

## BREAKING DOWN THE SNAPBACK

On 8 May 2018, as confirmed by the revised Frequently Asked Questions (the "FAQ") from the U.S. Treasury's Office of Foreign Assets Control ("OFAC"), the American President issued a National Security Presidential Memorandum ("NSPM") directing the Secretary of State and the Secretary of the Treasury to prepare immediately for the reimposition of all of the U.S. sanctions lifted or waived in connection with the Joint Comprehensive Plan of Action ("JCPOA" or "Nuclear Deal").

### WHAT DOES THIS MEAN?

Contrary to the American President's televised announcement that the U.S. may sanction any country supporting Iran's supposed quest for nuclear weapons, the NSPM in fact initiates a comprehensive snapback of nearly all sanctions on Iran which were in place prior to 16 January 2016, the Implementation Day of the JCPOA. The sanctions which will snapback are not merely limited to nuclear activity - indeed, the FAQ confirms that the NSPM presages the reimposition of all sanctions which had been lifted or waived in connection with the Nuclear Deal, which would, by definition, include both primary and secondary sanctions, both nuclear and non-nuclear.

The FAQ makes clear that the snapback will occur in three phases detailed here below:

#### **8 May 2018: Beginning of the Wind-Down Period**

Starting 8 May, many forms of new business with Iran or Iranian entities become henceforth prohibited, and entities already engaged in business with Iran are instructed by OFAC to commence the wind-down of their activities. This wind-down will operate through two overlapping periods of 90 and 180 days respectively, subject to the nature of such business.

#### **5 August 2018: Expiration of the 90 day wind-down period and beginning of sanctioning associated activities**

The 90-day wind-down period for the following named activities is set to expire on 5 August 2018, the day after which nearly all activity associated therewith may be sanctionable, including:

- Transactions in Iranian rials, in particular "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 the Iranian rial";
- Trade in gold/precious metals, graphite, and raw, or semi-finished metals;
- The Iranian "automotive sector", ostensibly in its entirety.

This means that, in short, the period of wind-down for activities related to the automotive industry, metals (precious or raw/semi-finished industrial), and rial (as named above) is 90 days; thereafter, no further wind-down activity may take place, and only payment/repayment for certain goods/services contracted prior to 8 May 2018 and delivered prior to 5 August 2018 may be made.

The FAQ also indicates that OFAC will revoke JCPOA-related authorizations for certain limited activities of U.S. persons vis-à-vis Iran, including carpets and foodstuffs; moreover, the specific licenses for the sales of commercial passenger aircraft, parts and services and any contingent contracts previously authorized under the General License I, will be revoked and, OFAC has said it will no longer consider new or pending specific licenses for aircraft sales.

#### **4 November 2018: Expiration of the 180 day wind-down period and beginning of sanctioning associated activities**

The 180-day wind-down period for the following named activities is set to expire on 4 November 2018; the day after which nearly all activity associated therewith may be sanctionable, including:

- Petroleum-related transactions with, among others, the National Iranian Oil Company (NIOC), Naftiran Intertrade Company (NICO), and National Iranian Tanker Company (NITC), including the purchase of petroleum, petroleum products, or petrochemical products from Iran;
- Associated services related to these petroleum-related activities, which should be understood as meaning services – including technical assistance, training, insurance, re-insurance, brokering, transportation, or financial service – necessary and ordinarily incident to the underlying activity (such definition promulgated as per OFAC FAQ dated 16 January 2016);
- Engagement of foreign financial institutions with the Central Bank of Iran and/or with certain designated Iranian financial institutions;
- Provision of specialized financial messaging services to the Central Bank of Iran and certain Iranian financial institutions (as per Section 104(c)(2)(E)(ii) of 2010 CISADA). Pursuant to this provision, transactions between Iranian and foreign financial institutions relying on the “SWIFT” system which allows transfer of money across international borders, may be once again blocked;
- Insurance industry/underwriting activities;
- Iran's energy sector more broadly.

In addition, more than 400 persons and entities removed from the OFAC SDN List under the JCPOA will be, per section 1.3 of the FAQ, once again thusly designated no later than 5 November 2018, effectively exposing any persons dealing with them thereafter to secondary sanctions.

Moreover, as would be expected, General License H, which previously authorized foreign subsidiaries of U.S. enterprises to engage in certain kinds of Iranian business, is to be modified/revoked, accordingly.

OFAC has declared that it intends, via Federal Register publication, to replace General License H, General License I, and the general authorizations relating to trade in Iranian-origin carpets and foodstuffs, with more narrowly defined authorizations specifically in order to allow U.S. persons and, as appropriate, U.S.-owned or U.S.-controlled foreign entities, to engage only in transactions deemed ordinarily incident and necessary to the wind-down of activities that were previously authorized pursuant to these General Licenses and authorizations.

## **GUIDANCE ON GRANDFATHERING**

The 8 May FAQ also elaborates upon the nature of so-called grandfathering of payments which are contractually specified under activities previously permitted by the JCPOA, resolving the long-standing question of legality of payments made under contracts initiated prior to snapback.

OFAC has stated that they will allow for non-U.S., non-Iranian persons which are owed payment for goods and services under a contract entered into before 8 May 2018, to be permitted to receive payment after the end of the wind-down period/the start of the reimposition of sanctions, under the terms of such contracts.

Such payment authorization is made on the condition that the goods or services are fully provided prior to 5 August 2018 or 4 November 2018, as applicable, and that the payment does not involve U.S. persons or the U.S. financial system (which, in any case, is not permitted even prior to any snapback). This is also true for loans or credits.

Hence, commencing 5 November 2018, the most significant non-sanctioned action related to Iranian business previously permitted under the JCPOA will be certain kinds of payments/repayments for goods and services, loans and credits, contracted prior to 8 May 2018 and provided/delivered prior to the end of 5 August 2018 / 4 November 2018, as the case may be.

## **A (RE)STATED OBJECTIVE: REDUCTION OF IRAN'S CRUDE OIL SALES**

The FAQ finally makes the important declaration that the U.S., through OFAC, specifically intends to reduce, once more, Iran's crude oil sales. This is consistent with prior efforts as per the IFCA / NDAA: harsh, anti-Iranian Acts which were implemented in the year 2012. At that time, this sanctions mechanism targeted the finances of oil importers, including their banks, which were threatened with exclusion from the U.S. financial system by prohibiting, closing or restricting their correspondent or payable-through accounts at U.S. financial institutions if their countries did not demonstrate substantial reductions of their purchases of Iranian crude oil.

These Acts did however, allow for a waiver of such petroleum-related sanctions for countries that could demonstrate they had "significantly reduced" their import of Iranian oil in the previous 180 days, and this time around, the U.S. government will begin making evaluations of whether a given country has made a "significant reduction" of its crude oil purchases from Iran after the 180 day wind-down period (5 November 2018).

The "significantly reduced" standard undoubtedly allows for considerable administrative discretion in determining what constitutes "significant" and even what the term "crude oil" comprises (e.g, whether it may cover condensate). In the past, the standard for "significant" was 20% by volume.

## **WHAT NOW?**

The U.S. government has unquestionably taken a sweeping, brazen approach to reimposing sanctions against Iran, in spite of Iran's manifest and repeated demonstrated compliance with all terms of the JCPOA.

While it is difficult to find aspects of the FAQ which leave substantial room for a continuation of commerce between Iran and nations subject to / choosing to obey U.S. secondary sanctions, there are certain finer points of the language which are to be noted:

- 1) The FAQ explains that sanctions will be reimposed on petroleum-related transactions and purchases of petroleum, petroleum products and petrochemical products.
- 2) The FAQ does not, however, mention gas, in any context, although the FAQ does state that the Energy Sector will once again be subject to sanctions. It is not clear whether the exclusion of the mention of "gas" provides a window for certain kinds of transactions, but by the same token, it is difficult to envision, at least immediately, how the reimposition of energy sector-wide sanctions would not, perforce, include gas.
- 3) The FAQ furthermore does not make mention of the dispute mechanisms embedded in the JCPOA itself. Pursuant to the complaint facilities contained therein, Iran may now, if it chooses to do so, file an action against the U.S. within the UN whereby the UN Security Council may undertake a resolution not to reimpose sanctions on Iran; however, the issue here is two-fold in that, even if such a resolution could be passed, the UN cannot necessarily force the U.S. not to reimpose unilateral sanctions (primary and secondary) on Iran, and moreover, with U.S.'s United Nations Security Council veto power, it would seem virtually impossible for any such resolution of any kind which could limit the effects of snapback on Iran to be passed.
- 4) The FAQ does not expressly exclude transactions in non-USD, non-rial currencies, and so although SWIFT may be at risk of closure vis-à-vis Iran, other financial transfer systems, including TARGET2, and bilateral payments frameworks such as those existing between Iran and Turkey, Russia and China, may offer viable alternatives over time.

In conclusion, preservation of the JCPOA or its enabling conditions for commerce between the globe and Iran will require swift and decisive action by the European Union, which has, through its "Remarks by High Representative Federica Mogherini on the Statement by US President Trump regarding the JCPOA", indicated an intent to protect the interests of its companies which have invested billions in Iran post-JCPOA. Such action could include the enactment of blocking regulations, the passing of council resolution(s) offsetting the ramifications of the NSPM-imposed snapback, or otherwise the filing of a WTO-based complaint against the U.S. to attempt to reverse the sanctions reimposition.

Absent these kinds of measures, it would seem that there is a likelihood that many companies engaged in Iranian business must contemplate the implications of the snapback for their business, and how they can wind down or otherwise transfer their existing project interests to parties which do not perceive the threat of sanctions consequences for remaining in Iran.

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## CONTACT PARTNERS

MEHRNOOSH ARYANPOUR  
[aryanpour@gide.com](mailto:aryanpour@gide.com)

CHRISTOPHE ECK  
[eck@gide.com](mailto:eck@gide.com)