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Springtime For 'Implementation Day' On Iran Sanctions

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Law360, New York (October 9, 2015, 12:44 PM ET) -- With a Democratic filibuster of the Republican-sponsored Senate resolution disapproving the agreement reached between the so-called P5+1 countries (i.e., the United States, United Kingdom, Germany, France, Russia and China) and Iran (the Joint Comprehensive Plan of Action or JCPOA), the agreement has cleared the last remaining hurdle to implementation.[1] On Sept. 17, the Obama administration took the first public step toward implementation by announcing the appointment of a senior [U.S. Department of State](#) official to oversee implementation by Iran, the United States and other parties to the agreement.[2]

The JCPOA, which was finalized on July 14, will be formally “adopted” on Oct. 18, 2015, which is 90 days after the U.N. Security Council endorsed the agreement on July 20, unless the parties agree on an earlier date. Sanctions relief under the JCPOA will then be phased in as Iran takes verifiable steps to fulfill its commitments with respect to its nuclear program.

The U.S. will not begin to lift additional sanctions on Iran until “Implementation Day,” which is the date on which the International Atomic Energy Agency verifies that Iran has implemented key nuclear-related measures described in the JCPOA. Implementation Day (and hence the lifting of additional U.S. sanctions) is not expected to occur until Spring 2016.

Even if Iran satisfies its commitments and the U.S. grants the sanctions relief provided under the JCPOA, however, not all sanctions will be lifted. While most sanctions applicable to non-U.S. persons will be lifted, the sanctions will generally remain in place with respect to U.S. persons, who will generally remain prohibited from engaging in any economic activity involving Iranian persons or entities. The U.S. will also continue to fully enforce sanctions that have been imposed on Iran for its support of terrorism and its human rights abuses. Moreover, if Iran violates the terms of the JCPOA at some point in the future, there is the potential that sanctions could be reimposed, or “snapped back”. Thus, companies (whether bound by existing U.S. or EU-imposed sanctions programs) considering doing business in Iran after Implementation Day should proceed cautiously — both because ambiguities remain under the JCPOA and because the sanctions will not necessarily be permanently lifted and may “snap back” with little notice.

In short, Implementation Day will and will not affect current U.S. and EU sanctions in the following ways:

- The U.S. and EU will largely suspend sanctions on certain activities by non-U.S. persons in the following sectors: energy and petrochemical; shipping, shipbuilding and ports; automotive; gold and other precious metals; software; and financial institutions and insurance.

- The U.S. embargo on Iran will remain. Sanctions will remain in effect for U.S. persons. The U.S. prohibition on virtually any transactions involving Iran will remain in place, as applied to U.S. persons. That has potential consequences even for non-U.S. persons. Because the U.S. banking system will continue to enforce the sanctions regime for U.S. persons, even non-U.S. companies no longer subject to the sanctions after Implementation Day may nonetheless risk having transaction payments blocked if they are denominated in U.S. dollars and pass through the U.S. banking system — unless specifically authorized by the U.S. government.
- U.S. sanctions involving the following activities by non-U.S. persons, among others, will remain in effect on Implementation Day: transfers of certain weapons-related technology; transactions involving Specially Designated Nationals ("SDNs"), including the Islamic Revolutionary Guard Corps ("IRGC") and entities it owns or controls; and facilitating or supporting transactions involving certain human rights abuses in Iran or international terrorism.
- Both the U.S. and EU have also committed to removing a number of Iranian persons from their respective sanctions lists. Those persons subject to delisting are set forth in the attachments to Annex II or the JCPOA.[3]

U.S. Sanctions Affecting U.S. Persons

The lifting of sanctions on Implementation Day will have little impact on the ability of U.S. persons to do business with Iran. The U.S. embargo on Iran will remain in place and the U.S. will continue to enforce stringent controls on Iran-related transactions by U.S. persons (wherever located), foreign entities owned or controlled by a U.S. person and foreign persons located in the United States. The Iranian Transactions and Sanctions Regulations ("ITSR") still prohibit the export, sale or supply, directly or indirectly, from the United States or by a U.S. person, wherever located, of any goods, technology or services to Iran. The ITSР also generally prohibits the import of goods and services from Iran into the U.S.[4]

Authorization from the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") is required before persons subject to U.S. jurisdiction can engage in most exports or imports from Iran. Annex II to the JCPOA specifically states that "[t]he sanctions that the United States will cease to apply, and subsequently terminate ... are those directed toward non-U.S. persons U.S. persons and U.S.-owned or U.S.-controlled foreign entities will continue to be generally prohibited from conducting transactions of the type permitted pursuant to this JCPOA, unless authorized to do so by" OFAC.

Nonetheless, after Implementation Day, there will be a few changes to sanctions for U.S. persons. The largest JCPOA change related to U.S. persons will be regarding their foreign subsidiaries and joint ventures. Under Section 5.1.2 of Annex II to the JCPOA, the U.S. committed that after Implementation Day it would "[l]icense non-U.S. entities that are owned or controlled by a U.S. person to engage in activities with Iran that are consistent with this JCPOA." This commitment will make some of the extraterritorial sanctions relief discussed in Section II below available to companies that are owned or controlled by a U.S. person if licensed by OFAC.

Granting such licenses would allow OFAC to mitigate some of the competitive disadvantage that U.S. companies and their subsidiaries will face after Implementation Day as a result of

sanctions relief granted to their foreign competitors under the JCPOA that is not available to U.S. businesses.

U.S. persons will also be able to engage in certain exports of commercial passenger aircraft and related spare parts and associated services to Iran and imports of certain food, such as pistachios and caviar, and carpets from Iran.

The U.S. has also committed to cease the application of the Iran Threat Reduction and Syria Human Rights Act of 2012 ("ITRSRHA") "exclusion of Iranian citizens from higher education coursework related to careers in nuclear science, nuclear engineering, or the energy sector," and to seek legislative action, as appropriate, to terminate such ITRSHRA requirements. Pursuant to Section 505 of the ITRSR, students from Iranian universities who are otherwise qualified for a nonimmigrant visa are authorized to carry out in the United States those activities for which such a visa has been granted by the State Department.

The delisting of certain Iranian persons and entities from the SDN List, discussed in more detail below, may provide some additional opportunities for U.S. persons — if otherwise permitted or licensed — to engage in transactions with previously restricted parties.

U.S. Sanctions Affecting Non-U.S. Persons

By contrast, as described below, Implementation Day will greatly affect the landscape of U.S.-Iran sanctions that affect non-U.S. persons ("extraterritorial" or "secondary" sanctions).

After Implementation Day, non-U.S. persons will be able to engage in a wide swath of activity in, among others, Iran's energy, financial, insurance, automotive, shipping, shipbuilding and mining sectors without risk of sanctions. *It is important to note, however, that such activities will no longer be sanctionable only to the extent that the activities are otherwise "consistent" with the JCPOA.* For example, a non-U.S. person may be sanctioned on and after the Implementation Day for providing insurance services for the transportation of semifinished metals for the benefit of an SDN (e.g., IRGC) or for Iran's sanctionable purposes (i.e., ballistic missile proliferation, human rights abuse and/or support for terrorism).

Furthermore, after Implementation Day, non-U.S. persons will continue to be prohibited from the following activities until Transition Day, which is due to occur eight years after adoption:

- Conducting and/or facilitating transactions with Iranian individuals and entities set out in Attachment 4 to Annex 2 of the JCPOA (Attachment 4 appears to include SDNs that have directly contributed to Iran's nuclear proliferation activities — e.g., Fulmen Group);
- Transferring to or acquiring from Iran equipment and technology: (1) controlled under multilateral control lists (Missile Technology Control Regime, Australia Group, Chemical Weapons Convention, Nuclear Suppliers Group, Wassenaar Arrangement); (2) of the same kind as those on multilateral lists but falling below the control list parameters, when it is determined that such items have the potential to make a material contribution to weapons of mass destruction or cruise or ballistic missile systems; (3) with potential to make such a material contribution, when added through case-by-case decisions; and (4) on U.S. national control lists for WMD/missile reasons that are not on multilateral lists — consistent with the U.S. approach to other non-nuclear weapon states under the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT").

- Participating in specified types of joint ventures that involve any activity relating to the mining, production or transportation of uranium.

Finally, non-U.S. persons will continue to be prohibited from the following activities with no current indication that such sanctions will be terminated or suspended:

- Conducting transactions with Iranian entities and individuals on the SDN List (e.g., those that are not currently identified on Attachments 3 to Annex 2 of the JCPOA).
- Assisting, sponsoring or providing financial, material or technological support for, or goods or services to or in support of, the IRGC and its officials, agents or affiliates the property and interest in property of which are blocked (collectively referred to herein as IRGC).
- Assisting, sponsoring or providing material, or technical support for, or goods or services to or in support of: (1) Iran's military or ballistic missile program; (2) Iran's support for international terrorism; or (3) Iran's human rights abuses.

Effect of JCPOA in EU

The consequence of lifting the EU's economic sanctions against Iran will mean that on Implementation Day the vast majority of previously sanctioned activities and their associated services will be permitted for non-U.S. persons. However, on Implementation Day financial sanctions concerning financial messaging^[5] will remain in place as will provisions concerning nuclear proliferation^[6] and arms^[7] — these will not be removed entirely until Transition Day.

From Implementation Day, a wide variety of activities will be permitted between EU member states and Iran in Iran's financial, banking, insurance, oil, gas, petrochemical, shipping, shipbuilding and transport sectors, as well as in relation to software, precious metals and certain other materials. As a result of delisting as specified in Annex II to the JCPOA, the EU will also release all funds and economic resources which belong to, and making available funds or economic resources to, the persons, entities and bodies, including Iranian banks and financial institutions, and the Central Bank of Iran, listed in Attachment 1 to Annex II to the JCPOA. As a result of delisting as specified, entry into, or transit through the territories of EU member states of individuals listed in Attachment 1 to Annex II to the JCPOA will also be permitted.

Conclusion

While the JCPOA provides an overview of the sanctions that will be suspended on Implementation Day and beyond, the precise operation of the suspensions has not been fully developed. The U.S. government has indicated that OFAC will issue guidance on the mechanics of the suspensions, and it is likely that other agencies will issue additional guidance as well.

What does seem certain is that the sanctions, if lifted, will be lifted for non-U.S. persons, but for the most part will remain in effect for U.S. persons. Companies (whether bound by existing U.S.-imposed or EU-imposed sanctions programs) considering doing business in Iran after Implementation Day should proceed cautiously, both because ambiguities remain under the JCPOA and because the sanctions will not necessarily be permanently lifted and may “snap back” with little notice.

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[1] Congress would normally not be asked, or have the power, to approve the JCPOA because it is not a treaty subject to the advice and consent of the Senate. In May, however, Congress passed, and the president signed, the Iran Nuclear Agreement Review Act of 2015, which gave Congress a role in reviewing the deal. The law barred the president from taking action to provide relief from sanctions under the JCPOA until Congress had 60 days to review it.

[2] Appointment of Ambassador Stephen D. Mull as Lead Coordinator for Iran Nuclear Implementation, <http://www.state.gov/secretary/remarks/2015/09/247006.htm>.

[3] See http://eeas.europa.eu/statements-eeas/docs/iran_agreement/annex_1_attachements_en.pdf.

[4] Prior to the recent agreement with Iran, OFAC had issued general licenses authorizing, for example, Iran-related transactions in exports of certain medical and food items, exports of certain Internet and communications services and support for specific activities, such as amateur sports and academic exchanges. There are also certain exceptions under the sanctions for travel to Iran and transactions “ordinarily incident to” such travel, personal remittances and certain information and informational materials.

[5] Namely (Article 20(12) of Council Decision 2010/413/CFSP; Article 23(4) of Council Regulation (EU) No 267/2012).

[6] Namely (Articles 1(1) (a), (b), (d), (e), (2), (3) and (4), 2, 3, 5, 14 and 21 of Council Decision 2010/413/CFSP; Articles 2, 3, 4, 5, 6, 7, 17(1) and (2)(a), 18, 19 and 22, and Annexes I, II and III of Council Regulation (EU) No 267/2012).

[7] Namely Articles 1(1)(c), (3) and (4), and 3 of Council Decision 2010/413/CFSP; Articles 5(1)(a) and (c), 17(1) and (2)(a), and 19 of Council Regulation (EU) No 267/2012.