

# President Obama directs key US agencies to prepare for sanctions waivers under the JCPOA

October 21, 2015

On October 18, 2015, President Obama published a memorandum to the Secretaries of State, the Treasury, Commerce, and Energy instructing them to prepare to implement the US's commitments under the Joint Comprehensive Plan of Action (JCPOA). Concurrently, the Secretary of State issued a "Waiver Determinations and Findings" (Contingent Waiver), certifying a number of US sanctions relief measures to take effect on the day the International Atomic Energy Agency (IAEA) verifies Iran's compliance with nuclear-related measures. This is the planned "Implementation Day."

These two documents signify the US's commitment to the first phase of sanctions relief under the JCPOA, the agreement reached on July 14, 2015, between the "P5+1" (China, France, Germany, Russia, the UK and the US), on the one hand, and the Government of Iran, on the other, with respect to Iran's nuclear activities. Under the JCPOA, the first phase of sanctions relief commences on "Implementation Day." The JCPOA parties, however, are required to begin preparing for Implementation Day starting on "Adoption Day," defined as 90 days after the UN Security Council endorses the JCPOA, which it did under Resolution 2231 on July 20, 2015.<sup>1</sup> Thus, starting on October 18, 2015, the US and others must now prepare to enact sanctions relief, and Iran must begin working toward meeting its compliance requirements under the JCPOA before that sanctions relief can take effect.

## The timing of sanctions relief under the JCPOA

As discussed in our earlier client alert,<sup>2</sup> the JCPOA framework operates with regard to five key dates, two of which have now passed: Finalization Day, the day when the parties agreed to the text of the JCPOA, or July 14, 2015; and Adoption Day, 90 days after the endorsement of the JCPOA by the UN Security Council, or October 18, 2015. The next key date, Implementation Day, is when the first phase of sanctions relief commences. On Implementation Day, the US and EU must effect a wide range of measures to cease the application of, or in some cases terminate, various sanctions. In addition, all sanctions imposed by UN Security Council resolutions concerning Iran will be conditionally lifted.<sup>3</sup>

President Obama's memorandum marks October 18, 2015, as Adoption Day, on which the US must begin preparations for Implementation Day. It does not, however, change the US's current sanctions regime with respect to Iran. Until Implementation Day, the only changes to the US Iran-related sanctions remain those provided for under the Joint Plan of Action (JPOA) of November 24, 2013, as extended through Implementation Day. Thus, until Implementation Day, US Persons—US citizens, permanent residents, entities organized under US laws (including foreign branches), any persons physically in the United States, and any entities owned or controlled by a US Person<sup>4</sup>—remain fully subject to the US's broad commercial ban against Iran. Moreover, the US continues to assert extraterritorial jurisdiction over non-US Persons for a wide swath of transactions with Iran.

The US Treasury Department's new Frequently Asked Questions (FAQs) underscore this point, stating that "certain

activities involving Iran, such as entering into contracts before Implementation Day with individuals and entities on [Office of Foreign Assets Control (OFAC)]'s List of Specially Designated Nationals and Blocked Persons (SDN List), could expose the parties to sanctions." Moreover, it may even be sanctionable to enter into contracts that are "contingent on the implementation of sanctions relief under the JCPOA, such as contracts involving individuals or entities on the SDN List."<sup>5</sup>

## Scope of relief under the Contingent Waiver

The Contingent Waiver, released on the same day as President Obama's memorandum, sets out one scope of the sanctions relief to be effective on Implementation Day. It is not the only sanctions relief, however; the JCPOA commits the US to undertake a number of other sanctions relief measures which are not provided for in the Contingent Waiver, such as terminating multiple Executive Orders and issuing licenses to overseas subsidiaries of US entities to engage in certain transactions with Iran.

In the Contingent Waiver, the Secretary of State certified that, as of Implementation Day, the US will waive the imposition of a number of mostly extraterritorial sanctions—to the extent necessary to implement the JCPOA—under three US laws: the Iran Freedom and Counter-Proliferation Act of 2012 (IFCA);<sup>6</sup> the National Defense Authorization Act for FY 2012 (NDAA);<sup>7</sup> and the Iran Threat Reduction Act and Syria Human Rights Act of 2012 (TRA).<sup>7</sup> The Contingent Waiver's scope of sanctions relief tracks the US's commitments in Annex II of the JCPOA, also discussed in our earlier client alert.<sup>9</sup>

As a result, as of Implementation Day (i.e., upon IAEA verification), the US will no longer impose sanctions on non-US Persons who:

- Engage in transactions with Iran's energy, shipping and shipbuilding sectors, or port operations, or knowingly provide significant support to a person engaged in Iran's shipping and shipbuilding sectors, or port operations, including selling, supplying, or transferring to or from Iran any significant goods or services in those sectors (IFCA 1244(c)(1),(d));
- Invest in Iran's oil, gas and petrochemical sectors; purchase, sale, transport, or market oil, gas and petrochemicals from Iran; export, sell or provide refined petroleum products and petrochemical products to Iran, or otherwise transact with Iran's energy sector including NICO, NIOC, and NITC, and associated services (ISA 5(a)).
- Sell, supply or transfer to or from Iran any precious metals (IFCA 1245(a)(1)(A)) or various industrial metals or software used under certain circumstances (IFCA 1245(a)(1)(B),(C));
- Provide underwriting services, insurance, or reinsurance services for the above activities (i.e., transactions with Iran's energy, shipping and shipbuilding sectors, or port operations, trading in precious metals and other materials) (IFCA 1246(a)(1)(A),(B)(i)-(ii));
- Provide underwriting services, insurance, or reinsurance services to persons blocked solely because of their connection to the Government of Iran or Central Bank of Iran (IFCA 1246(a)(1)(C));
- Provide underwriting services, insurance, or reinsurance services to the National Iranian Oil Company (NIOC) or National Iranian Tanker Company (NITC) (TRA 212(a));
- Purchase, subscribe to or facilitate the issuance of Iranian sovereign debt or debt of any entity owned or controlled by the Government of Iran (TRA 213(a));
- Are non-US financial institutions who knowingly conduct or facilitate any significant transaction in regard to the

above-described activities in Iran's energy, shipping and shipbuilding sectors, port operations, or trade in precious or industrial metals or software, or who facilitate a financial transaction for the sale, supply or transfer to or from Iran of natural gas (IFCA 1244(d),1244(h)(2), 1245(c)); or

- Are non-US financial institutions who knowingly conduct or facilitate any significant transaction with the Central Bank of Iran or other Iranian financial institution (NDAA 1245(d)(1)).
- An important caveat is for transactions with persons on the SDN list: the Contingent Waiver explicitly excludes these from the list of sanctions waivers. In addition, the Contingent Waiver excludes from the sanctions waiver the sale, supply, or transfer of certain industrial materials and software to Iran (set out in (IFCA 1245(a)(1)(B)) that have not been approved by the "procurement channel" established under the JCPOA (and pursuant to UN Security Council Resolution 2231), or that are for use in connection with Iran's military and ballistic missile program. Accordingly, it appears the US will continue to assert extraterritorial jurisdiction over non-US Persons who engage in such transactions even after Implementation Day.

While most sanctions relief is for non-US Persons, the Contingent Waiver rescinds the sanctions on US Persons for the sale of commercial passenger aircraft and spare parts and components—as well as US Persons providing underwriting services, insurance, or reinsurance services in connection with such sales—provided that OFAC has issued any required licenses.

## Implications

President Obama's memorandum and the Secretary of State's Contingent Waiver represent the beginning of what will be a lengthy process of implementing Iran-related sanctions relief. In addition to the key provisions in the Contingent Waiver, the JCPOA also commits the US to enact a number of other sanctions relief measures, which will require regulatory changes not only by State but also by OFAC and the Department of Commerce's Bureau of Industry and Security (BIS). The FAQs note that OFAC intends to publish on its website prior to Implementation Day detailed guidance and information on the implementation of US sanctions commitments under the JCPOA.

Iran must now obtain IAEA verification of the initial nuclear-related measures in order to meet the conditions for broader sanctions relief. Both the US and Iran have respectively cleared any legislative obstacles to the JCPOA's enactment. Should Iran meet its verification obligations to the IAEA, the sanctions relief provided under the Contingent Waiver, together with all the other sanctions relief required under the JCPOA and still to be detailed in future publications from the Departments of State, the Treasury, and Commerce, will take effect.

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<sup>1</sup> UN Security Council Resolution 2231: <http://www.un.org/en/sc/inc/pages/pdf/pow/RES2231E.pdf>

<sup>2</sup> Dentons Client Alert: "The Joint Comprehensive Plan of Action: A First Look"

<sup>3</sup> The second major phase of sanctions relief will be triggered on "Transition Day," defined as when the IAEA, together with the UN Security Council, confirms that Iran's nuclear materials are being used for peaceful activities, or eight years after Adoption Day. Finally, on "UN Security Council resolution Termination Day", defined as 10 years from Adoption Day, the provisions and measures imposed in resolutions concerning Iran would terminate and the UN Security Council would no longer have the right to "snap back" the sanctions on Iran.

<sup>4</sup> See §§ 560.215, 560.314.

<sup>5</sup> [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa\\_adoption\\_faqs\\_20151018.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_adoption_faqs_20151018.pdf)

<sup>6</sup> P.L. 112-239.

<sup>7</sup> P.L. 112-81.

<sup>8</sup> P.L. 104-172.

<sup>9</sup> See FN 2.

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