

A U.S. return to the JCPOA: Complications moving forward and the JCPOA's mechanisms to resolve them

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1. Introduction

On May 8, 2018, the United States announced that it would cease its participation in the Joint Comprehensive Plan of Action ('JCPOA') – the accord between the United States, other major world powers, and Iran with respect to Iran's nuclear program – and would re-impose those 'nuclear-related' sanctions that had previously been removed consistent with U.S. commitments under the JCPOA.¹ In accordance with this announcement, the United States took initial steps to re-impose all such sanctions that had been lifted under the JCPOA and to impose certain additional measures targeting Iran.² How the United States re-imposed its sanctions will have significant import moving forward: Instead of simply re-imposing the sanctions under the same legal authorities for which they had initially been imposed – i.e., those U.S. domestic legal authorities related to the proliferation of weapons of mass destruction³ – the United States re-imposed many of its sanctions on new legal grounds related to Iran's alleged support for international terrorism and its human rights abuses. In doing so, the Trump administration evidenced a commitment not only to return to the *status quo* that existed prior to the

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¹ 'Remarks by President Trump on the Joint Comprehensive Plan of Action, White House' (May 8, 2018) <www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action/>.

² Resource Center, May 2018 Guidance on Reimposing Certain Sanctions with Respect to Iran, U.S. Dep't of Treasury, Office of Foreign Assets Control (last updated Nov 5, 2018) <www.treasury.gov/resource-center/sanctions/Programs/Pages/052018_iran_guidance_archive.aspx>.

³ See Exec. Order 13382 (June 28, 2005).



JCPOA but also to preempt the efforts of any potential successor to return the United States to compliance with its sanctions relief obligations thereunder. Through its re-imposition of U.S. sanctions, the Trump administration had successfully complicated any path to a possible U.S. return to the JCPOA, as the agreement had ostensibly demanded only the lifting of ‘nuclear-related’ sanctions on Iran.

These actions will have significant consequences moving forward. The JCPOA has existed on effective life-support since the United States announced the cessation of its commitments thereunder. European powers have lacked the political resolve necessary to pushback against U.S. sanctions – many of which expose their home companies to sanctions risk and liability; and China and Russia, the other two parties to the JCPOA, have proven unable to offset the loss of international trade with, and investment in, Iran that accompanied the U.S.’s sanctions re-imposition. The benefit of Iran’s bargain under the accord has been entirely nullified, if not altogether reversed, and Iran has started to scale back compliance with its own nuclear-related commitments under the JCPOA in response to these failures. What has sustained the JCPOA to this day is the promise of a change in administration in the United States, which – it is hoped – would result in the U.S.’s return to, and rehabilitation of, the nuclear accord. This hope has been augmented by many prominent U.S. presidential contenders, who have expressed regret that the Trump administration ceased the U.S.’s participation in the JCPOA; have bemoaned the resulting harm to U.S. prestige and reputation that came in its wake; and have promised to make a swift return to the agreement should they be in a position to do so.⁴

As the United States nears a new presidential election and such a possible change in administration, it is incumbent for all parties to consider the manner in which the United States might rejoin the JCPOA, including the mechanisms provided for in the JCPOA itself or any legal interpretations arising out of United Nations Security Council Resolution (‘UNSCR’) 2231, which endorsed the nuclear accord. This necessarily also requires consideration of the ways in which the Trump administration re-imposed sanctions on Iran; what additional sanctions measures it

⁴ See, e.g., ‘Iran Nuclear Deal (JCPOA): Where 2020 Democrats Stand’ *The Washington Post* <www.washingtonpost.com/graphics/politics/policy-2020/foreign-policy/iran-nuclear-deal/>.



has taken in the interim to inhibit any possible return by a successor administration; and what the United States will need to do, at a minimum, to ensure that Iran receives the benefits required to make its nuclear-related commitments under the JCPOA politically tenable. Parsing these considerations accentuates the gulf that exists between the cabined understanding of the U.S.'s commitments under the JCPOA that prevails in the United States and what the U.S. will need to do if it seeks to sustain the JCPOA in future. This, in turn, underscores how the JCPOA – despite being a political agreement without international legal status – made fair provision for the changing status and needs of the parties thereto and how the detailed mechanisms in the agreement may serve as a means out of the present crisis.

2. *U.S. commitments under the JCPOA*

Underlying the JCPOA was a simple *quid pro quo* between the respective parties to the agreement: Iran would agree to take, or refrain from taking, certain steps related to its nuclear program for a period of years in return for the other parties to the agreement removing those multilateral and national sanctions that had been imposed on Iran for reasons relating to its nuclear program and ensuring Iran's economic re-integration into the global economy. For Iran, the JCPOA promised 'the comprehensive lifting of all UN Security Council sanctions, as well as multilateral and national sanctions related to [its] nuclear programme, including steps on access in areas of trade, technology, finance, and energy.'⁵

Annex II to the JCPOA specified the multilateral and national sanctions to be lifted by the United States and the European Union. The United States 'commit[ted] to cease the application of . . . all nuclear-related sanctions as specified in Section 4.1-4.9 [of Annex II] and to terminate [certain Executive orders].'⁶ These nuclear-related sanctions included measures targeting Iran's financial, energy, petrochemical, shipping, shipbuilding, port, and automotive sectors.⁷ Demonstrating the specificity of the negotiation between Iran and the United States, the

⁵ JCPOA, Preface.

⁶ JCPOA, Annex II para 4.

⁷ JCPOA, Annex II paras 4.1-4.7.



JCPOA specified the precise statutory and executive sanctions to be removed in the parentheses to Sections 4.1-4.9 of Annex II. Consistent with these commitments, the United States also agreed to remove from its sanctions lists the parties identified in Attachments 3 and 4 to Annex II, which had been designated under authorities exclusively related to the proliferation of weapons of mass destruction.⁸

To ensure that the lifting of the sanctions specified in Annex II had the effect of securing Iran's re-integration into the global economy, Annex II also included a section dedicated to describing the 'effects of the lifting of U.S. economic and financial sanctions.'⁹ For instance, Section 7 of Annex II stated that, '[a]s a result of the lifting of sanctions specified in Section 4 [],' the sanctions identified therein 'would not apply to non-U.S. persons who . . . engage in activities, including financial and banking transactions, with the Government of Iran, the Central Bank of Iran, [and] Iranian financial institutions and other Iranian persons specified in Attachment 3 to th[e] Annex.'¹⁰ While Footnote 14 to Annex II of the JCPOA maintained that 'the sanctions lifting described in [Section 4 of Annex II] . . . is without prejudice to sanctions that may apply under legal provisions other than those cited in Section 4,' Section 7 of Annex II appeared to limit the U.S.'s ability to impose future measures on Iran that, *inter alia*, rendered sanctionable transactions with the Central Bank of Iran and Iran's financial institutions identified in Attachment 3 to the Annex. Clearly, the purpose of Section 7 of Annex II was to ensure that any future U.S. sanctions that may be imposed on separate legal grounds did not frustrate Iran's expected economic dividend from its agreement to, and compliance with, the JCPOA.

Several provisions of the JCPOA further evidenced that the U.S.'s commitments under the agreement extended far beyond the mere lifting of those sanctions described in Annex II to the JCPOA. For instance, the JCPOA committed the United States 'to refrain from any action inconsistent with the letter, spirit and intent of th[e] JCPOA that would undermine its successful implementation,' as well as 'from imposing discriminatory regulatory and procedural requirements in lieu of the

⁸ JCPOA, Annex II paras 4.8.

⁹ JCPOA, Annex II para 7.

¹⁰ JCPOA, Annex II para XX.



sanctions and restrictive measures covered by th[e] JCPOA.¹¹ In addition, the United States committed to ‘make best efforts in good faith . . . to prevent interference with the realization of the full benefit by Iran of the sanctions lifting specified in Annex II.’¹² This included a commitment by the U.S. administration to ‘refrain from re-introducing or re-imposing the sanctions specified in Annex II that it has ceased applying under this JCPOA.’¹³ Perhaps most far-reaching, the United States committed to ‘refrain from any policy specifically intended to directly and adversely affect the normalization of trade and economic relations with Iran inconsistent with their commitments not to undermine the successful implementation of th[e] JCPOA.’¹⁴ This latter obligation appeared not only to limit the U.S.’s re-imposition of nuclear-related sanctions, but also the imposition of any other sanctions that could negatively affect Iran’s promised re-integration into the global economy. The JCPOA also included proactive commitments from the United States, stating, for instance, that ‘[t]he E3/EU+3 and Iran will agree on steps to ensure Iran’s access in areas of trade, technology, finance and energy.’¹⁵ Together, these JCPOA provisions evidenced that the United States had committed not merely to cease the application of certain national sanctions targeting Iran, but also to refrain from applying new sanctions measures that would inhibit Iran’s economic re-integration into the global economy and to take proactive steps to encourage such re-integration.

Besides appearing to limit any future use of U.S. sanctions targeting Iran – whether on grounds related to Iran’s proliferation of weapons of mass destruction or otherwise – the JCPOA also included provision for

¹¹ JCPOA, Main Text para 28.

¹² JCPOA, Main Text para 26.

¹³ JCPOA, Main Text para 26. The ambiguity of this language appears purposeful, as it could be read as effectively barring the United States from re-imposing sanctions on the parties identified in Attachments 3 and 4, irrespective of the legal authorities under which such sanctions are imposed. For instance, the parties identified in Attachments 3 and 4 were almost entirely designated by the United States pursuant to Executive Order (‘EO’) 13382, which imposed ‘blocking sanctions’ that obligated U.S. persons to ‘freeze’ the property and interests in property of such designated parties. Any designations on separate legal grounds—including, for instance, EO 13224—impose the same ‘blocking sanctions,’ meaning that the proscriptive sanction is the same in each case.

¹⁴ JCPOA, Main Text para 29.

¹⁵ JCPOA, Main Text para 33. The E3/EU+3 refers to the three European parties to the JCPOA (France, Germany, and the United Kingdom), the European Union, and China, Russia, and the United States.



Iran to request the removal of any enduring sanctions targeting Iran that interfered with the normalization of Iran's economy. Specifically, the JCPOA's Main Text stated that if 'Iran believes that any other nuclear-related sanction or restrictive measure of the E3/EU+3 is preventing the full implementation of the sanctions lifting specified in th[e] JCPOA,' then Iran may consult with the relevant JCPOA participant to resolve the issue and may refer the matter to the JCPOA's Joint Commission if resolution proves unfeasible.¹⁶ This provision indicated that – despite the JCPOA's promise that the agreement would 'comprehensive[ly]' lift all multilateral and national sanctions related to Iran's nuclear program – there may nevertheless be certain existing sanctions targeting Iran that are nuclear-related in origin. It also suggested that the United States may be required to act above and beyond the sanctions relief obligations identified in Annex II to the JCPOA if Iran proved unable to reap the expected economic dividends due to ongoing U.S. sanctions targeting the country.

The scope of these political commitments are far removed from the common understanding of the U.S.'s obligations pursuant to the JCPOA. This may largely be due to the political considerations of the prior U.S. administration, which – having forged agreement with Iran and other major world powers regarding limitations on Iran's nuclear program and sanctions relief – quickly pivoted to winning political support for the accord at home. Indeed, during the negotiations leading to the JCPOA, legislation was enacted that required Congressional review of the JCPOA alongside expedited consideration of a bill to prevent the Obama administration from implementing its sanctions-related commitments.¹⁷ This proposed legislation was only narrowly defeated. During the period of Congressional review, the U.S. administration downplayed the scope of its sanctions relief commitments and argued that the JCPOA in no way limited its ability to impose additional sanctions targeting Iran for conduct unrelated to its nuclear program.¹⁸ Accordingly, it became received wisdom in the United States that the U.S. could impose new and additional sanctions on Iran without implicating its commitments under the

¹⁶ JCPOA, Main Text para 24.

¹⁷ 'Iran Nuclear Agreement Review Act of 2015' Pub. L. 114-17.

¹⁸ See, e.g., Testimony of Adam Szubin, Acting Undersecretary for Terrorism and Financial Intelligence, 'Iran Nuclear Deal Oversight: Implementation and Its Consequences,' House Comm. on Foreign Affairs (May 25, 2016).



JCPOA or triggering Iran to scale back its own nuclear-related compliance thereto as an effective ‘counter-measure.’ Such received wisdom would later play into the Trump administration’s handling of its re-imposition of sanctions on Iran.

3. The U.S.’s reimposition of sanctions targeting Iran

Simultaneous with its announcement that the United States would cease participation in the JCPOA, the Trump administration stated its intent to begin re-imposing sanctions on Iran, defying the U.S.’s political commitments under the JCPOA. To do so, President Trump issued National Security Presidential Memorandum-12 on May 8, 2018 directing the relevant executive departments and agencies to begin undertaking all necessary action to re-impose those sanctions that had formerly been lifted consistent with U.S. obligations under the JCPOA. The Trump administration also clarified to interested parties that the U.S. sanctions reimposition would take place over 90- and 180-day periods, respectively, so that any U.S. or foreign parties engaged in lawful commercial activity with or related to Iran may wind-down their activities to avoid potential sanctions exposure in future.

Accordingly, on August 6, 2018, President Trump issued Executive Order (‘EO’) 13846, which re-imposed all those executive sanctions formerly lifted pursuant to U.S. commitments under the JCPOA. This included, in the initial stage, the re-imposition of U.S. sanctions related to the provision of U.S. banknotes and precious metals to Iran; U.S. sanctions related to Iran’s automotive sector; and U.S. sanctions on dealings in Iran’s sovereign debt and the Iranian rial. By November 6, 2018, EO 13846 had further re-imposed any remaining U.S. sanctions that had been lifted consistent with the JCPOA, including those sanctions targeting dealings with Iran’s energy sector, such as the National Iranian Oil Company (‘NIOC’) and the Naftiran Intertrade Company (‘NICO’); Iran’s financial sector, such as the Central Bank of Iran and other designated Iranian financial institutions; and additional Iranian parties identified by the United States as Specially Designated Nationals (‘SDNs’) and placed on its sanctions lists.

In re-designating Iranian parties to its sanctions lists, however, the Trump administration did not re-impose such sanctions under the same



legal authorities for which they had been initially imposed by the prior U.S. administration. Instead, the Trump administration utilized separate U.S. legal authorities related to Iran's purported support for international terrorism and human rights abuses to designate many of Iran's major public and private financial institutions, as well as various leading companies in Iran's industrial sectors. This action had the effect of, and appeared to be intended to, hinder any successor administration from being able to offer meaningful sanctions relief to Iran as part of any future U.S. return to the JCPOA. In a phrase set forth by one of the leading advocates of the Trump administration's 'maximum pressure' strategy, the intended purpose was to create a 'sanctions wall' that would not only isolate Iran's economy from the outside world but would have the effect of making that isolation permanent, as no future U.S. administration would ostensibly be able to remove sanctions imposed on grounds unrelated to Iran's nuclear program in order to regain status under the JCPOA.¹⁹

The legal mechanics of this move were simple. Most Iranian persons identified in Attachment 3 and 4 of Annex II to the JCPOA and removed from U.S. sanctions lists pursuant to the accord were designated under EO 13382 – an executive order providing legal authority to designate persons contributing to the proliferation of weapons of mass destruction. Instead of re-designating those Iranian persons under the same legal basis for which they were formerly designated, the Trump administration re-designated certain significant Iranian entities under EO 13224, which is an executive order providing legal authority to designate persons involved in or providing support for international terrorism or their supporters. For instance, the Trump administration designated Iran's leading state bank – Bank Melli – under EO 13224 in its November 5, 2018 re-designation action, as well as other major Iranian financial institutions such as Bank Tejarat, Future Bank, and the Export Development Bank of Iran.²⁰

This reshuffling of the legal authority for re-designation was not limited to the November 5, 2018 re-designation action. Indeed, as an effective prelude to that later action, the Trump administration designated

¹⁹ M Dubowitz, 'Build an Iranian Sanctions Wall' *Wall Street Journal* (April 2, 2019).

²⁰ Press Release, U.S. Dep't of Treasury, Office of Foreign Assets Control, 'U.S. Government Fully Re-Imposes Sanctions on the Iranian Regime As Part of Unprecedented U.S. Economic Pressure Campaign' (November 5, 2018).



Iran's largest automotive company, Bahman Group; a leading state-owned bank, Bank Sepah; and a leading private Iranian financial institution, Bank Parsian, pursuant to EO 13224 on October 16, 2018.²¹ Neither Bahman Group nor Bank Parsian had been previously designated by the United States under any legal authority.

Nor would the November 5, 2018 re-designation action prove a one-off occasion for the Trump administration to designate significant entities in Iran's economy for reasons relating to Iran's alleged support for international terrorism. According to these authors' review, the Trump administration has utilized EO 13224 to target Iranian parties in more than twenty (20) separate designation actions since 2017. This use of the authority with respect to Iran has no precedent in any prior U.S. administration and appears intended to further build an effective 'sanctions wall' to prevent any re-assumption of the U.S.'s status under the JCPOA.

Moreover, the increased reliance on non-nuclear-related sanctions authorities with respect to Iran has been accompanied by a concerted effort by the Trump administration to expand the scope of the sanctions available under those same authorities. For instance, President Trump issued a new executive order revising and broadening the scope of EO 13224 so as to authorize sanctions on any foreign financial institution determined to have knowingly conducted or facilitated any significant transaction on behalf of any person blocked by EO 13224.²² This revision means, in practical terms, that any bank transacting with an Iranian financial institution designated pursuant to EO 13224 risks the loss of its correspondent account relationships in the United States. The result is to further isolate significant portions of Iran's economy from the outside world and to do so on legal grounds that render the removal of such sanctions all the more politically challenging.

Since the U.S.'s sanctions re-imposition actions targeting Iran, the Trump administration has further issued new legal authorities that target additional sectors of Iran's economy and that are ostensibly geared towards Iran's non-nuclear activities. For instance, EO 13871 imposes sanctions related to Iran's iron, steel, aluminum, and copper sectors and

²¹ Press Release, U.S. Dep't of Treasury, Office of Foreign Assets Control, 'Treasury Sanctions Vast Financial Network Supporting Iranian Paramilitary Force That Recruits and Trains Child Soldiers' (October 16, 2018).

²² Exec. Order 13886 (September 9, 2019).



was promulgated in response to ‘Iran’s malign influence in the Middle East,’²³ while EO 13876 imposes sanctions on Iran’s political leadership, including the Supreme Leader and persons appointed by, and providing services to, him.²⁴ In addition, the Trump administration designated Iran a jurisdiction of primary money laundering concern under Section 311 of the USA PATRIOT Act and issued a final rule requiring U.S. financial institutions to conduct ‘enhanced due diligence’ on any correspondent accounts maintained for a foreign financial institution that itself provides banking services for or on behalf of Iranian banks.²⁵ The Trump administration based this latter action on ‘its finding that international terrorists and entities involved in missile proliferation have transacted business in Iran.’²⁶ The Trump administration also designated Iran’s Islamic Revolutionary Guard Corps – effectively, Iran’s primary military outfit – as a Foreign Terrorist Organization (‘FTO’) under Section 219 of the Immigration and Nationality Act, the first ever occasion on which the United States has designated a foreign state’s military a terrorist organization.²⁷ While few of these actions have had significant economic consequence for Iran – embattled as Iran already is by the U.S.’s sanctions re-imposition – they are clearly part of the Trump administration’s efforts to complicate, if not entirely preempt, a successor administration’s attempt to return to, and rehabilitate, the JCPOA by reinstating sanctions relief for Iran.

Ultimately, the Trump administration’s shift to non-nuclear-related sanctions authorities to target Iran is intended to impose limits on any future administration’s ability to return to the JCPOA and reinstate the necessary sanctions relief pursuant to the agreement. This effort rests on the perception that the JCPOA only offers Iran sanctions relief with respect to those nuclear-related sanctions targeting Iran’s proliferation-related activities. However, as outlined above, this perception does not square with the detailed obligations agreed to by the United States in the

²³ Exec. Order 13871 (May 8, 2019).

²⁴ Exec. Order 13876 (June 24, 2019).

²⁵ Press Release, U.S. Dep’t of Treasury, Office of Foreign Assets Control, ‘Treasury and State Announce New Humanitarian Mechanism to Increase Transparency of Permissible Trade Supporting the Iranian People’ (October 25, 2019).

²⁶ *ibid.*

²⁷ Fact Sheet, U.S. Dep’t of State, ‘Designation of the Islamic Revolutionary Guard Corps’ (April 8, 2019).



JCPOA. Any re-assumption of the U.S.'s status as a JCPOA participant by a successor administration will necessarily need to acknowledge the breadth and scope of those commitments and how those commitments may require the reversal of the Trump administration's actions detailed herein.

4. *Mechanisms for U.S. 're-entry' into the JCPOA*

The Main Text of the JCPOA includes provision for a dispute resolution mechanism.²⁸ Under this dispute resolution mechanism, the JCPOA's participants may refer compliance-related matters to the Joint Commission – comprised of members from each of the JCPOA participant states, as well as the European Union.²⁹ This mechanism provides a ready means by which to set the framework for any reassumption of the U.S.'s status as a participant to the JCPOA, as it can identify the compliance failures of the United States with respect to its JCPOA obligations; detail the measures that are required by the United States to remedy such failures; and normalize the U.S.'s status under the agreement. The Joint Commission serves as the forum for any negotiation related to a potential U.S. return to the JCPOA.

Under the JCPOA, the Joint Commission is tasked, *inter alia*, with 'review[ing], with a view to resolving, any issue that a JCPOA participant believes constitutes nonperformance by another JCPOA participant of its commitments under the JCPOA . . .'³⁰ This provides a clear basis under which the Joint Commission can assert its authority with respect to the U.S.'s cessation of its participation in the JCPOA and the U.S.'s concomitant failures to perform its obligations under the agreement.

Further, the JCPOA charges the Joint Commission with 'review[ing] . . . issues arising from the implementation of sanctions lifting as specified in th[e] JCPOA and its Annex II.'³¹ Indeed, since the U.S.'s cessation of its participation in the JCPOA, the Joint Commission has issued several statements underlining its regret over the U.S.'s decision and its

²⁸ JCPOA, Main Text para 36.

²⁹ JCPOA, Annex IV para 1.

³⁰ JCPOA, Annex IV.

³¹ JCPOA, Annex IV para 6.



continued resolve to mitigate the damage caused to the JCPOA by that decision, including through enactment of new mechanisms to facilitate commercial trade with and investment in Iran.³² This provision provides an additional basis under which the Joint Commission can review the U.S.'s compliance failures with respect to its JCPOA obligations and propose remediation, particularly if the United States were to seek effective 're-entry' in the JCPOA.

The Joint Commission is thus the appropriate forum for any efforts to rehabilitate the U.S.'s status under the JCPOA. Provided that the United States – either under the Trump administration or its successor – sought to 're-enter' the JCPOA and resume its sanctions-lifting obligations thereunder, the JCPOA's participants could immediately call a meeting of the Joint Commission to discuss the procedures by which the United States could assume its obligations under the JCPOA and reacquire its status as a 'JCPOA participant,' as well as the privileges attendant with such status.³³ The JCPOA parties could also invite the United States to attend a meeting of the Joint Commission with 'observer' status.³⁴ At such meeting, the Joint Commission could work towards resolving the U.S.'s compliance-related failures and what steps may be necessary for the United States to resume compliance with its obligations under the JCPOA. The Joint Commission may even render a decision as to what specific sanctions may need to be lifted in order for the United States to return to the *status quo* that existed at the time of the JCPOA's initial implementation. This may include requiring the lifting of non-nuclear-related sanctions that interfere with Iran's economic benefits under the JCPOA, as well as any additional U.S. sanctions determined to have set a prohibitive bar to Iran's economic reintegration.

³² See, e.g., Statement from the Joint Commission of the Joint Comprehensive Plan of Action (July 6, 2018) <https://eeas.europa.eu/headquarters/headquarters-homepage/48076/statement-joint-commission-joint-comprehensive-plan-action_en>.

³³ These privileges may include, for instance, a seat on the Joint Commission, as well as a right to trigger the dispute resolution mechanism outlined by the JCPOA. While certain parts of the Trump administration may believe that the United States retains such privileges even though it has 'ceased its participation' in the JCPOA, the other parties to the agreement are likely to contest such contention. See, e.g., M Lee, 'Horse-Trading Iran Hawks Seize on Pompeo's Senate Interest' Associated Press (December 17, 2019); B Avni, 'Making "Maximum Pressure" Multilateral Again' Wall Street Journal (December 17, 2019).

³⁴ JCPOA, Annex IV para 3.



To prepare the grounds for a potential U.S. ‘re-entry’ into the JCPOA, the Joint Commission may also undertake preliminary efforts to identify those U.S. sanctions that would need to be removed in order for the United States to return to compliance with its JCPOA commitments. The Joint Commission has ‘working groups’ dedicated to monitoring compliance with various elements of the accord, including a ‘Working Group on Implementation of Sanctions Lifting.’³⁵ This latter Working Group is tasked with ‘reviewing and consulting on issues related to the implementation of sanctions lifting as specified in th[e] JCPOA assisted by a working group on the implementation of sanctions lifting.’³⁶ Assuming this role, the Working Group can undertake efforts to review the U.S.’s sanctions re-imposition – including the varying legal authorities under which the United States re-imposed sanctions – as well as additional sanctions measures taken by the United States pursuant to the Trump administration’s ‘maximum pressure’ strategy. The Working Group can deliberate as to the measures required by the United States to return to compliance with its JCPOA commitments, including what specific sanctions need be removed to ensure Iran receives its expected economic dividend from the JCPOA. The Working Group can make recommendations directly to the Joint Commission, which the Joint Commission can either accept or take under advisement in any future negotiation with the United States as to the terms for its ‘re-entry.’

Each of these mechanisms may serve to facilitate negotiation between the relevant parties as to the terms under which the United States can reassume its status under the JCPOA. If the Joint Commission renders a decision identifying those sanctions that must be lifted in order for the U.S. to return to compliance with its JCPOA obligations, the United States can take such action as necessary to remove such sanctions. If the Joint Commission opts to set only a general framework for U.S. ‘re-entry,’ the JCPOA’s participants can use the Joint Commission as the appropriate forum for negotiation with the United States as to the terms for the U.S.’s re-assumption of its status under the agreement. In either case, the JCPOA provides not merely a dispute resolution mechanism, but also a dedicated forum through which the U.S.’s compliance failures can be adequately managed and resolved.

³⁵ JCPOA, Annex IV para 1; JCPOA, Annex IV para 7.

³⁶ JCPOA, Annex IV para 7.

5. *The contents of any future U.S. sanctions-lifting*

Considering the apparent bad-faith with which the United States re-imposed sanctions on Iran and introduced additional sanctions measures, a fair consideration of this issue by the Joint Commission may lead to an outcome whereby the U.S.'s 're-entry' into the JCPOA is conditioned on its lifting of all sanctions imposed with respect to Iran since on or after the United States' May 8, 2018 announcement that it would cease its participation in the JCPOA. This would include, for instance, the sanctions re-impositions of August 7, 2018 and November 5, 2018, as well as additional sanctions actions such as the United States Department of the Treasury's finalization of a rule designating Iran a jurisdiction of primary money laundering concern and its imposition of the fifth special measure under the USA PATRIOT Act.

For those reasons identified above, the JCPOA provides the grounds under which the Joint Commission may demand such action from the United States in order for the U.S. to resume its status as a JCPOA participant. Far from the cabined understanding predominant in the United States regarding the U.S.'s sanctions-lifting obligations under the JCPOA, several provisions of the JCPOA extend far beyond the mere lifting of those nuclear-related sanctions identified in the parentheses to Annex IV. These include, as noted, paragraph 7 of Annex II wherein the JCPOA outlines the effects of the sanctions-lifting described in paragraph 4 of that same annex, as well as those portions of the Main Text to the JCPOA describing restrictions on any future U.S. sanctions measures. For instance, paragraph 26 of the Main Text states that the United States 'will make best efforts . . . to prevent interference with the realisation of the full benefit by Iran of the sanctions lifting specified in Annex II,' and paragraph 29 of the Main Text similarly holds that the United States 'will refrain from any policy specifically intended to directly and adversely affect the normalisation of trade and economic relations with Iran . . .'

These provisions clearly require the United States refrain from actions that would nullify Iran's expected economic dividend under the JCPOA and for obvious reasons: as an agreement political in nature, the JCPOA's sustenance is entirely dependent on the parties to the accord viewing it as within their national interests. If any party to the JCPOA views the agreement as anathema to such interests, then that party will cease participation thereto, including their own commitments under the



JCPOA. By re-imposing sanctions on Iran's financial sector and on major Iranian financial institutions, as well as additional major sectors of Iran's economy, the United States has clearly acted contrary to its commitments under the JCPOA, irrespective of whether those sanctions were imposed for nuclear-related reasons or otherwise. If the United States views Iran's compliance with its nuclear-related commitments as within its national interests, then it will take the necessary steps, as may be outlined by the Joint Commission, to remove those sanctions that risk Iran's cessation of its participation in the JCPOA.

Because the Trump administration's cessation of its participation in the JCPOA and its re-imposition of sanctions on Iran have been in furtherance of its professed 'maximum pressure' strategy with respect to Iran, the JCPOA participants may reasonably regard all such sanctions imposed pursuant to such strategy – which is predicated on isolating, if not altogether collapsing, Iran's economy – as anathema to the U.S.'s commitments under the JCPOA. This would include the sanctions re-imposition actions of August 7, 2018 and November 5, 2018, as well as the promulgation of new Executive orders targeting major sectors of Iran's economy; the continued identification of Iranian parties to U.S. sanctions lists under a variety of legal authorities; and the finalization of a rule demanding enhanced due diligence by U.S. financial institutions of all correspondent accounts maintained on behalf of foreign financial institutions that themselves 'bank' Iranian parties. All of these actions have been pointedly aimed at negating any economic benefits that were intended for Iran under the JCPOA and at causing further damage to Iran's economic well-being. If the United States is to reassume its status as a JCPOA participant, then it will need to bring a close to this policy and reverse all steps taken pursuant to it. The Joint Commission could identify such action as the necessary prerequisite for any potential 're-entry' for the United States to the JCPOA.

Fortunately, any successor U.S. administration will have the legal tools necessary to effectuate this lifting of sanctions. As motivated as the Trump administration has proven to be seeking to limit a successor's freedom of action with respect to the JCPOA, the administration has yet to take any action that undermines the broad legal authorities at the disposal of the executive to remove sanctions against Iran. Indeed, a successor administration can use the same mix of statutory waivers, executive order revocations, and sanctions delistings as undertaken by the Obama



administration to implement U.S. commitments under the JCPOA. The obstacle to doing so is not legal, but is rather solely political in nature.

6. *Conclusion*

For a political agreement without international legal status, the JCPOA is ripe with provisions designed to ensure parties' compliance thereto and to resolve any disputes that may arise during the course of the agreement. These provisions provide ready-made solutions for the crisis at hand. Despite the Trump administration's best efforts to preempt a successor from returning to compliance with the JCPOA, including by re-imposing many of the sanctions under non-nuclear domestic legal authorities, the United States' commitments under the accord are broad enough to merit the lifting of such sanctions in the instance a successor administration seeks to return to the JCPOA and the JCPOA's dispute resolution mechanism offers the means by which an effective negotiation for the U.S.'s 're-entry' into the JCPOA can take place. While it is unlikely that any of the JCPOA's participants reckoned that one of the essential parties to the agreement would cease their participation thereto, the JCPOA's provisions may well prove adequate enough to deal with the current crisis provided that the United States rediscovers the political will necessary to comply with its commitments thereunder.

