination within the 180-day wind down period). Finally, companies should determine what policies, procedures and related controls must be revised in light of the May 8 announcement, and work quickly to enact necessary changes.

As a result of the May 8 announcement, many companies will face difficult commercial decisions with significant financial ramifications. For example, if portfolio companies are engaged in transactions with Iranian counterparties pursuant to General License H and have not secured appropriate termination provisions, those companies may be required to make the unenviable choice of (1) continuing performance of those agreements after Nov. 4, 2018 in potential violation of U.S. sanctions; or (2) exiting the agreements and risking civil litigation for breach of contract.

Similarly, non-U.S. companies, not ordinarily subject to OFAC’s jurisdiction, will have to determine whether their Iran-related business could put them at risk of violating reinstated (and potentially additional and new) U.S. secondary sanctions, and determine whether to (1) continue potentially lucrative engagements and risk being targeted by U.S. secondary sanctions (and, effectively, cut off from the U.S. marketplace); or (2) end potentially long-standing relationships and suffer commercial and, potentially, reputational harm.

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<sup>12</sup> Id.

<sup>13</sup> Id. #3.1

### ***Companies May Face Additional Challenges in the Near Future***

In addition to the immediate need to assess what changes are necessary to return their compliance programs and businesses operations to a pre-JCPOA state of affairs, both U.S. and non-U.S. companies will have to carefully scrutinize any potential additional changes to U.S. sanctions targeting Iran. For example, if the United States imposes additional secondary sanctions that extend further than pre-JCPOA secondary sanctions, non-U.S. companies may find that dealings that have never, until now, been the cause for concern present secondary sanctions risks. And if OFAC adds additional Iranian entities and individuals to the SDN list, companies may be required to exit business relationships and, potentially, block funds and file appropriate notices with OFAC.

### ***Increased Divergence Between U.S. and EU Sanctions Presents Practical Challenges***

The change in U.S. sanctions policy also may present practical challenges for organizations whose operations are subject to both U.S. sanctions and EU restrictive measures. Based on public statements to date, the EU parties to the JCPOA (i.e., France, Germany and the United Kingdom) appear unlikely to follow the United States' lead in withdrawing from the JCPOA, reinstating nuclear-related sanctions and (potentially) imposing new sanctions targeting Iran.<sup>14</sup> From a compliance perspective, the increased difference between U.S and EU sanctions policies toward Iran will foreseeably present practical challenges for companies with international operations.

At the most basic level, increased divergence between U.S. and EU sanctions policies toward Iran may contribute to employee confusion regarding jurisdictional requirements (and their potential conflict with existing corporate policies). The May 8 announcement also will necessitate revisions of sanctions-related procedures by many international companies and investors (e.g., amendments to existing policies and due diligence protocols and updates to automated embargo country blocks) and communication of those changes to employees.

While it is unclear how the parties to the JCPOA — or other countries — may react to the United States' withdrawal from the JCPOA, it is conceivable that certain countries may respond to the United States' action by implementing so-called "blocking" statutes that prohibit individuals and entities subject to their jurisdiction from complying with U.S. sanctions targeting Iran. Such a response would put companies that are subject to the laws of multiple jurisdictions in the legally untenable position of (1) electing to comply with local law, in possible violation of U.S. sanctions; or (2) complying with U.S. sanctions, in violation of local law.

### ***Effective Sanctions Compliance Requires Flexibility and Advance Planning***

Finally, the May 8 announcement is yet another reminder of the flexible and sometimes transitory nature of U.S. sanctions policy. All told, U.S. sanctions relief under the JCPOA lasted less than 30 months, which to many companies may seem like a short window, given the time and resources invested after implementation day to pursue Iran-related opportunities that now appear to be off-limits once again.

The Trump administration's recent roll-back of certain Cuba sanctions relief accorded by the Obama administration is a similar, though less stark, example of the risks presented by pursuing new business opportunities created by changes in U.S. sanctions policy. And, although the United States formally terminated its Burma/Myanmar sanctions program in October 2016, recent U.S. legislative efforts would impose sanctions on members of the Burmese military, effectively cutting off a substantial portion of the Burmese economy to U.S. persons.

The case studies of Iran, Cuba and Burma/Myanmar underscore the importance of pursuing business opportunities in former, as well as prospective, sanctioned jurisdictions with caution. Given the inherent unpredictability of international conflicts and, increasingly, world leaders' responses to those conflicts, companies and investors that

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<sup>14</sup> In the hours leading up to President Trump's announcement, for example, French sources reported to CNN that France had viewed the call between President Trump and French President Emmanuel Macron as "very, very disappointing." John King, French Sources call Trump-Macron call "very, very disappointing", CNN (May 8, 2018), <https://www.cnn.com/politics/live-news/trump-iran-nuclear-deal/>.

pursue opportunities in sanctions-prone jurisdictions should consider shielding themselves, as best as possible, through robust due diligence and sanctions-specific contractual protections.

## Conclusion

The May 8 announcement reflects a sea change in U.S. sanctions targeting Iran. While President Trump's decision to withdraw from the Iranian nuclear deal is not particularly surprising in light of his past statements and actions, it nevertheless creates significant challenges for companies doing business, whether directly or indirectly, with Iran. The announcement also creates substantial uncertainty, as it reflects the beginning of a still-unclear next chapter in U.S. sanctions targeting Iran, and underscores the vital importance of monitoring developments and dedicating sufficient resources to ensure continued compliance.