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President Obama Signs New US Sanctions Targeting Foreign Banks Dealing with Iran

On December 31, 2011, the President signed the National Defense Authorization Act for Fiscal Year 2012 (the "Act") into law. The Act includes a provision expanding CISADA's sanctions against foreign banks dealing with the Iranian financial sector by providing a ban on U.S. correspondent relationships for any financial institution that "has knowingly conducted or facilitated any significant financial transaction with the Central Bank of Iran."¹ However, the application of the sanctions is subject to enforcement discretion, and the new law contains several important potential exceptions relating to Iranian oil transactions that make the extent to which such transactions will be targeted unclear.

Previously, while dealings with most Iranian banks carried the threat of loss of access to U.S. correspondent accounts, dealings with the Central Bank of Iran in non-U.S. currency outside the United States did not, unless the underlying transaction related to: developing or expanding Iran's capacity to produce or refine oil, the importation of refined products, or weapons of mass destruction. Now, beginning 60 days from enactment of the Act, any private foreign financial institution that "knowingly conduct[s] or facilitate[s] any significant financial transaction" with the Central Bank of Iran, could be designated for sanctions by the President.² (Significant transactions with other major Iranian banks were already sanctionable under CISADA and the Iranian Financial Sanctions Regulations; as a result, the Central Bank of Iran was the primary remaining gateway for Iranian financial transactions for many foreign financial institutions.)³ These sanctions would prohibit the targeted financial institution from opening, and prohibit or place strict conditions upon maintaining, a correspondent or payable-through account in the United States, effectively closing off access to the U.S. financial system, including U.S. dollar clearing transactions. For financial institutions owned or controlled by a foreign government, such as foreign central banks, sanctions may be imposed only if the institution engages in a transaction for

¹ "CISADA" refers to the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, which amended the Iran Sanctions Act of 1996. For more detail on CISADA, including the recent Executive Order that effectively expanded its scope, please see our July 6, 2010 memorandum, available at http://www.cgsh.com/president_obama_signs_new_iran_sanctions_into Law/, and our November 22, 2011 memorandum, available at http://www.cgsh.com/u_s_expands_sanctions_against_iran/.

² Act § 1245(d)(1).

³ For more detail on the IFSR, please see our April 28, 2011 memorandum, available at http://www.cgsh.com/fincen_proposes_regulations_to_implement_cisada_provision_involving_non-us_banks/.

the sale or purchase of petroleum or petroleum products with Iran after 180 days from enactment of the Act.⁴

However, there are several provisions in the Act that provide for exceptions and waivers of the application of the statute, particularly for purchases of Iranian oil:

- Beginning 90 days after enactment of the Act, the Administration will make a periodic determination as to whether the price and supply of non-Iranian petroleum products are sufficient to permit those purchasing Iranian petroleum products to significantly reduce the volume of purchases. If not, then the foreign financial institution would not be subject to sanction for conducting or facilitating a financial transaction for the purchase of Iranian petroleum products.⁵
- Even if there is adequate global supply of petroleum products to permit a significant reduction in purchasing, if the President determines that the country with primary jurisdiction over a foreign financial institution has significantly reduced its purchases of Iranian crude oil, the foreign financial institution will not be subject to sanctions.⁶
- The President is authorized to waive the imposition of sanctions for successive 120-day periods, whether or not the transactions relate to Iranian oil, if he determines that “such a waiver is in the national security interest of the United States,” although any such waiver must be reported to Congress with an explanation.⁷ (The final language replaces language in the original version of the bill requiring that the President determine that the waiver is “vital to the national security of the United States,” and the change appears designed to provide the President with additional policy flexibility.) The statutory language does not restrict waivers to a case-by-case basis, and the related reporting requirement discusses “any concrete cooperation the President has received or expects to receive as a result of the waiver.” This provision could provide the President with significant flexibility to waive the threat of sanctions with respect to particular institutions, or potentially entire countries or groups of countries. As the imposition of sanctions against financial institutions from major economies that are significant purchasers of Iranian oil (and, in some cases, significant exporters of goods to Iran to balance those transactions) is likely to be a significant political issue, and the U.S. administration has been careful to attempt to build broad international support for sanctions against Iran, this flexibility could be significant.
- Finally, as under the Iran Sanctions Act (as amended by CISADA), the imposition of sanctions is not automatic. While the Administration has certainly become more

⁴ Act § 1245(d)(3).

⁵ Act § 1245(d)(4)(B).

⁶ Act § 1245(d)(4)(D).

⁷ Act § 1245(d)(5).

active in imposing sanctions under CISADA than under the original Iran Sanctions Act, and Congressional scrutiny is more intense, deciding which institutions to target will still be a matter of discretion. Furthermore, under CISADA the U.S. authorities have often engaged with institutions conducting transactions of concern prior to initiating formal sanctions proceedings, and that trend could continue.

The Act contains a number of other provisions of lesser importance, primarily codifying by statute sanctions freezing the assets of Iranian financial institutions within the United States (which already applied to the major Iranian institutions listed as Specially Designated Nationals) and designating the financial sector of Iran as a “jurisdiction of primary money laundering concern” under Section 311 of the USA PATRIOT Act.⁸

If you have any questions, please feel free to contact any of your regular contacts at the Firm, or Ken Bachman, Paul Marquardt, or Rick Bidstrup of our Washington office, listed on our website at <http://www.clearygottlieb.com>.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

⁸ For additional information on this designation, please see our November 22, 2011 Memorandum, available at http://www.cgsh.com/u_s_expands_sanctions_against_iran/.

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS

12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW

Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE

Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME

Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN

Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG

Bank of China Tower
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING

Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES

CGSH International Legal
Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO

Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299