

6 Possible Iran Deal Scenarios

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On Oct. 13, 2017, President Trump refused to certify Iran's compliance with the Joint Comprehensive Plan of Action (JCPOA) to Congress as required under the Iran Nuclear Agreement Review Act of 2015 (INARA). The president's refusal (commonly reported as a "decertification") does not mean that the United States is abandoning the JCPOA, but it opens the door for Congress to reinstate secondary sanctions against non-U.S. persons doing business with Iran that were waived by the Obama administration.

President Trump's announcement also outlined a new strategy for dealing with Iran and reiterated his willingness to withdraw from the JCPOA if he is dissatisfied with the subsequent response from Congress and other world leaders.

Although the announcement does not immediately impact U.S. obligations under the JCPOA, the surrounding rhetoric certainly creates confusion and questions about the future of the JCPOA.

Background of the JCPOA

On July 14, 2015, the P5+1 (China, France, Germany, Russia, the United Kingdom and the United States), the European Union and Iran entered into the JCPOA with the goal of ensuring that Iran's nuclear program would be exclusively peaceful.

Under the JCPOA, Iran agreed to significantly reduce its stockpile of uranium and other nuclear commodities and submit to significant restrictions on its nuclear energy program under ongoing inspections by the International Atomic Energy Agency (IAEA). In exchange, the JCPOA counterparty countries agreed to suspend or repeal portions of their respective sanctions against Iran and to refrain from imposing new versions of those sanctions.

Under the JCPOA, the United States specifically agreed to:

- Lift certain nuclear-related secondary sanctions against Iran. These secondary sanctions prohibited non-U.S. persons from engaging in specified



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conduct involving Iran, even though occurring outside the United States without involvement by U.S. persons.

- Remove more than 400 individuals and entities with ties to Iran from the Specially Designated Nationals and Blocked Persons List maintained by the U.S. Department of the Treasury – Office of Foreign Assets Control (OFAC) and unfreeze assets held by U.S. financial institutions.
- Permit U.S. persons to engage in limited transactions with Iran related to commercial passenger aircraft for civil aviation and to import Iranian-origin carpets and food products.
- Permit foreign subsidiaries of U.S. companies to transact business with Iran under limited circumstances without involvement from their U.S. parent company or other U.S. persons.

These sanction modifications did not become effective until “Implementation Day” on Jan. 16, 2016, when the IAEA verified that Iran had fulfilled initial commitments under the JCPOA. The sanction changes resulted in the release of assets and accounts belonging to Iran or former Iranian denied parties; however, the exact dollar amount of unfrozen assets is unknown.

Some authorities have estimated that the JCPOA returned from \$35 billion to more than \$100 billion in previously frozen assets to Iran. On the campaign trail, candidate Donald Trump stated that the JCPOA had returned more than \$150 billion to Iran, while his speech on October 13 described the amount as more than \$100 billion.

As a result of the lifting of the EU Iran sanctions and the suspension of U.S. secondary sanctions, non-U.S. persons are generally free to transact business with Iran following Implementation Day. However, U.S. primary Iran sanctions still prohibit U.S. persons from engaging in transactions with Iran.

Additionally, the JCPOA did not restrict the ability of the United States to maintain its existing sanctions against Iran or impose new Iranian sanctions related to Iran’s support of terrorism, Iran’s support of human rights abuses within Syria, other human rights abuses by Iran, Iran’s incursion against Yemen or Iran’s ballistic missile program.

Under the INARA, Compliance Certification Is Ongoing

If the Obama administration had entered into the JCPOA as a treaty, it would have required review and approval by two-thirds of the U.S. Senate. Instead, the Obama administration insisted that the JCPOA was a non-binding political commitment that was exempt from Senate approval.

Opponents in Congress attempted to enact legislation to prevent the Obama administration from entering into the JCPOA, but those opponents were unable to muster sufficient support to override an inevitable Obama veto. Instead, Congress ultimately adopted the INARA on May 22, 2015, to provide itself the opportunity to review the JCPOA and potentially delay its adoption.

The U.S. Senate and House of Representatives conducted the reviews permitted under the INARA, but ultimately did not adopt disapproving resolutions (which would have delayed, but not prevented, U.S. entry into the JCPOA). As a result, then Secretary of State John Kerry signed the JCPOA on behalf of the United States on July 14, 2015.

The INARA requires the president to make a continuing determination every 90 days and certify that Iran is in compliance with its JCPOA commitments and that the U.S. suspension of sanctions under the JCPOA remains “appropriate and proportionate” to Iran’s corresponding reductions to its nuclear program and

“vital to the national security interests” of the United States. If the president refuses to make this certification, the INARA gives Congress a 60-day window to consider and potentially enact on an expedited basis “qualifying legislation” to reinstate U.S. sanctions against Iran waived under the JCPOA.

The INARA defines “qualifying legislation” as a bill titled “A bill reinstating statutory sanctions imposed with respect to Iran,” and includes the specified language from the INARA to reinstate the waived secondary sanctions and prohibit the U.S. government from releasing funds or assets to Iran or providing any further relief to Iran pursuant to the JCPOA.

The INARA’s expedited review procedures are only available for this exact piece of “qualifying legislation.” Any alternative legislation would be subject to ordinary requirements for introduction, committee consideration, voting, etc., and could potentially take significantly longer than 60 days to become law.

Trump Withholds Certification

After taking office, President Trump ordered a comprehensive review of the JCPOA and the commitments of the United States. While that review was in process, he reluctantly certified the JCPOA at the first and second INARA certification deadlines on April 18, 2017, and July 17, 2017.

However, two days before the third INARA certification deadline on Oct. 15, 2017, President Trump announced that after considering results of the broader review of U.S. policy toward Iran undertaken by his administration, he had decided not to certify Iran’s JCPOA compliance for a third time.

Trump explained that he reached this decision in part because of flaws in the JCPOA, such as sunset provisions that he believes will provide Iran a pathway to a nuclear weapons program, insufficient enforcement mechanisms within the JCPOA and a lack of restrictions on Iran’s missile development activities.

President Trump expressed his hope that his certification refusal would prompt Congress and the JCPOA counterparties to address the flaws he cited in the JCPOA. However, he also stated that “[i]n the event we are not able to reach a solution working with Congress and our allies, then the [JCPOA] will be terminated. It is under continuous review, and our participation can be cancelled by me, as president, at any time.”

Six Potential Outcomes as a Result of President Trump’s Refusal to Certify the JCPOA

President Trump’s refusal to certify the JCPOA does not affect primary U.S. sanctions against Iran, which continue to prohibit U.S. persons from engaging in transactions with Iran and the government of Iran. It also has no immediate effect on the JCPOA. However, the certification refusal allows Congress the opportunity to institute the INARA’s “qualifying legislation” to reinstate secondary Iran sanctions against non-U.S. persons, which would violate the JCPOA. Alternatively, Congress or the president could modify the Iran sanctions through other means that might or might not violate the JCPOA.

Potential outcomes following President Trump’s refusal to issue the certification include, but are not limited to, the following:

Congress could reinstate secondary Iran sanctions against non-U.S. persons as “qualifying legislation” under the INARA

In its current form, the INARA only allows (but does not require) Congress to enact “qualifying legislation”

to reinstate the secondary sanctions waived by the Obama administration under the JCPOA. If Congress did enact the exact “qualifying legislation” that is already included in INARA, such action would violate U.S. commitments under the JCPOA to refrain from reinstating secondary sanctions and would entitle Iran to abandon the JCPOA.

If that occurred, IAEA inspections of Iran’s nuclear facilities would cease, so the JCPOA counterparties would lose their current visibility to Iran’s nuclear development program and Iran would no longer be obligated to limit its reserves of nuclear materials.

Additionally, even if Congress did decide to statutorily reinstate secondary U.S. sanctions against Iran, the European Union has indicated it would consider adopting its own blocking legislation to prohibit EU companies from complying with any reinstated U.S. secondary sanctions. That would put foreign subsidiaries of U.S. companies (and many financial institutions) in the untenable position of being required to choose whether to follow U.S. or EU requirements.

Congress could amend the INARA in an attempt to influence the JCPOA

Based on President Trump’s statements, this appears to be his desired approach. Congress could amend INARA to specify a list of desired improvements to the JCPOA and use the threat of statutorily reinstating secondary sanctions at a later date to indirectly pressure the JCPOA counterparties to amend the JCPOA or to adopt a course of conduct consistent with Congress’ desired JCPOA improvements.

This sort of legislation would be a deviation from the INARA’s “qualifying legislation” and would not be entitled to INARA’s streamlined review process. Considering that it took the JCPOA parties several years to negotiate the JCPOA, it is unlikely that 60 days would be enough time to force any sort of amendments to the JCPOA.

This approach would instead potentially provide Congress the opportunity to exert more influence over the JCPOA in the longer term. Further details on this option may become available in the near future because President Trump’s speech indicated that members of the U.S. House of Representatives and Senate are currently drafting this proposed legislation.

Congress might not take action

The INARA only permits Congress to consider reinstatement of the secondary sanctions through “qualifying legislation” and is silent on what would happen should Congress fail or elect not to enact “qualifying legislation” within its proscribed 60-day limit. In such event, the JCPOA would remain in place but Congress would also retain the ability to statutorily reinstate secondary sanctions against Iran independent of the INARA.

President Trump or Congress could seek to impose sanctions against Iran under carve-outs permitted by the JCPOA

The Trump administration’s new announced policy toward Iran includes a commitment to end Iran’s support of terrorist activities, human rights abuses and missile development programs. Those policy objectives are at least partially compatible with the above-described sanctioning authority that the United States retained when it entered into the JCPOA.

Therefore, either President Trump or Congress could theoretically implement new sanctions against non-

U.S. persons and remain in compliance with the JCPOA if the new sanctions were properly limited to the areas of terrorism, human rights or missile development.

President Trump could seek to reinstate secondary sanctions under the JCPOA's existing "snapback" procedures

President Trump's speech alleged that Iran has already violated JCPOA provisions relating to heavy water limitations, centrifuge operations and inspection procedures. If the United States did pursue the JCPOA's dispute resolution process and proved that these alleged violations took place, the JCPOA would permit the United States to reinstate its secondary sanctions against Iran (commonly referred to as a "snapback").

OFAC issued prospective snapback sanctions guidance in December 2015. However, Iran has stated that it will not honor its obligations under the JCPOA if snapback sanctions are reinstated.

Therefore, although this approach would allow increased participation from the other JCPOA counterparties, it would ultimately achieve the same result as the United States directly reinstating its secondary sanctions or unilaterally withdrawing from the JCPOA.

President Trump could withdraw from the JCPOA

As discussed above, the United States entered into the JCPOA as a nonbinding political commitment. Therefore, in addition to any of the previously discussed actions, President Trump could unilaterally withdraw the United States from the JCPOA at any time.

The JCPOA does not expressly address what would happen if a member-country made such a withdrawal, but the other JCPOA counterparties may find it very difficult to enforce the JCPOA absent U.S. participation, and Iran would presumably cease complying with the JCPOA's requirements for its nuclear program.

What This Means to You

For now, the current U.S. sanctions against Iran have not changed and primary sanctions remain in place for U.S. persons. However, uncertainty over the future of the JCPOA remains.

U.S. and non-U.S. companies should proceed with caution while keeping a close eye on Congress and the Trump administration during the next 60 days, as they grapple with how to approach U.S.-Iran policy without jeopardizing relationships with U.S. allies and preventing a breach of current JCPOA commitments.

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