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De-Certification and the Iran Nuclear Deal: The Beginning of the End, or Much Ado about Nothing?

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Press reports indicate that President Trump intends to "de-certify" the Iran nuclear deal this week. In practical terms, that means he would refuse to re-certify one or more statutory elements of a law passed by the U.S. Congress pertaining to Iran's obligations under the deal and the merits of providing sanctions relief to Iran. The next deadline for certification is October 15, 2017.

De-certification would not by itself automatically unravel the Iran nuclear deal and result in the re-imposition of U.S. sanctions. Rather, it would initiate a process whereby the U.S. Congress could vote, under special procedural rules, on whether or not to re-impose the "secondary" sanctions that previously had been lifted. "Secondary" sanctions are restrictions that apply to non-U.S. companies even where there is no U.S. nexus involved (e.g., U.S. persons, U.S items or U.S. dollars or financial institutions). In the event Congress does not pass such legislation, continued sanctions relief would depend upon the renewal of a number of statutory waivers by the Secretary of State. Although the situation remains fluid, key stakeholders in Congress do not appear eager to "snap back" the secondary sanctions relief afforded to Iran under the deal.

De-certification will exacerbate uncertainty around the deal in the short-term. Depending on what Congress and the Administration choose to do, it could have little to no long-term practical impact for companies engaged in activities involving Iran, or it could result in Iran once again being off-limits for most businesses.

We summarize below what this process might look like, as well as potential actions Iran or the European Union might take in the event that U.S. sanctions are re-imposed.

Background - Sanctions and the Iran Nuclear Deal

On January 16, 2016, the U.S. and EU lifted nuclear-related sanctions against Iran pursuant to the terms of the Joint Comprehensive Plan of Action (JCPOA or the Iran nuclear deal) after the International Atomic Energy Agency (IAEA) confirmed that Iran had met certain specified commitments regarding its nuclear program. This lifting was effected by the termination in whole or in part of several Executive Orders, as well as the issuance of a number of statutory waivers by the Secretary of State.

In particular, these waivers lifted a number of U.S. secondary sanctions restrictions targeting non-U.S. companies engaged in key sectors across the Iranian economy, including banking and finance,

insurance, energy and petrochemicals, shipping and shipbuilding, and the automotive sector. (A detailed description of the sanctions relief can be found here.)
These statutory waivers must be renewed periodically (either every 120 or 180 days, depending upon the specific provision involved). If the U.S. government did not renew these waivers, the secondary sanctions described above would "snap back" into effect. Under President Obama, these waivers were routinely renewed, and up until now, the Trump Administration has also issued renewals of these waivers.

What Does De-Certification Mean?

"De-certification" refers to a domestic U.S. statutory requirement that is separate from the JCPOA, which is a non-binding political arrangement. This certification requirement is also separate from the statutory sanctions waivers described above, meaning that such waivers could still be issued even in the event of de-certification.

The certification requirement stems from the Iran Nuclear Agreement Review Act of 2015 (INARA, Pub. L. 114-17), which created a period of review allowing Congress to vote on a joint resolution of disapproval on a nuclear agreement with Iran. Such a joint resolution ultimately never passed Congress, and the JCPOA became operational in January 2016.

Section (d)(6) of INARA requires that, after this initial Congressional review period, the President must certify to the following every 90 days:

(i) Iran is transparently, verifiably, and fully implementing the agreement, including all related technical or additional agreements;
(ii) Iran has not committed a material breach with respect to the agreement or, if Iran has committed a material breach, Iran has cured the material breach;
(iii) Iran has not taken any action, including covert activities, that could significantly advance its nuclear weapons program; and
(iv) The suspension of sanctions related to Iran pursuant to the agreement is –
    (I) Appropriate and proportionate to the specific and verifiable measures taken by Iran with respect to terminating its illicit nuclear program; and
    (II) Vital to the national security interests of the United States.

Importantly, in order to make this certification, the President must find that all four conditions noted above are satisfied. Failure to satisfy any one of these conditions is sufficient grounds to not make a certification.

If the President does not make such a certification, section (e) of INARA allows for the expedited consideration of legislation re-imposing sanctions on Iran.

Expedited Consideration

Broadly speaking, INARA creates a 60-day review period *permitting*, but not requiring, Congress to vote on legislation re-imposing sanctions. During this period, procedural hurdles and opportunities for debate are strictly limited, and certain legislative tools, most notably the Senate filibuster, are unavailable.

In the House, either the House Majority or Minority Leader may introduce, within 60 calendar days, a bill to reinstate sanctions. In the Senate, either the Majority or Minority Leader is given this prerogative. The

bill is subject to expedited congressional procedures, though each chamber could choose to use its existing procedures instead.

In the first instance, committees that are referred the bill are automatically discharged from consideration if they have not reported the bill after 10 legislative days (House) or session days (Senate). The statute specifies the Senate Committee on Foreign Relations as the relevant committee; multiple (unspecified) House committees could potentially receive referral.

In the House, on or after the third legislative day after reporting/discharge, a majority could agree to a non-debatable motion to bring up the bill. In the Senate, after reporting/discharge, a majority could agree to a non-debatable motion to bring up the bill; no cloture process, with its associated three-fifths vote threshold, is necessary for the Senate to do so. Without the use of the filibuster, no one Senator could block the body from voting, as is typically the case; it would also be more difficult for a group of Senators to do the same. Once taken up, the legislation would remain the unfinished business of the upper chamber until disposed of; in other words, the Senate could effectively not proceed to any other business during the period, except by unanimous consent.

House floor consideration is limited to two hours. The statute provides that if the House votes on one such motion to proceed on a qualifying bill, it may not vote on another such motion "with regard to the same agreement." This provision seems designed to prevent the House from having to vote against serial motions made in relation to the same bill. The Senate limit on floor consideration is 10 hours; thus, a simple majority of 51 votes could pass the bill without the need for three-fifths to first invoke cloture. (A majority could also agree to a non-debatable motion to spend less time on the bill.) Provisions in the statute explicitly or effectively preclude the consideration of amendments to the measure.

Other procedures would expedite second-chamber consideration of a bill received from the other body. If one chamber receives the other chamber's qualifying legislation prior to passage of its own measure, the other chamber's measure is not referred to committee, and the vote on final passage is on the other chamber's measure. If one chamber has had no qualifying measure introduced in that chamber, then the measure received from the other chamber is entitled to the expedited floor procedures.

If Congress Acts

In the event that both houses of Congress approve a bill re-imposing U.S. sanctions, the President would then have a choice as to whether to approve or veto such legislation. (Expedited consideration does not change the fundamental mechanism whereby both houses of Congress must act to pass the same legislative vehicle.) Were he to veto it (which would appear to be an unlikely outcome, given President Trump's criticism of the JCPOA, and his decision to de-certify in the first place), Congress would then have an opportunity to override the veto, which would require a 2/3 majority in both houses.

If he did not veto such a bill, and either signed it or allowed it to enter into law without his signature, U.S. sanctions would "snap back" into effect, thereby eliminating the sanctions relief of the JCPOA. In this scenario, Iran may seek to challenge the U.S. actions through a dispute resolution mechanism established by the JCPOA. The EU, as well, might take action by bolstering restrictions known as "blocking statutes" prohibiting compliance with U.S. sanctions, similar to rules in effect for Cuba.

If Congress Does Not Act

If legislation is either not introduced or fails to pass both houses of Congress, the status quo would remain in effect, and the President would have to decide whether to have the Secretary of State continue issuing the statutory waivers described above.
Notably, the standards for these waivers are different from the INARA certification standard discussed above, meaning that, as a legal matter, the U.S. could continue reissuing these waivers even after de-certification occurs. In the event of de-certification, we expect that the White House would face tremendous pressure, particularly from the EU, to continue issuing these waivers, given the impact that snapback would have on many European businesses.

The waiver requirements under other statutory authorities are much more general than the certification requirements under INARA – generally speaking, they only entail a finding that issuance of a waiver is "vital to the national security of the United States," or "in the national security interest of the United States." (*See*, *e.g.*, Section 1245(g)(1)((A) of the Iran Freedom and Counter-Proliferation Act of 2012 (IFCA), Subtitle D of Pub. L. 112-239; Section 1245(d)(5)(A) of the National Defense Authorization Act for Fiscal Year 2012 "NDAA 2012", Pub. L. 112-81.)

In practice, this could mean that the White House could refuse to certify on the grounds that Iran is not being transparent or fully implementing its obligations under the JCPOA, or that Iran has taken actions that could further its nuclear weapons program (such as continued ballistic missile testing), while nonetheless finding that continued issuance of waivers under other statutory authorities is in the national security interests of the United States.

If the White House were to de-certify on national security grounds, the continued issuance of such waivers could be seen as inconsistent with its stated grounds for de-certification. Therefore, the precise grounds for de-certification could serve as an indication of the White House's continued willingness to issue statutory waivers.

If the White House were to cease issuing such waivers, the reaction from both Iran and the EU would be largely the same as if legislation re-imposing sanctions were to enter into force; that is, they would likely claim that the U.S. had violated the terms of the JCPOA.

Possible Iranian and European Responses

Under the JCPOA, if any of the parties to the deal (that is, the U.S., EU, U.K., Russia, France, Germany, China, or Iran) believe that another party is not meeting its commitments under the deal, it may refer the matter to the Joint Commission (*i.e.*, a dispute settlement body comprised of the eight parties to the deal), triggering a series of procedural steps to resolve the matter. (*See* Sections 36 and 37 of the JCPOA.) If these efforts do not resolve the matter, the complaining participant may then refer the matter to the U.N. Security Council.

Although Iran may avail itself of the Joint Commission mechanism, it seems unlikely that it would take the issue to the Security Council, as such a move could result in the snapback of UN sanctions that were lifted as part of the deal. However, if Iran opts to stop implementing its nuclear-related commitments due to U.S. non-compliance, it would technically be required to trigger Security Council involvement. In practice, it is entirely conceivable that an ad hoc diplomatic process—rather than the diplomatic process envisioned by the JCPOA—will emerge should a party to the deal raise grievances regarding the other side's non-performance.

Conclusion

Thus, de-certification would not by itself result in the re-imposition of sanctions or the restarting of Iran's nuclear program. Rather, it would be the first step in a series of actions that could result in re-imposition of sanctions and the unraveling of the deal. Ultimately, these are complex political and national security decisions in the hands of decision-makers from not only the United States, but also Tehran, Europe, Beijing, and Moscow. In Washington, de-certification means that Congress has an opportunity to play a major role in the future of the deal alongside the Trump Administration.

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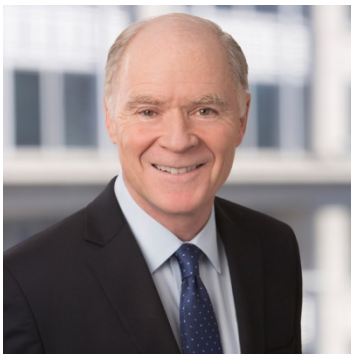

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