

Alerts & Publications

Lausanne Nuclear Framework Agreement with Iran: A Path is Set for Congressional Review, but Key Substantive Questions Remain



April 15, 2015

On April 14, the Senate Foreign Relations Committee unanimously approved an amended version of S. 615, *The Iran Nuclear Agreement Review Act of 2015*, introduced by Sen. Bob Corker (R-Tenn), Chairman of the Senate Foreign Relations Committee, with numerous co-sponsors. The White House announced that President Obama would sign the compromise measure, if passed as adopted by the Committee. Comments of Speaker of the House John Boehner and others suggest that Congress will move quickly to pass the legislation.

The emphatic Committee action dramatically capped a tense period following the announcement on April 2 that the P5 + 1 (United States, United Kingdom, France, Germany, Russia, and China) and Iran had reached a framework agreement designed to limit Iran's nuclear weapons capabilities in exchange for certain sanctions relief. The framework agreement itself has no substantive effect; rather, its terms set the basis for negotiation of a definitive Joint Comprehensive Plan of Action ("JCPOA"), to be concluded by June 30, 2015. In turn, upon enactment of S. 615, the viability of any JCPOA will hinge on whether President Obama can overcome any Congressional vote to prevent sanctions relief by the United States from taking effect.

Despite a surprising amount of specificity in some aspects of the Lausanne agreement, the vagueness of key terms, important discrepancies among the parties' descriptions of the agreement, and fierce criticism in the U.S. Congress combine to leave fundamentally uncertain if, when, and how international commerce with Iran will resume, and whether there will be any change to the current broad embargo. We address several questions below. The key takeaways are:

- **President Obama Retains the Trump Card – Veto Power:** S. 615 carves out a robust review power for Congress, but at the end of the day, 67 Senate votes will be needed to prevent the President from implementing sanctions relief that may be afforded in a JCPOA. Congress could pass legislation disapproving the JCPOA and barring the President from affording sanctions relief for which the JCPOA provides, but the President could veto that legislation. Then, only a Congressional vote to override the veto would prevent the President from implementing sanctions relief within his power that will enable an agreement to become effective.
- **No Immediate Changes to Sanctions:** The framework agreement itself does not implement any new sanctions relief or make changes to the current regime, including the limited interim relief that has been in effect since January 2014. Indeed, U.S. officials are emphasizing that the interim relief will expire June 30, 2015, if a final JCPOA is not reached by that time. In

addition, S. 615 prevents sanctions relief from becoming effective during a period of Congressional review.

- **Any Sanctions Relief Limited to Nuclear Sanctions:** The U.S., EU, and UN would lift “nuclear” sanctions, but the scope of relief (should it occur) may ultimately be quite different between the U.S. and other jurisdictions. Iran asserts the agreement effectively means the immediate termination of all economic and financial sanctions, including unilateral U.S. sanctions. That clearly will not happen, immediately or at any time in the foreseeable future. What may occur instead is an initially synchronized suspension of sanctions matched to Iranian achievement of milestones, followed by further liberalization by the EU and other jurisdictions, but not the United States.
- **Potential Divergence between U.S. and EU on Degree of Sanctions Relief:** It is not difficult to foresee that U.S. sanctions will remain in place that effectively prevent U.S. persons from engaging in meaningful new business with Iran, while the EU and other jurisdictions substantially open the door to commerce. ***Such divergence would pose significant challenges for U.S. companies with foreign affiliates, and for foreign companies with significant U.S. operations.***
- **Scope of Any U.S. Sanctions Relief Uncertain:** A divergence in sanctions relief would call into question the status of so-called U.S. “secondary sanctions,” under which the U.S. threatens to impose penalties on foreign companies that engage in certain energy-related business involving Iran (e.g., investment in oil and gas or petrochemical operations). The President may choose to waive those sanctions, but that choice would not be without political controversy.
- **Any Sanctions Relief at least Several Months Off:** Even under optimistic scenarios that assume an agreement will be reached in June, and Congress will not block it from taking effect, any sanctions relief will not likely be implemented until late 2015 or early 2016, at the earliest.

We offer the following more detailed observations on some of the key questions that illustrate the implications of this agreement and the likely legislation providing for Congressional review:

What does S. 615 do?

Under the revised version of S. 615, if the Administration reports to Congress on the final agreement with Iran by July 9, 2015, Congress would have 30 days to approve or reject it. The President would be prohibited from waiving or suspending any sanctions during this review period. Any relief provided in the original Joint Plan of Action in November 2013 and implemented in January 2014 (see prior alert [here](#)), and any additional relief to which the parties agree at least 45 days before the final agreement, will continue during the approval period. If the required reports are made after July 9, 2015, the Congressional review period is extended to 60 days.

Following receipt of the President's report, Congress could pass a joint resolution either approving or rejecting the agreement. Rejection would extend for up to another 22 days the period during which the President cannot implement sanctions relief. First, if Congress rejects the agreement, the President would have 12 days to decide to accept or to veto the resolution. Then, if he vetoes that resolution, Congress would have an additional 10 days to vote whether to override the veto.

If Congress passes a joint resolution approving the agreement, or fails to take any action with respect to the agreement, the President may take any action regarding sanctions relief otherwise permissible by law. The bill also requires periodic reporting to Congress of Iran's fulfillment of its obligations under the agreement, and of any material breaches by Iran. It also provides for the expedited passage of legislation reinstating sanctions in the event of the President's failure to file a required report or a finding of breach by Iran.

Technically, the bill is an amendment to the Atomic Energy Act of 1954 ("AEA"). Its structure parallels the framework of Section 123 of the AEA, which sets forth the process for obtaining Congressional approval of peaceful nuclear cooperation agreements, which are a prerequisite to significant nuclear cooperation between the United States and another country. Under Section 123 of the AEA, the President must submit a report to Congress outlining the text of the agreement and certifying that it serves certain U.S. non-proliferation objectives. Like S. 615, these "123 agreements" are then subject to a vote of approval or disapproval within a certain time period. Thus, the mechanism for reviewing a final nuclear agreement with Iran has a well-established precedent.

Enactment of S. 615 is likely, though not yet certain. Further unknowns include the impact the bill might have, if passed, on the ongoing negotiations with Iran. For the moment, however, S. 615 appears to have displaced possible alternatives involving mandated enhanced sanctions (for example, through the "Kirk-Menendez" bill, S. 269).

What are the terms of the Lausanne agreement?

The P5+1 and Iran reached an understanding on key parameters that will serve as the framework for a more detailed agreement to be negotiated over the next three months. Currently, however, they have not released a single common document describing those parameters. Instead, the United States and Iran separately, and the European Union and Iran jointly, all issued separate statements describing the agreement:

- U.S. State Department Fact Sheet (See [here](#))
- E.U. High Representative and Iran Foreign Minister have issued a joint statement ("EU/Iran Joint Statement," see [here](#))
- Iranian Foreign Ministry Fact Sheet (See [here](#))

There are major discrepancies among these statements, especially with regard to the easing of sanctions against Iran.

The U.S. State Department states that for a period of 10 years, the agreement will ensure that Iran's breakout time (the time it will take for Iran to acquire enough material for a nuclear weapon) will increase from two to three months to one year. To achieve this increase in the breakout time, Iran will take steps to reduce its nuclear capabilities and stockpile, and it will grant the International Atomic Energy Agency ("IAEA") broad access to the country's uranium production and enrichment processes, including all of Iran's nuclear facilities, the nuclear program supply chain, uranium mines and mills, and any suspicious sites.

In exchange, according to the State Department, the P5+1 have agreed to lift certain sanctions on Iran:

- U.S. and EU nuclear-related sanctions will be suspended once Iran has taken all of the key nuclear-related steps. These sanctions will “snap back” if Iran fails to fulfill its commitments, and the architecture of the U.S. nuclear-related sanctions will remain in place. **U.S. sanctions on Iran for terrorism, human rights abuses, and ballistic missiles will also remain in place.**
- The United Nations will lift U.N. Security Council (“UNSC”) resolutions on Iran’s nuclear issues after Iran completes nuclear-related actions. Core provisions dealing with transfers of sensitive technologies and activities will be re-established by a new UNSC resolution.
- The parties will establish a dispute resolution process, through which any JCPOA member can resolve disagreements about performance of JCPOA commitments. Previous U.N. sanctions could be reimposed if significant non-performance by Iran cannot be resolved through that process.

According to Secretary of State John Kerry, Russia has also released a statement endorsing the U.S. summary of the negotiations as reliable and accurate.

In contrast, the Iranian Fact Sheet states that a much wider range of sanctions will be lifted immediately once a final agreement is reached, a view reinforced by Iranian Supreme Leader Ayatollah Ali Khamenei in a widely-covered speech last week:

“[A]ll of the UN Security Council resolutions will be revoked, and all of the multilateral economic and financial sanctions of the EU and the unilateral ones of the US including financial, banking, insurance, investment, and all related services, including oil, gas, petrochemicals, and automobile industries will be immediately revoked. In addition, nuclear-related sanctions against real and legal individuals, entities, and public and private institutions, including the Central Bank, other financial and banking institutions, SWIFT, shipping and aviation industries of the Islamic Republic of Iran, oil tanker companies, will be immediately removed. Also, the P5+1 member countries are committed to restraining from imposing new nuclear-related sanctions.”

The EU/Iran Joint Statement also references the easing of sanctions, but in much more general terms. According to that statement:

- “The EU will terminate the implementation of all nuclear-related economic and financial sanctions”;
- “[T]he US will cease the application of all nuclear-related secondary economic and financial sanctions, simultaneously with the IAEA-verified implementation by Iran of its key nuclear commitments.”
- “A new UN Security Council Resolution will endorse the JCPOA, terminate all previous nuclear-related resolutions and incorporate certain restrictive measures for a mutually agreed period of time.”

In short, all three statements refer to the lifting of “nuclear” sanctions, but (1) Iran claims all sanctions will terminate, (2) the EU refers only to “nuclear-related” sanctions, but adds that the U.S. nuclear secondary sanctions will not be applied, and (3) neither the EU nor the United States explains what are “nuclear” sanctions.

What are the U.S. “nuclear-related” sanctions?

According to the State Department, all U.S. “nuclear-related” sanctions will be eased, while sanctions grounded in concerns over Iran’s support for international terrorism, engagement in human rights abuses, and development of ballistic missiles will remain in place. But the Administration has carefully avoided spelling out which specific sanctions are “nuclear” sanctions covered by the agreement. In fact, this is very difficult to do, because many sanctions were imposed in response to a more general finding that the activities constituted a threat to U.S. national security – a multi-factor determination based on Iran’s quest for weapons of mass destruction (“WMD”), sponsorship of terrorism, and human rights abuses. If particular sanctions are only partly prompted by Iran’s nuclear threat, are they “nuclear” sanctions?

The United States maintains two types of Iran sanctions: (1) a comprehensive regime of primary sanctions that prohibits U.S. persons, including U.S. citizens and entities established under U.S. law, as well as foreign entities owned or controlled by U.S. persons, from directly engaging in virtually all business with Iran; and (2) secondary sanctions that threaten to deny access to U.S. financial and commercial markets to non-U.S. persons that engage in specified energy-related business in Iran. The latter may comfortably be characterized as nuclear-related, and the President is authorized to temporarily waive them if he makes certain findings.

Plainly, the EU expects the President to take this action if Iran follows through on its commitments. It also seems likely that Iran is most concerned with regaining access to European and Asian markets, than to the United States, both for political reasons and because there would be much more work to do in order to establish business – the U.S. and Iran have had only limited economic interactions for nearly 20 years. Iran’s references to a broader lifting of economic sanctions may in reality refer to actions by the EU only.

What are the EU “nuclear-related” sanctions?

Although the EU statement does not say which sanctions comprise its “nuclear-related” sanctions, because the EU regime has been more directly focused on Iran’s nuclear program, it is likely that most of the EU sanctions could be lifted if a final deal is reached. Council Regulation (EU) No 961/2010 of October 2010, as amended, forms the bedrock of the EU sanctions regime against Iran. It sets forth a broad spectrum of restrictions in relation to the energy, financial, insurance and transport industries, and enterprises associated with the Iranian government and the country’s nuclear industry. These measures were supplemented by new sanctions introduced in January 2012 by Council Decision 2012/35/CFSP and implemented by various Council Regulations. Nearly all of the amending directives and regulations can be classified as nuclear-related.

EU human-rights related sanctions, as well as those dealing with international suppression and surveillance, are likely to remain in place. These include asset freezes and export controls on certain security and monitoring equipment.

What is the immediate effect of the agreement?

The Lausanne agreement makes no changes to the U.S. or international sanctions against Iran, a critical point emphasized by Treasury and Commerce Department guidance (see [Treasury guidance](#) and [Commerce guidance](#)).

Currently, only the limited sanctions relief provided as part of the original JPOA, implemented in January 2014, is in place. That relief was extended in July 2014, and again in November 2014, to allow the parties to continue negotiating. The relief will expire on June 30, 2015, unless the parties conclude a JCPOA and the P5+1 extend the relief once again.

Thus, U.S. companies are still prohibited from doing business in or with Iran, with certain limited exceptions for civil aviation and humanitarian relief pursuant to the JPOA. (As part of the JPOA, other temporary relief has also been granted for non-U.S. companies relating to Iran's export of crude oil, petrochemicals, and gold and precious metals, in addition to related services, as well as Iran's auto industry.) The Administration has repeatedly emphasized that during the JPOA period, all other remaining sanctions will be vigorously enforced.

Can the President lift U.S. sanctions unilaterally if an agreement is reached?

If S. 615 is enacted, it will extend to Congress the ability to temporarily suspend sanctions relief while it considers whether to approve or reject the final agreement. Assuming that Congress approves the agreement, the President must still have the authority to grant sanctions relief under the existing sanctions law. Because the authorities for the U.S. sanctions against Iran originate from a complex web of overlapping executive orders and statutes, some sanctions may be terminated unilaterally through Executive action, whereas others may require the Administration to make and to certify to Congress certain findings about the state of Iran's WMD activity or sponsorship of terrorism. Here are a few key examples:

- The President may waive temporarily or suspend certain secondary sanctions upon a finding that doing so serves the national interest, to varying degrees. For example, under the Iran Sanctions Act ("ISA"), as amended, the President can waive application of the ISA secondary sanctions on a person for six months, if vital to the national security interests of the United States, and for 12 months, if vital to the national security interests of the United States and the person is in a country that is cooperating with the United States in multilateral efforts to prevent Iran from acquiring or developing certain weapons. The President may also waive sanctions imposed pursuant to the Iran Freedom and Counter-Proliferation Act, for a period of 180 days, if he determines that waiver is vital to the national security of the United States and provides a report to the appropriate Congressional committees with the justification for the waiver.
- Other sanctions may require the President to make certain certifications to Congress regarding Iran's activities with respect to pursuit of weapons, including WMD, and state sponsorship of terrorism, before termination. For example, the blocking order on the Government of Iran may only be lifted 90 days after the President makes a certain certification to Congress about the activities of the Central Bank of Iran. The blocking order effectively forestalls most activity in Iran by U.S. persons, because it does not permit U.S. persons to engage in any transactions with the Government of Iran, entities owned or controlled by the Government of Iran, or Iranian financial institutions.

Assuming a deal is reached, and any required Congressional approval is obtained, it is likely that the U.S. secondary sanctions on Iran will be waived or suspended only on a temporary basis, in order to accommodate a "snap back" of sanctions in the event of non-performance by Iran.

What is the realistic timeframe for easing of sanctions?

On top of its substantive uncertainty, the Lausanne agreement does not specify precisely when sanctions will be lifted, and indeed, discrepancies on this issue exist among the three statements. Iran, both in its fact sheet, and in the remarks of Iranian Supreme Leader Ayatollah Ali Khamenei, takes the position that sanctions must be lifted immediately upon the execution of any agreement. However, both the State Department Fact Sheet and the EU/Iran Joint Statement call for sanctions to be lifted upon completion or implementation by Iran of key nuclear-related steps. U.S. Secretary of State John Kerry has also stated that the timing for sanctions relief is dependent on how quickly Iran executes the steps outlined above and extends its breakout time to one year, and estimates that relief could begin approximately four to 12 months after a final agreement is reached.

* * * * *

We will continue to monitor the progress of the negotiations and assess their impact on the business community. For questions or additional information, please contact Ted Kassinger at (202) 383-5170, Greta Lichtenbaum at (202) 383-5249, Lauren Sun at (202) 383-5294, or Hayley Ichilcik at +44 (0) 20 7558 4863.

This memorandum is a summary for general information and discussion only and may be considered an advertisement for certain purposes. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport to represent the views of our clients or the Firm. Theodore Kassinger, an O'Melveny partner licensed to practice law in the District of Columbia and Georgia, Greta Lichtenbaum, an O'Melveny partner licensed to practice law in the District of Columbia, Lauren Sun, an O'Melveny counsel licensed to practice law in the District of Columbia, and Hayley Ichilcik, an O'Melveny counsel licensed to practice law in England and Wales, contributed to the content of this newsletter. The views expressed in this newsletter are the views of the authors except as otherwise noted.

Portions of this communication may contain attorney advertising. Prior results do not guarantee a similar outcome. Please direct all inquiries regarding New York's Rules of Professional Conduct to O'Melveny & Myers LLP, Times Square Tower, 7 Times Square, New York, NY, 10036, Phone:+1-212-326-2000. © 2015 O'Melveny & Myers LLP. All Rights Reserved.