

President Trump “Decertifies” the Iran Deal – What Happens Next?

October 16, 2017

Executive Summary

On October 13, 2017, President Trump **announced** that he would not make a quarterly certification required by the Iran Nuclear Agreement Review Act (“**INARA**”) because he was unable to certify that the provision of sanctions relief to Iran under the Joint Comprehensive Plan of Action (“**JCPOA**”) is appropriate and proportionate to the specific and verifiable measures taken by Iran with respect to its nuclear program.¹ The President has taken this step despite the fact that the **International Atomic Energy Agency** (“**IAEA**”) and **U.S. government agencies** have found Iran to be in compliance with its obligations under the JCPOA, and notwithstanding objections by the **other signatories** to the JCPOA.

In making this announcement, President Trump denounced the JCPOA as “one of the worst and most one-sided transactions the United States has ever entered into,” and noted that he had instructed his administration to work with Congress to develop new legislation intended to force the amendment of the JCPOA to remove sunset provisions and impose restrictions on Iran’s ballistic missile programs. He also indicated that, should Congress not pass such legislation, he would “terminate” the JCPOA, noting that he retains the authority to act unilaterally to reimpose sanctions at any time.

In addition, the President announced the administration’s new Iran strategy, which resulted from a months-long interagency review. Although the President provided few details, it appears that the revised strategy will focus on countering Iran’s destabilizing regional activities, support for terrorism, and proliferation of missiles and other weapons, in addition to seeking to strengthen the JCPOA as described above. In furtherance of this policy, and consistent with Section 105 of the Countering America’s Adversaries Through Sanctions Act of 2017 (“**CAATSA**”), the Treasury Department’s Office of Foreign Assets Control (“**OFAC**”) **designated** the Islamic Revolutionary Guard Corps (“**IRGC**”) pursuant to Executive Order (“**E.O.**”) 13224, which targets terrorists and their supporters. As noted in OFAC’s **Frequently Asked Questions** published in connection with the designation, the IRGC had previously been subject to sanctions pursuant to a number of authorities, so this additional designation has few practical consequences. It does, however, render transactions with or involving the IRGC ineligible to claim the statutory “Berman exemptions” relating to personal communication, humanitarian donations, information or informational materials, and travel. OFAC further noted that it would fully implement Section 105 of CAATSA, which requires the application of sanctions pursuant to E.O. 13224 to IRGC officials, agents and affiliates, when that section takes effect on October 31, 2017.

¹ INARA requires the President to certify on a quarterly basis that (1) Iran is transparently, verifiably, and fully implementing the JCPOA, including all related technical or additional agreements; (2) Iran has not committed a material breach with respect to the agreement or, if Iran has committed a material breach, Iran has cured the material breach; (3) Iran has not taken any action, including covert activities, that could significantly advance its nuclear weapons program; and (4) suspension of sanctions related to Iran pursuant to the agreement is: (i) appropriate and proportionate to the specific and verifiable measures taken by Iran with respect to terminating its illicit nuclear program; and (ii) vital to the national security interests of the United States. 42 U.S.C. § 2160e(d)(6). For further details on INARA and the JCPOA, see Davis Polk’s prior memoranda “**Iran Nuclear Review Act Becomes Law**,” dated May 29, 2015, “**Nuclear Deal with Iran Establishes Plan for Sanctions Relief**,” dated August 11, 2015, and “**JCPOA Implementation Day Raises New Sanctions Challenges**,” dated January 20, 2016.

The President's decision does not immediately result in the reimposition of any Iran-related sanctions or place the United States in breach of its commitments under the JCPOA. Rather, the President's failure to provide the certification required under INARA by October 15, 2017 triggers a process whereby Congress may but is not required to consider on an expedited basis specific legislation that would: (1) reinstate statutory sanctions that have been waived in order to comply with U.S. commitments under the JCPOA; and (2) restrict the executive branch from acting to provide further sanctions relief to Iran. If enacted, such legislation would put the United States in breach of its commitments under the JCPOA. At the moment, however, it is not clear whether Congress will consider such legislation, or whether there is sufficient support, particularly in the Senate, for it to pass. Notably, the legislation seemingly envisioned by the President in his announcement would not be eligible for INARA's expedited procedures, and would require bipartisan support for enactment.

We discuss below three possible approaches Congress may take in response to the President's decision, as well as the implications of the decision for future executive branch implementation of the JCPOA and its impact on the other signatories to the agreement and on the regulated public.

Next Steps in Congress

As noted above, the President's decision not to certify the JCPOA gives Congress an opportunity under INARA to consider and pass on an expedited basis legislation reimposing waived statutory sanctions relating to Iran, but does not require it to do so. Congress may also consider other sanctions legislation, including legislation of the type proposed by the President, or simply fail to act at all. We consider each of these possibilities in turn.

1. Congress Passes "Qualifying Legislation"

Under INARA, the President's non-certification gives the Congress a 60-day window (until December 14, 2017) during which "qualifying legislation" reimposing statutory sanctions may be introduced. Qualifying legislation may be introduced in the House by the Majority or Minority Leader and in the Senate by the Majority or Minority Leader or his respective designee, and must take the following form:

- The title of the bill must be: "A bill reinstating statutory sanctions imposed with respect to Iran."
- The matter after the enacting clause of the bill must be: "Any statutory sanctions imposed with respect to Iran pursuant to _____ that were waived, suspended, reduced, or otherwise relieved pursuant to an agreement submitted pursuant to section 135(a) of the Atomic Energy Act of 1954 are hereby reinstated and any action by the United States government to facilitate the release of funds or assets to Iran pursuant to such agreement, or provide any further waiver, suspension, reduction, or other relief pursuant to such agreement is hereby prohibited.", with the blank space being filled in with the law or laws under which sanctions are to be reinstated.

Qualifying legislation is considered under expedited procedures that limit committee consideration and debate and guarantee that introduced legislation will receive a floor vote. Passage of qualifying legislation is subject to a majority vote in the Senate.

Through qualifying legislation, Congress can choose to reinstate some or all of the following statutory sanctions provisions that have been waived to implement the JCPOA:

- section 5(a) of the Iran Sanctions Act of 1996 ("**ISA**"), as amended;
- sections 212(a) and 213(a) of the Iran Threat Reduction and Syria Human Rights Act of 2012 ("**TRA**");
- section 1245(d)(1) of the 2012 National Defense Authorization Act ("**NDAA**"); and/or
- sections 1244(c)(1), (d), and (h)(2); 1245(a)(1)(A)-(C) and (c); 1246(a); and 1247(a) of the Iran Freedom and Counter-Proliferation Act of 2012 ("**IFCA**").

These authorities provide for the imposition of secondary sanctions on non-U.S. persons that engage in specified activity involving Iran. Regardless of which of these provisions is expressly reinstated, enactment of qualifying legislation would appear to prohibit the U.S. government from renewing waivers of any of these provisions going forward, which would ultimately result in the reimposition of all waived statutory sanctions provisions as existing waivers expire and cannot be renewed.

Enactment of qualifying legislation would not reverse certain other measures taken by the U.S. government to provide sanctions relief committed to under the JCPOA, such as the revocation of E.O.s 13574, 13590, 13622, 13645, and §§ 5-7 of E.O. 13628, the removals of persons from the list of Specially Designated Nationals and Blocked Persons (“**SDN List**”), Foreign Sanctions Evaders (“**FSE**”) List, and Non-SDN ISA List, the commitment to forbear from applying certain discretionary sanctions, and the issuance of general licenses authorizing transactions by U.S.-owned or -controlled foreign entities and the importation into the United States of and other dealings in Iranian-origin foodstuffs and carpets. The qualifying legislation would, however, appear to prohibit the further issuance of new licenses, and renewals of existing licenses, pursuant to the Statement of Licensing Policy for activities related to the export or reexport to Iran of commercial passenger aircraft and related parts and services, though it would not automatically revoke existing specific licenses issued under that policy. Additionally, as noted above, qualifying legislation cannot be used as a vehicle for new Iran-related sanctions measures.

The likelihood of enactment of qualifying legislation is uncertain. Notwithstanding their prior **unanimous opposition** to the JCPOA, a number of Republican Senators, as well as the Chairman of the House Committee on Foreign Affairs, Ed Royce, have **expressed concerns** about acting precipitously to reimpose sanctions. As discussed in more detail below, the administration itself has asked Congress to instead consider other legislation aimed at forcing Iran to make additional concessions. However, advocates of a more aggressive U.S. policy towards Iran are likely to urge the use of INARA’s expedited process to act immediately, especially if it becomes apparent that other legislative options, which would require 60 votes in the Senate, are unlikely to be enacted. Additionally, it is important to note that the quarterly certification requirement under INARA remains in effect even after the President’s decision not to make this particular certification. To the extent President Trump remains unwilling to make the required certification going forward, the 60-day window in which to introduce qualifying legislation will recur quarterly, adding an additional layer of uncertainty regarding the fate of U.S. commitments to the JCPOA.

2. Congress Passes Other Legislation

As noted above, the administration has not requested that Congress pass qualifying legislation as defined by INARA; rather, President Trump has suggested that Congress amend INARA with measures aimed at strengthening the JCPOA. Senators Bob Corker and Tom Cotton have announced that they will introduce legislation consistent with the President’s request. A **fact sheet** describing the proposed legislation, the text of which is not yet available, suggests that it would provide for automatic “snapback” of Iran sanctions in the event that Iran’s nuclear program crosses certain thresholds at any point in the future, a measure intended to address concerns about the JCPOA’s limited duration. The fact sheet also indicates that the legislation will include provisions designed to strengthen inspection and verification of Iran’s compliance with the JCPOA, and limit Iran’s ability to develop advanced centrifuges. It is not clear how these provisions would operate, what specific sanctions measures this legislation will include, or whether it would result in a breach of U.S. commitments under the JCPOA, either immediately or in the future. Senate Majority Leader Chuck Schumer and Ranking Member of the Senate Foreign Relations Committee Ben Cardin, who both opposed the JCPOA in 2015, have each announced their **opposition** to the President’s legislative proposal, suggesting that it will be difficult for it to obtain sufficient support to pass under a 60-vote threshold in the Senate.

Alternate legislative approaches could include additional sanctions targeting Iran's non-nuclear activities, such as those provided for by H.R. 1698, the [Iran Ballistic Missiles and International Sanctions Enforcement Act](#), which would not necessarily be inconsistent with U.S. commitments under the JCPOA. Such sanctions could be paired with measures, proposed by [some supporters](#) of the JCPOA, to amend INARA to alter or remove the quarterly certification requirements; this would allow implementation of the JCPOA to go forward without the need for President Trump's personal certification. Legislation of this sort could potentially attract bipartisan support, though it is unclear whether it would be acceptable to the President or would deter him from unilaterally terminating the United States' commitment to the JCPOA.

3. Congress Does Nothing

Given the number of other matters that Congress needs to address prior to the end of the year, and the possibility that there may not be sufficient support at this time to enact either qualifying legislation or other Iran-related sanctions legislation, it is quite possible that Congress will simply not act during the 60-day window established by INARA. In this case, INARA's quarterly certification requirement would remain in place, with failure by the President to provide such certifications triggering additional opportunities for the enactment of qualifying legislation, as noted above. Additionally, sanctions legislation outside of the framework of INARA could be considered and passed at any time. Absent congressional action, the administration may be willing to continue to maintain U.S. commitments under the JCPOA for some period of time, and the President has provided no clear deadline for the congressional action he has requested.

Next Steps for the Administration

In announcing the decision not to certify, President Trump indicated that he is seeking congressional action in the first instance, but emphasized that he retains the authority to act unilaterally to reverse most of the sanctions relief measures that have been put in place to implement the JCPOA. For example, the waivers of sanctions under the ISA, the 2012 NDAA, the TRA, and IFCA can be revoked at any time. Additionally, these waivers must be renewed periodically (every 120 days under the NDAA, every 180 days under IFCA, and every six months under ISA and the TRA), and will all terminate in January 2018 if not renewed. The authority to issue the waivers has been delegated to the Secretary of State, and requires a finding that the waiver is in the national security interests of the United States. Notably, the President stated in his announcement that he had determined that he could not certify that the suspension of sanctions was "appropriate and proportionate" to Iran's nuclear commitments under the JCPOA, but remained silent with respect to whether the JCPOA is in the vital national security interests of the United States. This language appears to have been crafted to leave room for future national security waivers of statutory sanctions, though the administration has provided no indication as yet of its position on such waivers. But President Trump said that if certain amendments are not made to the JCPOA, including making all restrictions on Iran's nuclear activity permanent under U.S. law, he will "terminate" the deal.

Next Steps for the Other Parties to the JCPOA

Other signatories to the JCPOA issued [statements](#) criticizing President Trump's decision and emphasizing their intent to continue to adhere to their respective commitments under the JCPOA. Iranian President Rouhani made it clear that he would not renegotiate the terms of the JCPOA. Given President Trump's indication that he will require amendments to the JCPOA or will terminate it, the future of the agreement remains precarious. As Congress considers what course of action to take in response to the President's decision, the governments of allied countries will likely continue to press for an outcome that leaves the JCPOA intact.

In the event that the United States violates the terms of the JCPOA through either new legislation or executive action, the other parties to the agreement will have limited recourse. There are dispute

resolution processes under the JCPOA, but no mechanism through which the other parties can compel the United States to continue sanctions relief. In fact, the structure of the JCPOA's dispute resolution process would permit the United States, if it chose to do so, to unilaterally trigger the reimposition of United Nations Security Council sanctions with respect to Iran even over the opposition of the other signatories and in the absence of an actual breach of the Agreement by Iran.

The European Union ("EU") Ambassador to the United States, David O'Sullivan, noted in a [panel discussion last month](#) that the EU would likely consider extending the EU Blocking Regulation to prohibit compliance with U.S. extraterritorial sanctions relating to Iran, if such sanctions are reimposed. Other foreign jurisdictions could follow suit with similar measures, and we would expect significant diplomatic resistance to any effort by the United States to strictly apply reinstated sanctions. Diplomatic pressure or even countervailing EU legislation, however, may offer little practical comfort for non-U.S. companies considering whether to do business with Iran permitted by the JCPOA, as they cannot eliminate exposure to U.S. sanctions, and may create additional exposure under local law for actions taken to mitigate U.S. sanctions risk.

Iran's Foreign Minister, Mohammad Javad Zarif, indicated in an [interview](#) in late September that Iran would likely continue to adhere to its nuclear-related commitments under the JCPOA notwithstanding the U.S. move to decertify, provided that the other signatories remained committed to the Agreement and did not cooperate with any U.S. attempt to reimpose sanctions.

Considerations for Regulated Persons

As noted above, the President's decision does not immediately reimpose or otherwise alter any U.S. sanctions relating to Iran. In general, the relief from statutory sanctions provided by the United States under the JCPOA did not affect the legal obligations of U.S. persons, as primary sanctions related to Iran have remained in place. Accordingly, reinstatement of such sanctions, either through enactment of qualifying legislation under INARA or otherwise, would be unlikely to affect U.S. persons significantly. However, U.S. persons (including U.S.-owned or -controlled foreign entities) that rely on the licensing policy changes made by OFAC to implement the JCPOA will want to carefully monitor the legislative process, and may wish to consider how they might wind down currently licensed activity, in the event that licensing policy does change.

For non-U.S. companies, the stakes are potentially much greater. Companies engaged in or considering doing business with Iran that is permitted under local law and consistent with the JCPOA now face the prospect that their activities will become sanctionable under U.S. law. Even if sanctions are not immediately reimposed, President Trump's evident antipathy towards the JCPOA and the specter of indefinitely repeating "decertification" decisions will amplify already considerable uncertainty about ongoing sanctions exposure and will complicate decisions based on a presumption that U.S. commitments under the JCPOA will be durable.

In [guidance](#) published during the prior administration, the Treasury Department's Office of Foreign Assets Control ("OFAC") indicated that, in the event of a "snapback" of sanctions waived under the JCPOA, it would not apply sanctions retroactively to legitimate activity conducted after January 16, 2016 and prior to snapback, but that it would not grandfather contracts signed prior to snapback. See FAQ M.4. OFAC also indicated that it would provide a 180-day grace period in which to wind down sanctionable or prohibited activities. See FAQ M.5. Though these assurances are not legally binding, the Trump administration has thus far provided no indication that it will not abide by them in the event sanctions are reimposed.

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