BACK TO THE FUTURE . . . SECONDARY SANCTIONS RETURN AS WHITE HOUSE WITHDRAWS UNITED STATES FROM JCPOA; REINSTATES "HIGHEST" SANCTIONS ON IRAN

On May 8, 2018, President Trump announced his decision to withdraw the United States from the Joint Comprehensive Plan of Action (JCPOA) and issued a National Security Presidential Memorandum (NSPM) directing the US Treasury Department and other federal agencies to reinstate sanctions against Iran that were suspended under the JCPOA in January 2016. This action results in the re-imposition of stringent US unilateral and secondary sanctions against Iran, which greatly heightens US sanctions risk for non-US companies that continue to engage in business with Iran after a 3-to-6 month wind-down period that otherwise is permitted under their local legislation. US assertion of authority to instruct non-US companies to terminate entirely non-US business with Iran, despite Iran's apparent compliance with the JCPOA, already has attracted a heated response from major trading partners and allies who resent this intrusion on their sovereignty.

Key issues

- The US Government will reinstate secondary sanctions against Iran in two phases following a 90-day and 180-day wind-down period ending August 6 and November 4, 2018, respectively.
- US secondary sanctions will largely revert to their pre-JCPOA levels, posing risks for non-US companies that have invested in key sectors of the Iranian economy since 2016.
- OFAC will re-expand US primary sanctions by revoking General License H, which authorizes certain activities by US-owned or controlled foreign entities, as well as specific licenses granted for the sale of commercial passenger aircraft and related parts and services, and General License I, which authorizes contingent contracts related to such sales.

In a statement about the decision, US Treasury Secretary Steven T. Mnuchin said the Trump administration "*is resolved to addressing the totality of Iran's destabilizing activities.*" Without asserting Iran had violated the terms of the JCPOA, Mnuchin cited "*malign activity*" such as the Iranian government's support of terrorism, use of ballistic missiles, support for the Syrian government, human rights violations, and "*abuses of the international financial system*," which have been the subject of intensifying non-nuclear US primary sanctions outside of the JCPOA framework in recent years. Mnuchin also stated the United States "*will continue to work with our allies to build an agreement that is truly in the best interest of our long-term national security.*"

Phased Approach

The US Treasury Department's Office of Foreign Assets Control (OFAC) issued a set of Frequently Asked Questions (FAQs) regarding the re-imposition of US sanctions which will take place in two phases over the course of 180 days ending on November 4, 2018 (*available at* https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf). During this time, relevant provisions of Executive Orders 13574, 13590, 13622, 13628, and 13645 which President Obama had revoked pursuant to the JCPOA will be reinstated to give legal effect to President Trump's decision.

The FAQs state that persons engaged in activities that could subject them to a designation under US secondary sanctions "*should take the steps necessary to wind down those activities by November 4, 2018, to avoid exposure to sanctions or an enforcement action under US law*."

The first phase of the JCPOA wind-down will last 90 days, ending on August 6, 2018, after which the US government will reinstate sanctions on associated services related to:

- The purchase or acquisition of US dollar banknotes by the Government of Iran;
- Iran's trade in gold or precious metals;
- The direct or indirect 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;
- Significant transactions related to the purchase or sale of Iranian rials, or the maintenance of significant funds or accounts outside the territory of Iran denominated in Iranian rials;
- The purchase, subscription to, or facilitation of the issuance of Iranian sovereign debt; and
- The Iranian automotive sector.

The second phase will last 180 days ending on November 4, 2018, after which the US government will reinstate sanctions on associated services related to:

- Iran's port operators and Iran's shipping and shipbuilding sectors, including the Islamic Republic of Iran Shipping Lines, South Shipping Line Iran, or their affiliates;
- Petroleum-related transactions, including the purchase of petroleum, petroleum products, or petrochemical products from Iran;
- Transactions by foreign financial institutions with the Central Bank of Iran and certain designated Iranian financial institutions;
- The provision of specialized financial messaging services to the Central Bank of Iran and Iranian financial institutions (e.g. SWIFT);
- The provision of underwriting services, insurance, or reinsurance; and
- Iran's energy sector.

Additionally, following the same 180-day period, the US government will resume efforts to reduce Iran's crude oil sales using sanctions authorized by section 1245(d) of the National Defense Authorization Act for Fiscal Year 2012 (NDAA). During the 180-day period, the US State Department will engage in consultations with countries purchasing Iranian crude oil and make determinations with respect to significant reduction exceptions under the

NDAA. The FAQs encourage countries seeking such exceptions "*to reduce their volume of crude oil purchases from Iran during this wind-down period*."

Finally, OFAC will expand the List of Specially Designated Nationals (SDNs) no later than November 5, 2018 to include Iranian financial institutions and Iranian government-owned entities currently blocked under Executive Order 13599. Restoring these entities to the SDN List will subject their counterparties to designation risk under the secondary sanctions.

General and Specific Licenses

Following the 90-day period ending August 6, 2018, the US government will revoke the following authorizations made pursuant to the JCPOA:

- General licenses for the importation into the United States of Iranian-origin carpets and foodstuffs and certain related financial transactions;
- 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; and
- General License I related to contingent contracts for activities eligible under the Statement of Licensing Policy.

Following the 180-day period ending November 4, 2018, the US government will revoke General License H, which authorizes US-owned or -controlled foreign entities to engage in Iran-related business. Thus, after that date, non-US subsidiaries of US companies will have the same restraints as US companies in respect to any Iran-related business.

OFAC will continue to evaluate applications for specific licenses for the exportation or re-exportation of goods, services, and technology to insure the safety of civil aviation and safe operation of US-origin commercial passenger aircraft in Iran. The FAQs do not suggest or imply the termination of other general licenses that are not linked to the JCPOA, such as General License J, which authorizes the temporary sojourn of US-controlled civil aircraft to Iran and related transactions, or General License D-1, which authorizes the export or re-export of US-controlled services, software, and hardware incident to personal communications.

Post-Wind Down Transactions

To prevent Iranian individuals or companies from receiving a windfall as a result of US secondary sanctions, OFAC will allow non-US, non-Iranian persons to receive goods or services, or repayments of loans or credit, following the 90-day or 180-day wind down periods, subject to the following conditions.

For payments for goods or services:

- The goods or services must be fully provided or delivered to the Iranian counterparty prior to August 6 or November 4, 2018, as applicable;
- The provision must be pursuant to a written contract or written agreement entered into prior to May 8, 2018; and
- Such activities must be consistent with US sanctions in effect at the time of their delivery or provision.

For repayments of loans or credits:

- The loans or credits must be extended pursuant to a written contract or written agreement entered into prior to May 8, 2018;
- Such activities must be consistent with US sanctions in effect at the time the loans or credits were extended;
- Repayment must be made according to the terms of the written contract or written agreement; and
- Such payments cannot involve US persons or the US financial system, unless exempt or authorized by OFAC.

With respect to US persons and US owned/controlled entities, OFAC will replace relevant authorizations such as General License H and I, with "*more narrowly scoped authorizations*" to allow for all transactions ordinarily incident and necessary to wind down activities previously authorized by OFAC, including the receipt of payments according to the terms of a written contract or written agreement entered into prior to May 8, 2018, for goods or services fully provided or delivered.

International Response

President Trump's decision to disregard US obligations under the JCPOA by withdrawing without any justification under the agreement (i.e., without any apparent Iranian violations) triggered immediate expressions of disappointment from US allies and major trading partners (other than Israel and Saudi Arabia). A joint statement by the leaders of the United Kingdom, France, and Germany urged "*all sides to remain committed to [the JCPOA's] full implementation and to act in a spirit of responsibility*," noting that the International Atomic Energy Agency has certified Iran's continued compliance with the agreement which was unanimously endorsed by the United Nations Security Council. The European Union, Russia, China, and Iran have signalled their intentions to remain in the JCPOA following the United States' withdrawal.

The US action places at risk of secondary sanction many non-US companies that are engaging in business that remains legal under their local legislation, and we expect there will be significant diplomatic activity to address these circumstances, although the outcome of such talks is far from certain. Non-US companies, particularly in the European Union and other jurisdictions that intend to resist US efforts to deter entirely non-US business by their companies with Iran, should monitor developments closely in making commercial decisions with respect to Iran during the wind-down period. In addition, non-US companies whose Iranian business involves OFAC-licensed US elements should take immediate action to address the compliance obligations under primary sanctions if OFAC terminates the licenses.

CLIFFORD CHANCE

CONTACTS

David DiBari
Partner

T +1 202 912 5098
E david.dibari@cliffordchance.com

George Kleinfeld
Partner

T +1 202 912 5126
E george.kleinfeld@cliffordchance.com

Wendy Wysong
Partner (Washington DC); Foreign Legal Consultant (Hong Kong)

T +852 2826 3460
T +1 202 290 7634
E wendy.wysong@cliffordchance.com

Jacqueline Landells
Counsel

T +1 202 912 5061
E jacqueline.landells@cliffordchance.com

Ali Burney
Counsel

T +65 6506 1964
E ali.burney@cliffordchance.com

Nicholas Turner
Registered Foreign Lawyer

T +852 2825 8854
E nicholas.turner@cliffordchance.com