

# President Trump ‘Decertifies’ the JCPOA, but the US Remains a Party to the Deal

Skadden

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Pursuant to the Iran Nuclear Agreement Review Act of 2015 (INARA), the president is required to make certifications every 90 days that Iran is complying with its obligations under the Joint Comprehensive Plan of Action (JCPOA) and that the U.S. government’s continued suspension of nuclear-related sanctions against Iran remains “appropriate and proportionate.” Citing what he described as “multiple violations” by Iran of the JCPOA, on October 15, 2017, President Donald Trump opted not to certify Iran’s compliance with the JCPOA. In announcing his decision to decertify, the president stated that he would be seeking congressional action to address flaws in the deal.

Significantly, however, the president has neither withdrawn the United States from the JCPOA nor suspended any U.S. sanctions relief under the deal. We previously discussed the contours of the U.S. sanctions relief afforded Iran by the JCPOA in a July 2015 client alert and the implications of the JCPOA’s implementation in a January 2016 client alert.

## The Meaning of Decertification

INARA was passed by Congress as the Obama administration was engaged in multi-lateral negotiations regarding Iran’s nuclear program. President Barack Obama signed INARA into law on May 22, 2015, approximately two months before the P5+1 (China, France, Germany, Russia, the United Kingdom and the United States), the European Union and Iran reached the JCPOA.

INARA constructed an oversight framework for the JCPOA that requires the president to certify to Congress every 90 days whether: (i) Iran is “transparently, verifiably and fully implementing the agreement, including all related technical or additional agreements”; (ii) Iran has committed a “material breach” with respect to the agreement and, if so, whether that breach has been cured; (iii) Iran has taken any action that could “significantly advance its nuclear weapons program”; and (iv) suspension of sanctions related to Iran pursuant to the agreement is “appropriate and proportionate” to the measures taken by Iran with respect to its nuclear program and “vital to the national security interests of the United States.”

The president’s decision to decertify the JCPOA has started a 60-day clock under INARA for Congress to introduce “qualifying legislation” that would reinstate sanctions on Iran. During the 60-day period, qualifying legislation is entitled to expedited consideration in the House of Representatives and the Senate. Congress, however, is not obligated to follow through or to enact any specific legislation — or to do so within the 60-day timetable. Introducing new legislation outside of the INARA process simply means that the legislation would not benefit from INARA’s expedited process.

INARA’s certification requirement is a domestic process between the president and Congress, and, unless further steps are taken by either the executive or legislative branches to terminate U.S. sanctions relief or withdraw from or modify the agreement, the president’s decertification will not alter U.S. participation in the JCPOA. Decertification is neither required for Congress to prepare new Iran sanctions legislation nor a necessary trigger for the executive branch to take further action.

## Corker-Cotton Plan

Senators Bob Corker and Tom Cotton have indicated that they will introduce a bill to address deficiencies in the JCPOA and have released a proposed framework for this legislation. The Corker-Cotton plan proposes to eliminate JCPOA sunset provisions as they apply to U.S. sanctions. This would indefinitely allow for U.S. sanctions to “snap

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back” should Iran cross certain thresholds related to nuclear weapons development. Senator Corker has also stated that the new strategy may include provisions regarding Iranian ballistic missile capabilities as well as modifications to the certification requirement. Significantly, as set out in the framework, this new legislation would not appear to reinstate sanctions that have been suspended under the JCPOA at any time in the near future. Senator Corker has stated that this bill will go through the regular committee process and other members will have the opportunity to make changes.

There is questionable appetite in Congress at the moment to reinstate the sanctions that were suspended under the JCPOA. Indeed, the Corker-Cotton framework itself states that the new legislation is not intended to conflict with the JCPOA at the time of passage. Rather, the bill would set certain conditions that could be triggered in the future. Such conditions, including with respect to the termination of sunset provisions set out in the JCPOA, however, have the clear potential to set up a longer-term collision between the forthcoming bill, if passed, and the JCPOA.

## Upcoming Waiver Renewal

Substantially more important to the JCPOA than INARA’s certification requirement is the waiver of U.S. sanctions, which must occur every 120 days for the relief of certain key sanctions provided by the United States pursuant to the deal to stay in effect. Secretary of State Rex Tillerson last waived these sanctions on September 14, 2017, meaning that the next waiver renewal must take place by January 12, 2018. It will be important to monitor how the Trump administration approaches the January waiver renewal.

## Outlook

The president’s decision to decertify has created a cloud of uncertainty with respect to the long-term future of the JCPOA. Although decertification has raised certain questions, supporters of the JCPOA can perhaps take some comfort in the fact that the president did not take the threatened step of withdrawing the United States from the deal — a move that was entirely within his discretion and control. By decertifying, the president passed a procedural baton to Congress — a baton that Congress did not

require to act. We expect that there will be efforts, whether the Corker-Cotton plan or a different initiative, to push for legislative changes like those described above as a way of spurring renewed negotiation to address concerns with the JCPOA. If such efforts prove to be unsuccessful, the president has threatened to exercise the legal authority he has had — and retains — to exit the deal and to reimpose suspended U.S. sanctions on Iran.

As the JCPOA is a multilateral arrangement, any future legislation or presidential action that seeks to modify the JCPOA will require the involvement of the other P5+1 countries and Iran to do so. In response to President Trump’s new strategy on Iran, the leaders of the United Kingdom, France and Germany issued a joint statement in which they expressed their continued commitment to the JCPOA and their concern about the potential implications of President Trump’s decision to decertify. Notably, they also indicated a willingness to “take further appropriate measures” to address concerns about Iran’s ballistic missile program and regional activities.

Over the coming months, we expect continued and aggressive action by the Trump administration to use sanctions to address areas outside of the scope of the JCPOA, such as Iran’s ballistic missile program, support of terrorism, and destabilizing activities in the Middle East and elsewhere. Indeed, on October 13, 2017, the day the president announced that he would decertify the JCPOA, OFAC imposed another round of Iran-related designations. Among this set of designations, OFAC included the designation of the Iranian Revolutionary Guard Corps pursuant to Executive Order 13224 (a terrorism authority), an action directed by Section 105 of the Countering America’s Adversaries Through Sanctions Act. The IRGC has long been designated under other authorities, and business with the IRGC has continued to create risk under U.S. secondary sanctions in the JCPOA era for non-U.S. companies entering the Iranian market.

Although the president’s decertification does not alter the legal landscape of U.S. sanctions on Iran, it does raise questions about the future direction of U.S. policy toward Iran and what that means for the JCPOA and related U.S. sanctions relief. We will continue to closely monitor developments.

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