

# THE IRAN DEAL: CHALLENGES AHEAD



## Introduction

On the campaign trail it was described as *“the dumbest deal ever”* and that *“horrible, disgusting, absolutely incompetent deal with Iran”* by President Trump. Even though this rhetoric has been toned down slightly since Trump took office, there are concerns that the Iran nuclear deal in its current form now hangs in the balance. So what are the potential threats to the survival of the deal: can businesses confidently do business in Iran and what should they be doing to protect their interests?

This briefing focuses on two key threats, as well as looking at Switzerland’s relationship with Iran and whether trade finance is available to do business there.

It has now been over a year since Implementation Day<sup>1</sup> under the Joint Comprehensive Plan of Action (JCPOA), put in place to ensure that Iran’s nuclear programme remains exclusively peaceful. As part of the JCPOA, sanctions against Iran have been partially relaxed.

There has been particular interest in doing business in Iran from international companies in the oil and gas, aviation, automobile and pharmaceuticals industries. Iran has been able to sell oil more freely since Implementation Day, leading to an increased demand for output from Iran’s ageing oil fields, which are in desperate need of new investment. Production in Iran has increased by approximately one million barrels per day in a year but the Iranian government said recently that an investment of US\$200 billion will be required over five years if production is to be maintained and further increased.

Despite these huge opportunities that have come with the gradual opening up of the Iranian economy, there has been an increase in diplomatic tensions in recent months. The US imposed further sanctions against Iran in February 2017, targeted against individuals and companies, as the Trump administration responded to the testing of a ballistic missile.



The political uncertainty created by the Trump presidency and the imminent elections in Iran mean that businesses must proceed with caution and keep a close eye on any business dealings or other investments made in the country.

### The new Trump administration

President Trump has made it clear since before his inauguration that he does not like the Iran nuclear deal. It is now five months since he took office and many are waiting to see if the status quo on Iranian sanctions will remain. There have been some clues on the new administration's policy.

### Will President Trump tear up the Iran nuclear deal?

The answer is not yet clear, but there are signs that it is at risk.

Both during the electoral campaign and since he took office, President Trump has not held back from voicing his opinions about the nuclear deal on Twitter.

On 2 February 2017, Trump tweeted that *"Iran has been formally put on notice for firing a ballistic missile. Should have been thankful for the terrible deal the U.S. made with them!"* The next day he followed up with another tweet: *"Iran is playing with fire...they don't appreciate how 'kind' President Obama was to them. Not me!"*

On 19 April 2017 Secretary of State Rex Tillerson announced a *"comprehensive review"* of the Iran nuclear deal.

In a press conference two days later, and in a statement that could pave the way for the breakdown of the Iranian nuclear deal, President Trump made the following comments.

*"I think they are doing a tremendous disservice to an agreement that was signed. It was a terrible agreement. It shouldn't have been signed. They are not living up to the spirit of the agreement, I can tell you that."*

The word 'spirit' was most likely carefully chosen in this context: only a few days earlier, the US State Department had certified that Iran was still compliant with the deal.

A great deal hinges on the next move of the Trump administration. The current Foreign Minister of Iran has threatened to walk away from the nuclear deal if the United States does not live up to its commitments.

### What could President Trump do?

Although such action would be the subject of strong opposition from the EU, the United States could decide to withdraw from the 2015 deal altogether.

Alternatively, President Trump could sign an executive order to either reimpose previously suspended sanctions or impose new sanctions, either of which would likely infringe the JCPOA. Although no specific plans for such an order have been outlined, the possibility remains a threat to the status quo and President Trump has signed 30 executive orders in his first 100 days as President, more than any other President has signed in their first 100 days since WWII. However, executive orders are often only symbolic and have only minimal impact on policy. They can be challenged by the courts, as has been demonstrated in the response to the recent executive orders on immigration.

### The upcoming presidential elections in Iran

The presidential elections in Iran on 19 May 2017 could be decisive for the survival of the nuclear deal.

One might think from reading the extensive press coverage that followed the JCPOA that it was highly unlikely that Iran could turn its back on one of the most celebrated comprehensive liftings of a sanctions regime of this century.

However, there are concerns amongst Iranian and international commentators that some Iranian hardliners may not embrace international investments in the same way as the incumbent, President Hassan Rouhani. If a more hard-line candidate replaces the relatively moderate President Rouhani, the deal's chances of surviving could be further diminished.

There are currently five candidates in the race, including one candidate tipped to be the next supreme leader. It has been said that the election pits President Rouhani, who favours joining the global economy, against the so-called 'resistance economy' championed by the hardliners. A win by a conservative candidate could put the country on a collision course with the Trump administration.

### What about the European Union's relationship with Iran?

European support for the nuclear deal appears steadfast. This support is characterised by the following statement in February 2017 by EU High Representative for Foreign Affairs and Security Policy Federica Mogherini:

*"There should be no doubt that the EU stands firmly by the deal."*

European trade with Iran nearly doubled in 2016 compared to 2015. However, the current annual trade volume of €13.7 billion is still at only half of the pre-sanctions value. High profile European companies exploring business opportunities in Iran include France's Total, Anglo-Dutch Shell, German Siemens and Austrian OMV. Oil majors have considerable lobbying power and would resist any reversal of the sanctions relaxation.

Further support for the deal has come in the form of a 2016 resolution by the European Parliament outlining an EU strategy towards Iran after the nuclear agreement and proposing a cooperative dialogue on areas of mutual interest. There is little doubt that a US withdrawal



from the nuclear deal and the return of US sanctions would face huge push back from European politicians.

### Potential “snap back” of sanctions

There remains a constant, underlying risk of a “snap back”: in the event of a significant non-performance by one party of its commitments under the JCPOA, and after having exhausted all recourse possibilities under the Dispute Resolution Mechanism, the other party could immediately reintroduce the sanctions that have been lifted or take other steps which it considered appropriate.

### What difference could US withdrawal from the JCPOA make to traders, in practice?

At the moment, non-US companies with US parents are able to benefit from “General License H,” enabling them to do business with Iran (provided the US parent has no involvement). These companies could be significantly affected if the US withdraws from the JCPOA because they will lose the benefit of General License H. Companies with no US connection could also be affected if the US “snaps back” its so-called secondary (extra-territorial) sanctions against Iran, resulting in a clear conflict between the EU and US positions.

If both the EU and US ‘snap back’ sanctions, the position will revert to the pre-Implementation Day situation for both EU and US companies.

The US has previously committed not to retroactively impose sanctions for legitimate activity undertaken after Implementation Day. Transactions conducted after any snap back occurs however could be sanctionable to the extent they implicate activity for which sanctions have been re-imposed. The US government has a past practice of working with US or third-country companies to minimise the impact of sanctions on the legitimate activities of those parties undertaken prior to the imposition of sanctions. We would

hope for the same in the event of a JCPOA sanctions snap back.

### Switzerland’s relationship with Iran

Swiss sanctions continue broadly to follow the EU sanctions, although not mirroring them entirely. Thanks to the State Secretariat for Economic Affairs (SECO), it is relatively easy to get a quick and clear written answer to queries made about potential trades on an anonymous basis.

Increasingly, international companies doing business in Iran opt for contracts governed by Swiss law. The two countries have for a long time maintained a unique relationship because of Switzerland’s neutrality and sustained diplomatic relations. The Swiss legal system is well respected in Iran and the Swiss Chambers’ Arbitration Institution organises frequent visits to Iran offering arbitration services for disputes between Iranian and foreign companies. This unusual approach to governing law shows the strong relationship between the Swiss Chamber of Commerce and Tehran.

### Trade finance and Iran

It is still difficult to do business in Iran for many seeking trade finance. Only a very few well-known players provide trade finance for Iranian business. Private equity funding is another possibility. However, funding for Iranian trade can be difficult because of the constraints involved in completely ring-fencing any US investors. The main obstacle to financing Iranian business is the blockade on the transfer of cash. Many banks active in trade finance have revoked the necessary correspondent banking keys, meaning they cannot participate in deals involving Iran or Iranian banks.

### What should businesses be doing?

Because of the risk that sanctions might snap back into place if Iran fails to comply with its obligations pursuant to the JCPOA or if the Trump

administration decides to abandon the Iran nuclear deal entirely, parties should include sanctions clauses in their contracts. Those clauses should include not only warranties and ideally indemnities, regarding the lawfulness of the trade, but also suspension and termination rights in, the event that there is a breach of the warranties, or the sanctions snap back into place.

It is clear that for many, despite the threats to the nuclear deal, Iran is open for business. HFW can help businesses structure deals and adopt internal procedures to ensure that they pursue Iranian opportunities in ways that are compliant with the current sanctions.

## Stop press

In some news that broke just as this article was going to press, the United States has announced that it will extend for another 120 days the wide sanctions relief against Iran. At the same time, the Trump administration has signalled its continued tough stance in respect of the remaining sanctions on Iran by adding a handful of Iranian and Chinese individuals and companies to existing sanctions lists for allegedly supporting Iran’s ballistic missile programme.

The result of the Iranian presidential election was announced on Saturday 20 May 2017. The incumbent, President Rouhani won a second term in office with a convincing 58% of the vote. The elections saw record high voter turnout with 70% of the 56 million people eligible to vote doing so, and in fact, polling stations had to extend their opening time by five hours to accommodate the turnout. This election victory will be seen by many as a big endorsement for the nuclear deal in Iran, where President Rouhani has promised a moderate and outward-looking Iran.



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