

US WITHDRAWAL FROM JCPOA: US SANCTIONS AND EU COUNTERMEASURES

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On May 8, 2018, United States President Donald Trump announced that the US will withdraw from the Joint Comprehensive Plan of Action (“JCPOA”), the multilateral agreement between the US, the European Union, Germany, France, the United Kingdom, China, Russia and Iran that was designed to limit Iran’s nuclear program, in return for which Iran was granted relief from certain United Nations, EU and US nuclear-related sanctions.

Pursuant to the JCPOA, in January 2016, the vast majority of US “secondary sanctions” on Iran were waived or otherwise lifted. For a summary of our briefing describing the implementation of the JCPOA, see [here](#).

As a result of the US withdrawal, almost all of the US sanctions waived or lifted in 2016 will be reinstated. Guidance on the re-imposition of sanctions will be supplemented in the weeks to come with more information as to how the administration will withdraw from the JCPOA. Nevertheless, the US Office of Foreign Asset Control’s (“OFAC”) recent guidelines provide an expected road map for the re-imposition of sanctions.

The EU, including the JCPOA parties Germany, France and the UK, have decided to abide by their commitments under the plan, so long as Iran respects its obligations. In an attempt to protect EU business from the re-imposition of US secondary sanctions, the European Commission has launched a formal process to re-activate the 1996 so-called “blocking statute”. This will prohibit EU companies from complying with US secondary sanctions on Iran, and entitle them to recover damages arising from such sanctions from the person causing them.

"Violation of secondary sanctions does not subject the relevant party to direct fines or cash penalties...[but instead] limit[s] their ability to transact with the US."

THE US WITHDRAWAL AND ITS EFFECTS PURSUANT TO US LAW

Secondary Sanctions: Targeting Non-US Persons – Potential penalties.

US “primary” sanctions apply to “US persons,” which generally means US citizens or permanent residents, entities organized in the US, or persons in the US. Most primary sanctions on Iran were not lifted under the JCPOA, so US persons generally were and remain unable to do business with Iran (with certain exceptions, as described below).

In contrast, US “secondary” sanctions (also known as “extraterritorial” sanctions) are largely intended to prevent non-US persons from interacting with Iran. Secondary sanctions are not comprehensive, and do not operate to prevent non-US persons from undertaking all transactions with Iran or Iranian companies. Rather, secondary sanctions generally target non-US persons engaging in transactions with certain sectors of the Iranian economy, as well as Iranian “specially designated nationals” (“SDNs”).

In contrast to primary sanctions, a violation of secondary sanctions does not subject the relevant party to direct fines or cash penalties. Instead, non-US persons that violate secondary sanctions are subject to “menu-based” sanctions designed to limit their ability to transact with the US. For a non-US company with significant ties to the US (and given the interconnectedness of global trade, with any significant global ties), these sanctions can be devastating.

The precise sanctions depend on the violation, but among the potential penalties that may apply to a non-US company found in violation are:

- Being added to the SDN list (meaning that the non-US company’s property in the US is frozen, and it generally cannot transact with US persons);
- Denial of US Export/Import Bank guarantees;
- Denial of US export privileges (meaning the non-US company generally cannot obtain items that are subject to US export controls);
- Prohibition on US financial institutions making loans in excess of \$10m to the non-US company;
- Prohibition on dealing in US Treasury bonds or serving as a repository of US government funds;
- Prohibition on entering into contracts with the US government;
- Prohibition on transactions in foreign exchange;
- Prohibition on transfers of credit or payments through US financial institutions;
- Prohibition on US investors acquiring debt or equity of the non-US company;
- Blocking all property of sanctioned persons that are in the US or in the possession or control of US persons;
- Prohibition of imports by a sanctioned person to the US; and
- Prohibition on maintaining a correspondent account at US banks.

SANCTIONED ACTIVITIES

The re-imposition of sanctions will occur in two stages: some sanctions will be re-imposed on August 6, 2018, and the remainder will be re-imposed on November 4, 2018.

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August 6, 2018

Secondary sanctions on the following activities are scheduled to be re-imposed after

August 6, 2018:

- Finance and banking
 - Transactions involving the Iranian Rial and maintaining accounts denominated in Rial outside of Iran;
 - The provision of material assistance or support for the purchase of US banknotes by the Government of Iran; and
 - The purchase of, subscription to, or facilitation of the issuance of Iranian sovereign debt, including governmental bonds.
- Gold and precious metals
 - The sale, supply, or transfer of gold or other precious metals to or from Iran, including the services necessary to facilitate such transactions.
- Software and other metals
 - The sale, supply, or transfer to or from Iran of graphite, raw or semi-finished metals such as aluminium and steel, coal, and software for integrating industrial processes and for associated services, with respect to materials to be used in connection with energy, shipping or the shipbuilding sector of Iran, or for use in Iran's military, nuclear, or ballistic missiles programs.
- Automotive
 - The sale, supply, or transfer of goods to or from Iran, in connection with Iran's automotive sector, and the provision of associated services for the automotive sector.

November 4, 2018

Secondary sanctions on the following activities are scheduled to be re-imposed after November 4, 2018:

- Finance and Banking
 - Financial and banking transactions with persons and entities, including the Central Bank of Iran ("CBI"), the National Iranian Oil Company ("NIOC"), the Naftiran Intertrade Company ("NICO") and the National Iranian Tanker Company ("NITC"); and
 - Financial messaging services to the CBI and Iranian financial institutions listed on OFAC sanctioned persons lists, which it is expected, will also affect the global money transfer system of SWIFT, organized as a cooperative society under Belgian law.
- Energy and Petrochemical
 - Investment (including participation in joint ventures) in goods, services, information, technology and technical expertise and support for Iran's oil, gas, and petrochemical sectors;
 - The export, sale, or provision of refined petroleum products and petrochemical products to Iran;
 - The purchase, acquisition, sale, transport, or marketing of petroleum, petrochemical products, oil, and natural gas from Iran;
 - Transactions with Iran's energy sector including with NIOC, NICO and NITC; and
 - The sale and purchase of Iran's crude oil (subject to waivers, as discussed below).
- Shipping, shipbuilding, and port operators
 - Transactions with Iran's port operators, and Iranian shipping and shipbuilding entities, including the Islamic Republic of Iran Shipping Lines ("IRISL"), South Shipping Line Iran and NITC; and
 - The sale, supply, or transfer to Iran of significant goods or services used in connection with the shipping and shipbuilding sectors, including, financing, classification and port services such as bunkering and inspection.
- Insurance
 - The provision of underwriting services, insurance, and reinsurance in connection with the export from Iran of petroleum, petrochemicals, precious metals, and the shipping, shipbuilding, automotive and aviation sectors, and related activities.

PERSONS THAT WERE REMOVED FROM THE SDN LIST PURSUANT TO THE JCPOA WILL BE RE-LISTED.

In addition, the US will re-impose limitations on the quantity of Iranian crude oil to be sold and the countries that can receive it. Within the next few months, the US government plans to work with countries that have contracts for crude oil with Iran to decrease the amount of crude oil purchased under such agreements. With appropriate authorizations, transactions in crude oil that fall within the scope of these arrangements will not be subject to secondary sanctions.

Further, by November 5, 2018, persons that were removed from the SDN List pursuant to the JCPOA will be re-listed pursuant to Executive Order 13599. These SDNs will have their assets in the US frozen, and a non-US person that transacts with these SDNs may be subject to secondary sanctions.

EFFECTS ON US PERSONS

Because the JCPOA's effect on primary US sanctions targeting US persons was minimal, the recent actions have less of a direct impact on US persons. Nevertheless, the easing of primary US sanctions under the JCPOA will be reversed. Accordingly, after August 6, 2018, US persons will be prohibited from:

- Importing Iranian-origin carpets and foodstuffs into the US; and
- Selling passenger aircraft to Iran for civil aviation use, spare parts for such aircraft, and related services once permitted by specific licenses.

Additionally, effective November 5, 2018, activities authorized pursuant to General License H, which formerly permitted US-owned or controlled foreign entities to engage in certain activities with Iran, will be prohibited. Similarly, all activities once allowed under General License I, allowing US persons to enter into contingent contracts relating to licensed aircraft parts or services, must be completed by August 6, 2018.

Implications for Pre-Existing Contracts

To help effectuate the US withdrawal from the JCPOA, the US government has implemented "wind-down" periods that will allow US and non-US companies to take appropriate action in light of the re-imposition of US sanctions.

Payment for Goods and/or Services

The US government will permit non-US persons to receive payment, after the applicable wind-down period, for goods or services fully provided or delivered to an Iranian counterparty prior to the applicable wind-down period, so long as the underlying contract was entered into prior to May 8, 2018. However, parties cannot engage in the provision of goods and/or services after the applicable wind-down period, even if it is pursuant to a contract dated prior to May 8, 2018.

REPAYMENT OF LOANS AND EXTENDED CREDIT

In the event a non-US person is owed repayment of a loan or extension of credit after the wind down period, but pursuant to a written contract entered into prior to May 8, 2018, the US government will allow the non-US person to receive the repayment of the related debt or obligation. However, in either circumstance, payments made pursuant to pre-existing contracts need to be consistent with US sanctions, and must not involve US persons or the US financial system.

The same wind-down conditions are applicable for US persons and US-owned or controlled foreign entities that have engaged in Iranian transactions within the scope of US sanctions law. However, as soon as possible, OFAC intends to issue narrow authorizations allowing US persons and US owned/controlled foreign entities, to engage in transactions that were previously authorized pursuant to General Licenses H and I.

"EU persons are prohibited to comply with the US sanctions laws...the prohibition is designed to be very comprehensive, and covers deliberate omissions"

Entering New Iran-Related Transactions

During the wind-down period, OFAC has not indicated that persons will be prohibited from engaging in activity that was formerly permitted pursuant to the JCPOA. However, it is risky for companies to enter into new transactions related to Iran during this time period, even if they are completed by the end of the applicable wind-down period. When considering future enforcement actions with respect to transactions engaged in after the applicable wind-down periods, OFAC has expressed that it will evaluate a party's efforts to wind-down activities and consider whether a party engaged in new business involving Iran during the applicable wind-down period.

THE EU BLOCKING STATUTE AND ITS EFFECTS

As mentioned above, despite the decision of the US, the other parties to the plan have not withdrawn from the JCPOA. Germany, the UK, France and the EU remain committed to the continued, full and effective implementation of the plan, so long as Iran respects its obligations. Iran has announced that it will remain in the agreement if the other parties can secure the economic benefits of the JCPOA for Iran despite the US withdrawal.

Against this background, the European Commission announced on May 18, 2018, that it has launched the formal process to activate the blocking statute by updating the list of the aforementioned US sanctions on Iran falling within its scope. The blocking statute (Council Regulation No 2271/96) was adopted by the Council of the European Union in 1996 to protect European business against the extra-territorial application of US sanctions against Cuba (Helms-Burton Act) as well as Iran and Libya (Iran and Libya Sanctions Act). However, at such time, the EU and the US came to an agreement and the blocking statute was not enforced.

Main provisions

Subject to any amendments of the blocking statute, the 1996 version of the statute can be summarized as follows:

Targeting EU Persons engaging in commercial activities

The statute generally applies to nationals (both individuals and legal persons) and residents of the EU. It may also apply to more peculiar corporate structures such as shipping companies established outside the EU which are controlled by nationals of an EU member state, if their vessels are registered in that member state in accordance with its legislation. Moreover, its application depends on engagement of the EU person in international trade and/or the movement of capital and related commercial activities which are affected by the relevant sanction laws.

Prohibition to comply with the relevant US sanction laws

EU persons are prohibited to comply with the US sanctions laws falling under the scope of the statute. The prohibition is designed to be very comprehensive, and covers deliberate omissions as well as indirect acts through a subsidiary or other intermediary. Moreover, any requests by foreign courts based on or resulting, directly or indirectly, from the relevant sanction laws apply to the prohibition.

No recognition of foreign judgements and decisions

The statute provides that no judgement of a court or tribunal and no decision of an administrative authority located outside the EU, directly or indirectly, giving effect to the relevant sanction laws or to actions based thereon or resulting therefrom, shall be recognized or enforceable in any manner.

Information obligation

EU persons shall inform the EU Commission accordingly when their economic and/or financial interests are affected by the relevant sanction laws. In case of legal persons the obligations apply to the directors, managers and other persons with management responsibilities.

Recovery of damages

EU persons shall be entitled to recover any damages, including legal costs, caused by the application of the relevant sanction laws. Such recovery may be obtained from a natural or legal person or any other entity causing the damages or from any person acting on their behalf or as their intermediary. Judicial proceedings for such damages may be instituted in the courts of any EU member state where the relevant debtor holds assets.

Consequences of non-compliance

The statute does not provide for specific legal consequences in case of breach of its provisions by a relevant EU person. Rather, each member state shall determine penalties that are effective, proportional and dissuasive.

Exemption from prohibition to compliance

Obviously, the blocking statute may raise severe conflicts for companies that are active worldwide, such as major banks and other entities with substantial US business exposure. Accordingly, the statute provides that relevant parties may apply to the European Commission for authorization to comply with the relevant sanctions laws to the extent that non-compliance would seriously damage such parties' interests or those of the EU itself.

Further procedure

The European Parliament and the European Council will now have a period of two months to make objections to the blocking statute, subject to any prior announcements of non-objection. Hence, the EU aims to implement the blocking statute before the first stage of re-imposition of US sanctions on August 6, 2018.

However, the European Commission has mentioned that the process can be ended if political circumstances no longer justify the adoption of the blocking statute. Any further negotiations with, and reactions from, the US and/or Iran will certainly have an impact on the actual implementation of the blocking statute.

Other measures of the EU

The EU has also announced further measures in response to the US withdrawal from the JCPOA. These include launching a formal process to remove obstacles from the European Investment Bank, allowing it to support EU investment in Iran.

OPEN QUESTIONS

The US withdrawal from the JCPOA and the EU's countermeasures leave open several questions as to how the new conflicting laws will be enforced in practice and can be fulfilled by non-US companies and financial institutions, the impact on political and economic relations between the US and EU, and whether Iran will ultimately decide to stay in the JCPOA.

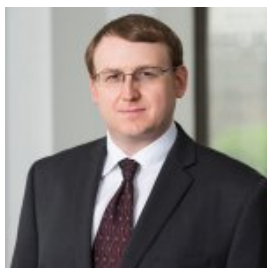
These include:

- It remains to be seen how the blocking statute will actually be applied in practice and which other provisions, such as penalties for breaching the prohibition on complying with the sanction laws, will be put in place by EU member states;
- As mentioned above, violating secondary sanctions does not subject the relevant party to cash penalties, but instead limits such party's ability to transact with the US. Though the blocking statute provides for recovery of damages from the person causing them, it will be challenging to calculate any specific damages incurred. Even more challenging will be determining which persons are liable for the damages, and to what extent. The expansive wording of the statute allows actions to be taken against a wide range of potential debtors such as relevant US counterparts, US banks and even the US government. Actual implementation of recovery claims might therefore cause significant frictions in US-EU relations;
- Global companies, including major banks, may apply for exemption from the provisions of the blocking statute. Subject to how such requests are handled in practice, it seems that, as indicated by the European Commission, the blocking statute will primarily help small and medium sized companies with no or very limited US exposure. Given that trade is becoming increasingly interconnected at a global level, challenges will likely remain even for companies with no US exposure; and
- Depending on the enforcement and actual effect of the secondary sanctions and blocking statute on EU trade with Iran, the latter has yet to decide whether the proposed countermeasures are sufficient to ensure it will continue to enjoy the economic benefits of adherence to the JCPOA, and therefore whether it will continue to remain in the agreement and abide by its terms.

Parties that are involved in trade with Iran, directly or indirectly, should pay close attention to future developments.

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