

E-ALERT | Foreign Trade Controls

June 25, 2010

CONGRESS PASSES COMPREHENSIVE, UNILATERAL SANCTIONS AGAINST IRAN

On June 24, Congress overwhelmingly passed the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010. The [bill](#) (i) amends the Iran Sanctions Act (“ISA”) to expand existing sanctions and add new unilateral sanctions against Iran; (ii) codifies and adds new layers of sanctions and restrictions against Iran beyond the ISA context; (iii) authorizes states and local governments to divest from companies that invest in Iran’s energy sector; (iv) directs the Administration to address countries of diversion concern with respect to transfers of sensitive technologies to Iran; (v) harmonizes penalties among various trade control statutes; and (vi) requires various reports on investments in and trade with Iran.

Of principal importance, the bill imposes new sanctions on persons that supply refined petroleum products to Iran or provide support for the maintenance or expansion of Iran’s domestic refining capacity. The measure also mandates sanctions against foreign financial institutions that engage in certain activities, including activities that assist Iran in developing weapons of mass destruction or supporting international terrorism.

The bill represents a compromise between differing versions of the legislation previously passed by the House and Senate. The bill now goes to the President, who will, by all indications, sign it into law.

I. BACKGROUND

As reported in our [e-alert](#) dated February 2, 2010, the ISA, as currently enacted, provides for retaliatory sanctions against persons that make a single “investment” of at least \$20 million, or any combination of investments of at least \$5 million each that in the aggregate equals \$20 million in a 12-month period, that “directly and significantly contribute[s] to the enhancement of Iran’s ability to develop petroleum resources of Iran.” The ISA calls on, but does not require, the President to investigate potentially sanctionable conduct. Once a party is determined to have committed a sanctionable act, the President is required either to exercise certain waiver powers or to impose at least two of the following six sanctions: (1) denial of Export-Import Bank financing for exports to the sanctioned person; (2) denial of federal agency licensing, if required, for exports of goods and technology to the sanctioned person; (3) denial of access to U.S. financial institutions for loans or credit in an amount of more than \$10 million in any 12-month period; (4) ineligibility to serve as a primary dealer in U.S. government securities or as an agent of the U.S. government or a repository for U.S. government funds (for financial institutions); (5) ineligibility to contract with the U.S. government as a supplier of goods or services; and (6) restrictions on imports into the United States.

To date, the President has, via the State Department, initiated a number of investigations under the ISA but has closed only one such inquiry with a finding of sanctionable conduct, in that case choosing to exercise his waiver authority.

II. KEY PROVISIONS OF THE LEGISLATION

The legislation passed by Congress expands existing sanctions and imposes significant new sanctions against Iran. Specifically, the bill:

- **Amends the ISA to expand existing sanctions and add new unilateral sanctions against Iran.**
- ***The bill broadens the scope of sanctions for investments in the development of Iran's petroleum resources by changing certain key definitions.*** Under the current ISA, an investment in the development of Iran's petroleum resources is sanctionable only if it takes place with "actual knowledge." The bill sanctions conduct that takes place "knowingly," which is defined in the bill to include both actual knowledge as well as when a person "should have known." Similarly, the term "petroleum resources" is expanded from "petroleum and natural gas resources" to "petroleum, refined petroleum products, oil or liquefied natural gas, natural gas resources, oil or liquefied natural gas tankers, and products used to construct or maintain pipelines used to transport oil or liquefied natural gas." "Refined petroleum products," a newly added term, is defined as "diesel, gasoline, jet fuel (including naphtha-type and kerosene-type jet fuel), and aviation gasoline." Finally, the bill also amends the current ISA's definition of "investment," eliminating a prior exclusion for contracts for the sale or purchase of goods, services, or technology.
- ***The bill imposes new sanctions on persons that sell refined petroleum products to Iran, or directly and significantly contribute to Iran's ability to import or domestically produce refined petroleum products.*** The legislation requires the President to impose sanctions on persons that, in more than *de minimis* amounts, knowingly (i) sell or provide refined petroleum products to Iran; (ii) sell, lease or provide goods, services, technology, information or support that could "directly and significantly facilitate the maintenance or expansion of Iran's domestic production of refined petroleum products, including any direct and significant assistance with respect to the construction, modernization, or repair of petroleum refineries;" or (iii) sell, lease or provide goods, services, technology, information or support that could "directly and significantly contribute to the enhancement of Iran's ability to import refined petroleum products," including underwriting, insuring, financing, or brokering such transactions or providing ships or shipping services to deliver refined petroleum products to Iran. (For these purposes, the *de minimis* threshold is exceeded by a single transaction with a fair market value of at least \$1 million, or multiple transactions in a 12-month period with an aggregate value of \$5 million or more.) However, the President may not impose sanctions against underwriters and insurers if the President determines that they exercised due diligence in implementing controls to ensure that they did not engage in any sanctionable transactions.
- ***The bill expands the menu of sanctions against persons that engage in sanctionable conduct.*** The new legislation changes the sanctions framework in two important ways. First, the bill directs the President to impose at least three sanctions from the menu, rather than two, for conduct undertaken after enactment of the bill, both for "investments" in Iran's energy sector and for transactions related to refined petroleum products, as described above. Second, the bill adds three new sanctions to the menu of options, authorizing the President to: (1) prohibit any transactions in foreign exchange subject to U.S. jurisdiction in which the sanctioned person has an interest; (2) prohibit transfers of credit or payments involving financial institutions to the extent the transactions involve an interest of the sanctioned person and are subject to U.S. jurisdiction; and (3) prohibit any person from engaging in any transaction in property that is subject to U.S. jurisdiction and with respect to which the sanctioned person has any interest.

- **The scope of persons that may be sanctioned under the ISA is expanded.** The bill expands the definition of persons who may be subject to sanctions to include financial institutions, insurers, underwriters, and other business organizations; government entities that are not operating as business entities are excluded.
- **The bill clarifies when sanctions may be imposed against parties that are related to an entity engaging in sanctionable conduct.** Under the bill, sanctions are to be imposed on any person that owns or controls a sanctioned person if the person that owns or controls the sanctionable party had actual knowledge, or should have known, of the sanctioned person’s conduct. Sanctions also are to be imposed against entities that are owned or controlled by the sanctioned entity, and other entities under common ownership or control with the sanctioned entity, so long as these related parties “knowingly” engaged in the sanctionable activities. (Under the broad definition described above, “knowingly” here would appear to include both actual knowledge as well as when a person “should have known.”)
- **The bill imposes mandatory sanctions relating to the transfer of nuclear technology.** Subject to certain exceptions and waivers, the bill provides that in any case where a person is subject to sanctions for an activity that relates to nuclear weapons, missiles, or related weapons, restrictions are applied against the country with jurisdiction over the sanctioned person. These restrictions prohibit the transfer to that country of any nuclear material or related goods, services, or technologies.
- **The bill bans government contracts for ISA-sanctionable entities.** The bill requires each prospective federal contractor for new procurement contracts to certify that the contractor does not engage in any sanctionable conduct under the ISA, regardless of whether sanctions actually have been imposed.
- **The bill changes the standards for presidential waiver.** Under the current ISA, the President has two principal waiver powers. First, to assist in efforts to secure multilateral sanctions against Iran, the President may waive sanctions for six months against a person of a given country if the President certifies that it is “vital to the national security interests of the United States.” Second, the President has a more general power to waive the imposition of sanctions if it is “important to the national interest of the United States.” The bill passed by Congress maintains the first waiver and modifies the second. It also creates additional waivers for new situations and categories of sanctionable conduct.
 - **Higher threshold for the general waiver power.** Whereas under the current ISA, the President can waive sanctions when it is “important to the national interest,” the new legislation would require the President to conclude that a waiver is “necessary to the national interest.”
 - **Separate waiver for sanctions relating to nuclear technology transfers.** The President can waive the new mandatory sanctions relating to transfers of nuclear technology only if the President concludes that the waiver is “vital to the national security interest.”
 - **Case-by-case waivers for persons in countries that cooperate in multilateral efforts with respect to Iran.** The bill authorizes the President to waive sanctions against a person, on a case-by-case basis, for not more than 12 months if the President certifies to Congress that the government with jurisdiction over the person is “closely cooperating” with the United States in multilateral efforts against Iran. To apply the waiver, the President must, among other things, identify the person to Congress and certify that the waiver is “vital to the national security interests of the United States.” This renewable waiver is in addition to the existing authority in the ISA, noted above, which gives the President a similar power to waive sanctions for six months in aid of the President’s multilateral diplomatic efforts.
 - **Waiver for prospective government contractors.** The President is given the power to waive the requirement that prospective government contractors certify that they do not engage in

any sanctionable conduct under the ISA. To grant such a waiver, the President must find that it is “in the national interest of the United States to do so.”

- ***The bill requires mandatory investigations.*** In contrast with the current ISA, the bill passed by Congress generally requires the President to (i) initiate investigations upon receipt of credible information indicating that a person is engaged in sanctionable conduct; and (ii) conclude investigations within 180 days. To encourage withdrawal from Iran, the bill provides that the President need not initiate an investigation, and may terminate an investigation, if the President determines and certifies that the target is no longer engaging in sanctionable activities (or is taking verifiable steps toward stopping) and the President has received reliable assurances that the target will not engage in such activities in the future. Notably, for the refined-petroleum provisions of the bill, the requirement of mandatory investigations becomes effective one year after the date of enactment. This one-year time frame may be extended by the President for 180 days if he makes a report to Congress on his diplomatic efforts and certifies that there has been a “substantial reduction” in sanctionable conduct during the one-year period. The President is also granted the power to further delay by 180-day periods the effectiveness of the mandatory investigations provision if he makes additional reports to Congress and certifies that there have been “progressive reductions” in sanctionable activities.
- ***The bill extends the ISA.*** Under the bill passed by Congress, the ISA will expire (unless further extended) on December 31, 2016; it had been set to expire at the end of 2011.
- **Codifies and adds new layers of sanctions and restrictions against Iran outside of the ISA context.**
- ***The bill restricts certain interactions between U.S. financial institutions and foreign financial institutions that assist the Iranian government with certain sensitive activities.*** Foreign financial institutions will have their access to the U.S. financial system restricted if they (i) facilitate the Iranian government in developing weapons of mass destruction (“WMD”) or supporting international terrorism; (ii) facilitate the activities of Iranian persons subject to sanctions under U.N. Security Council resolutions; (iii) engage in money laundering to carry out the activities described in (i) and (ii); (iv) facilitate efforts by the Central Bank of Iran or any other Iranian financial institution to carry out the activities described in (i) and (ii); or (v) facilitate significant transactions for, or provide significant financial services to, Iran’s Revolutionary Guard Corps, its blocked agents or affiliates, or any other financial institution subject to U.S. blocking in connection with Iran’s WMD program or Iran’s support for international terrorism. For those foreign financial institutions that engage in the enumerated activities, the Treasury Secretary is directed to restrict the opening or maintaining in the United States of a correspondent account or payable-through account. The Treasury Secretary is also directed to promulgate regulations requiring domestic financial institutions that maintain correspondent accounts or payable-through accounts for a foreign financial institution to implement one or more of certain enumerated safeguards, including audits and the establishment of due diligence procedures to ensure that their foreign financial institution counterparties are not engaging in these sanctionable activities.
- ***The bill prohibits any person owned or controlled by a domestic financial institution from knowingly engaging in transactions with Iran’s Revolutionary Guard Corps or any of its blocked agents or affiliates.*** Under the bill passed by Congress, violations of this prohibition by any person owned or controlled by a domestic financial institution can be attributed to the domestic financial institution if the domestic financial institution knew or should have known of the violative transactions with Iran’s Revolutionary Guard Corps or any of its blocked agents or affiliates.

- **The bill codifies and expands asset blocking and the trade embargo.** The bill codifies the existing Iranian trade embargo and certain asset-blocking measures already administered by the Treasury Department’s Office of Foreign Assets Control (“OFAC”). The bill authorizes the President to freeze the assets of certain Iranian parties that are designated as supporting weapons proliferation, terrorism, or other sensitive activities. The bill also codifies a general prohibition on trade between the United States (or involving U.S. persons) and Iran, with certain exceptions including for personal communications, transactions incident to travel, informational materials, and certain humanitarian assistance. The bill also appears to retain OFAC’s existing licensing authority for exports to Iran of qualified food, agricultural commodities, medicine and medical devices. Significantly, the bill does not appear to prohibit sales by non-U.S. parties of non-sensitive items (*i.e.*, those classified as EAR99 under the Export Administration Regulations administered by the Commerce Department) drawn from *bona fide* non-U.S. general inventories and destined for non-restricted end-uses and end-users outside of the energy and weapons industries.
- **The bill imposes sanctions on persons who are responsible for human rights abuses in Iran relating to the June 2009 election.** The bill directs the President to maintain a list of persons who are responsible for committing human rights abuses against Iranians in relation to the June 2009 Iranian election. Those on the list would be subjected to sanctions, including asset blocking and ineligibility for visas.
- **Persons that export “sensitive technology” to Iran are prohibited from obtaining federal government procurement contracts.** The term “sensitive technology” is defined broadly for these purposes to include technology that could restrict the free flow of information to Iran or disrupt, monitor, or otherwise restrict the speech of the people of Iran.

➤ **Authorizes U.S. state and local government divestment.**

The bill authorizes U.S. states and local governments, after providing notice and opportunity to comment to the affected entity, to divest their holdings in any entity that has investments of \$20 million or more (or, in the case of a financial institution, \$20 million or more in credit extended to another person for the purpose of making such an investment) in the “energy sector of Iran.” The bill also authorizes enforcement of previously enacted state and local measures requiring divestment from a person that “engages in investment activities in Iran . . . or other business activities in Iran.” For purposes of these divestment provisions, the phrase “energy sector of Iran” refers to “activities to develop petroleum or natural gas resources or nuclear power in Iran.”

➤ **Combats the diversion of sensitive technologies to Iran.**

The bill directs the Administration to identify those countries where sensitive technology is diverted to Iran, and to impose additional export licensing restrictions on such countries. The President is given discretion to delay the additional licensing restrictions if the President determines that the country in question is taking steps to combat the diversion.

➤ **Harmonizes criminal penalties for violations of sanctions.**

Under the bill passed by Congress, maximum criminal penalties for violators of U.S. and U.N. sanctions are increased to \$1 million in fines (per violation) and 20 years in prison.

➤ **Requires various reports on trade with and investments in Iran.**

The bill requires the President to submit to Congress a number of new reports, including: (i) a report on investments from January 2006 forward in Iran’s energy sector, updated semiannually,

including an estimate of the volume of energy-related resources, including ethanol, that Iran imports during the period, as well as a list of all “significant known energy-related joint ventures, investments, and partnerships located outside Iran that involve Iranian entities in partnerships with entities from other countries;” (ii) a report on the activities of foreign export credit agencies that would be ISA-sanctionable, and a report on U.S. Export-Import Bank co-financing of such projects; (iii) a report on diplomatic and other efforts to dissuade foreign persons, and to encourage foreign governments to dissuade persons under their jurisdictions, from engaging in the refined-petroleum activities newly sanctionable under the bill, plus a description of each ISA investigation that was initiated or ongoing; and (iv) an annual report on the “dollar value amount of trade, including in the energy sector,” between Iran and each of the members of the G-20.

III. DIFFERENCES BETWEEN THE CONFERENCE BILL AND THE HOUSE AND SENATE BILLS

The conference bill reflects the give and take between the Administration and Congress that has been widely reported in the preceding months. The original House and Senate bills had sharply limited the flexibility of the Executive Branch by making all investigations mandatory, ratcheting up the standard for presidential waivers, and making certain key sanctions mandatory for violations of the refined-petroleum provisions of the bills.

During the conference process, it was reported that the Administration was seeking to restore some of its flexibility in implementing the proposed ISA amendments. Particularly, the Administration reportedly sought a broad waiver power allowing it to exempt all companies of certain “closely cooperating countries” that are participating in multilateral sanctions against Iran. While the final conference bill did not embrace a blanket waiver for “closely cooperating countries,” it did restore to the President a significant amount of discretion. First, it allows the President to delay implementation in certain circumstances of the portion of the conference bill that makes investigations mandatory. Second, it gives the President the power to waive sanctions for 12 months on a case-by-case basis for nationals of a country if that country is participating in multilateral sanctions against Iran. Third, the mandatory sanctions from the House and Senate bills have now been added to the menu as options the President may consider, but they are no longer required for parties who are being sanctioned under the refined-petroleum provisions of the bill.

IV. NEXT STEPS AND TIMING FOR PRESIDENTIAL ACTION

Now that both houses of Congress have passed identical legislation, the bill goes to the President for his signature or veto. Given the overwhelmingly bipartisan nature of this legislation (as well as the Administration’s own signals and apparent success in moderating certain provisions in the legislation), there is little chance of a veto. Rather, all indications are that the President will sign the bill, which under the Constitution must take place within 10 days.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our foreign trade controls practice group:

Peter Flanagan	202.662.5163	pflanagan@cov.com
Corinne Goldstein	202.662.5534	cgoldstein@cov.com
Kimberly Strosnider	202.662.5816	kstrosnider@cov.com
Alan Larson	202.662.5756	al Larson@cov.com
David Addis	202.662.5182	daddis@cov.com
Eric Carlson	86.10.5910.0503	ecarlson@cov.com
Alex Berengaut	202.662.5367	aberengaut@cov.com

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