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Iran: President's Decertification of the JCPOA and Its Implications

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October 16, 2017 – On October 13, 2017, President Trump announced that he will not certify the Iran nuclear deal (the Joint Comprehensive Plan of Action, or “JCPOA”). While his decision has no immediate consequences, it creates a climate of uncertainty.

Shifting Responsibility to Congress

The obligation to certify every 90 days that the Iranians are in compliance with the JCPOA and that the deal remains in the vital national security interests of the United States is not a requirement of the JCPOA. Rather, it is a requirement under the Iran Nuclear Agreement Review Act (“INARA”) passed by Congress in 2015. The decision to decertify triggers a 60 day fast-track process under which Congress can (but is not required to) re-impose sanctions on Iran. In his statement, however, the President indicated he would seek to work with Congress and U.S. allies to address perceived flaws in the JCPOA, and the Administration itself is not expected to seek a re-imposition of sanctions at this stage. The President identified flaws in the JCPOA that he seeks to address, including the JCPOA's failure to address Iran's ongoing efforts to develop ballistic missiles, Iran's support of terrorism, and Iran's failure to comply with the JCPOA's international inspection provisions. However, unless and until the Congress re-imposes sanctions, the JCPOA remains intact.

In response to the President's announcement, instead of seeking an immediate re-imposition of sanctions under INARA, Senators Tom Cotton and Bob Corker announced plans to introduce legislation that would trigger an automatic re-imposition of sanctions only under certain conditions, including if Iran reaches the point where it has reached a less than one-year “breakout” period for developing a nuclear weapon. It is not yet clear who would determine whether any of the conditions have occurred, nor what specific sanctions would be re-imposed under the legislation. Notably, the President – through his executive power, as well as the exercise of waiver authorities under existing sanctions legislation – already has the ability to re-impose sanctions on Iran at any time, subject to whatever conditions he chooses. Indeed, in his statement, President Trump said that if Congress and the allies fail to find a solution to what he identified as the JCPOA's shortcomings, then he would unilaterally terminate U.S. participation in the deal.

OFAC Designation of the Islamic Revolutionary Guard Corps

Immediately following the President's announcement, the Treasury Department's Office of Foreign Assets Control ("OFAC") announced the designation of the Islamic Revolutionary Guard Corps ("IRGC") under Executive Order 13224, which targets global terrorists and their supporters. The move, which was mandated in any event by the Iran-Russia sanctions legislation passed in August, has few additional practical consequences, as the IRGC was already designated by OFAC as a "Specially Designated National" under three other authorities. U.S. persons remain prohibited from transacting or dealing with the IRGC and entities that it owns 50% or more, and the IRGC and its designated agents or affiliates remain subject to certain secondary sanctions that have not been waived as part of the JCPOA.

Possible Consequences of Decertification

The decertification, shifting of responsibility to Congress, and OFAC's designation of the IRGC have no immediate practical impacts on U.S. and European companies doing business in Iran, and the legal landscape remains, for now, unchanged. However, it is not clear how the President's decision to decertify might impact sanctions implementation, an area in which OFAC retains considerable discretion. For instance:

- The Administration's policy shift may impact OFAC's decision to process or grant requests pursuant to its favorable licensing policy for Iran's civil aviation sector;
- Similarly, Treasury's press release announcing the IRGC designation cautioned the private sector that those who do business with "IRGC-controlled companies" do so at great risk. That might suggest a more aggressive use of secondary sanctions authorities that continue to apply to the IRGC;
- Lastly, while OFAC's General License H continues to authorize U.S. owned and controlled entities abroad to engage in most business with Iran, its fate – like that of the JCPOA itself – is tenuous, and companies operating in Iran pursuant to that authority should have exit strategies in place.

Possibility for Further Presidential Action

As a separate matter from the President's decision to decertify Iran's compliance pursuant to the INARA legislation, the President also has authority to revoke or not to reissue his waivers of various Iran sanctions legislation. (Specified sanctions under the Iran Freedom and Counter-Proliferation Act of 2012, the Iran Sanctions Act of 1996, the Iran Threat Reduction and Syria Human Rights Act of 2012, and the National Defense Authorization Act for Fiscal Year 2012.) These waivers are the basis for the suspension of the U.S. secondary sanctions – a critical component of the JCPOA. These waivers need to be renewed every few months (different pieces of legislation require different waiver periods), and the White House has continuously issued the waivers since the JCPOA. The next waiver is due on January 12, 2018. Revocation of the waivers at any time, or failure to re-issue them when they are due for renewal, would lead to immediate snap-back of secondary sanctions against Iran. As discussed above, if the President were to determine that Congress does not satisfactorily address his concerns with the JCPOA, he could re-impose sanctions through the exercise of his waiver authority.

International Reaction

The other signatories to the JCPOA, including European countries, Russia and China, have indicated that regardless of what the United States does, they will not walk away from the JCPOA. Thus, while U.S. companies and their subsidiaries are facing business uncertainty, it appears that the rest of the world may continue the path toward more engagement with Iran.

Conclusion

Because of the many uncertainties about how events will unfold, the October 13 actions are unlikely to be the last word. Interested parties should expect uncertainty to continue and be prepared for yet further developments concerning Iran sanctions.

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