

International Trade & Regulatory ADVISORY

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Congress Passes New Legislation Tightening Sanctions on Iran

On December 19, 2012, House and Senate conferees reached agreement on the final language of the Menendez Amendment (SA 3232) (the “Amendment”) to the National Defense Authorization Act for FY 2013 (S. 3254) (the “Act”), which further tightens sanctions on Iran. Both houses of Congress approved the conference report containing the Amendment on Friday, December 21. Proposed by Senator Robert Menendez (D-NJ), and enjoying strong bipartisan support, the Amendment targets Iran’s energy, port, shipping and shipbuilding sectors by designating those sectors as entities of “proliferation concern.” The new sanctions block the U.S. property of, and prohibit transactions with, any person anywhere in the world the President has determined to be “part of” the above sectors or operating a port in Iran, as well as of any person anywhere in the world the President has determined to have knowingly provided “significant” financial, material, technological or other support, goods or services in support of “any activity or transaction on behalf of or for the benefit of” a person so designated by the President or in support of any Iranian person on the Specially Designated Nationals List (“SDN List”) other than an Iranian financial institution designated solely with the [IRAN] tag. The net effect of this provision is essentially to place any person designated under the Amendment in the status of an SDN, with all their property subject to U.S. jurisdiction blocked.

In addition, the Amendment requires the President to impose five or more sanctions under the Iran Sanctions Act (ISA)¹ on any person and prohibit correspondent and payable-through accounts by foreign financial institutions determined by the President to have knowingly “conducted or facilitated a significant transaction”

¹ The following sanctions are available under the ISA, as amended by the Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 (CISADA) and the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA):

1. Denial of Export-Import Bank loans, credits or credit guarantees for U.S. exports to the sanctioned party;
2. Denial of licenses for the export of military, dual-use, or nuclear-related goods or technology;
3. Denial of U.S. bank loans exceeding \$10 million in any 12-month period;
4. Prohibition on designation as a primary dealer in U.S. government bonds, and/or prohibition on service as a repository for U.S. government funds, if the sanctioned party is a financial institution (each counts as one sanction);
5. Prohibition on U.S. government procurement from the sanctioned party;
6. Prohibition on foreign exchange transactions subject to U.S. jurisdiction;
7. Prohibition on banking transactions subject to U.S. jurisdiction;
8. Prohibition on transactions involving any property subject to U.S. jurisdiction in which the sanctioned person has an interest;
9. Prohibition on investment in significant amounts of equity or debt instruments of the sanctioned party;
10. Denial of visas to corporate officers of companies that violate the ISA;
11. Imposition of ISA sanctions on the principal executive officers of companies that violate the ISA;
12. Restriction on imports from the sanctioned entity.

See 50 U.S.C. §1701 note.

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for the supply of goods or services “used in connection with the energy, shipping or shipbuilding sectors of Iran,” including NIOC and IRISL. The Amendment furthermore restricts trade in precious metals and materials relevant to Iran’s shipbuilding and nuclear programs, including graphite, “raw or semi-finished metals such as aluminum and steel,” coal and software for integrating industrial processes. Finally, the Amendment explicitly subjects underwriters, insurers and reinsurers providing services to or for any person “with respect to or for the benefit of any activity in the energy, shipping or shipbuilding sectors of Iran” to ISA sanctions to be imposed by the President.

The effective date of the new sanctions is 180 days following the enactment of the Amendment. Limited (successive 180-day) waiver provisions are available. Even though likely to be passed by Congress, the fate of the Amendment at this point is uncertain because President Obama has threatened to veto the Act for reasons unrelated to the Amendment.

New Sanctions on Iran’s Energy, Port, Shipping and Shipbuilding Sectors

Section 1244 of the Act designates Iran’s energy, port, shipping and shipbuilding sectors as entities of “proliferation concern.” Section 1244(c) blocks all property subject to U.S. jurisdiction of any person who is part of Iran’s energy, shipping or shipbuilding sectors or who operates a port in Iran. Section 1244(c) further blocks all property subject to U.S. jurisdiction of any person who knowingly provides “significant” financial, material, technological or other support to, or goods or services to Iran’s energy, port, shipping or shipbuilding sectors or to any Iranian person on the Office of Foreign Assets Controls’ SDN List other than an Iranian financial institution designated solely with the [IRAN] tag. There is no definition of “significant” in the Amendment.

These sanctions on the energy, port, shipping and shipbuilding sectors and their supporters significantly extend U.S. sanctions beyond those existing on Iran’s petroleum and petrochemical industry under CISADA, the National Defense Authorization Act for FY 2012 (“NDAA 2012”) and ITRA. They potentially create SDNs of whole sectors of the Iranian economy and, more importantly, of anyone who knowingly provides “significant” support to those sectors. In addition, while CISADA and ITRA generally provide for the imposition of ISA sanctions on parties engaged in specific types of transactions meeting defined value thresholds, the Amendment seemingly lowers the bar for the imposition of ISA sanctions by broadly requiring the President to impose at least five such sanctions on anyone who knowingly “sells, supplies, or transfers to or from Iran significant goods or services used in connection with the energy, shipping, or shipbuilding sectors of Iran.”²

Sanctions Impacting U.S. and Foreign Financial Institutions

In conjunction with the designation of Iran’s energy, port, shipping and shipbuilding sectors, the Amendment imposes additional sanctions on both U.S. and foreign financial institutions that facilitate transactions with the designated sectors. Specifically:

- Section 1244(d) of the Act prohibits the opening and restricts the maintaining in the United States of correspondent accounts or payable-through accounts by “a foreign financial institution” that knowingly conducts or facilitates a “significant financial transaction for the sale, supply, or transfer to or from Iran” of goods or services used in connection with Iran’s energy, shipping or shipbuilding sectors. Section 1245

² See Section 1244 (d)(1)(A) of the Act.

imposes similar restrictions on facilitation of trade with respect to precious metals and materials used in connection with Iran's energy, shipping or shipbuilding sectors.

- Section 1247 prohibits the opening and restricts the maintaining of U.S. correspondent accounts or payable-through accounts by "a foreign financial institution" that knowingly facilitates a "significant financial transaction" on behalf of an Iranian SDN (other than an Iranian financial institution that is designated solely with the [IRAN] tag).

Under Section 1242 of the Act, in determining the "significance" of a financial transaction or service, the "totality of the facts and circumstances" will be considered, including factors set forth in 31 C.F.R. §561.404.

Restrictions on Trade in Precious Metals and Other Commodities Relevant to Iran's Shipbuilding and Nuclear Sectors

Section 1245 of the Act also imposes sanctions on persons supplying a defined list of commodities to Iran that are allegedly relevant to Iran's shipbuilding and nuclear sectors, including precious metals, graphite, "raw or semi-finished metals such as aluminum and steel," coal and "software for integrating industrial processes." Under the Amendment, the President is required to report to Congress on whether Iran is using any of the above materials as barter or listing any of them as assets of the Government of Iran for purposes of the national balance sheet of Iran. The restriction on trade in precious metals is designed to prevent Iran from evading existing sanctions on Iran's Central Bank.

In relation to sanctions on trade and facilitation of trade in precious metals and materials used in Iran's nuclear programs, Section 1245(f) provides exemptions for persons exercising due diligence in establishing and enforcing official policies procedures and controls to prevent the proscribed transactions in metals and materials.

Sanctions Impacting Underwriters, Insurers and Reinsurers

Under Section 1246 of the Act, the President must impose sanctions on anyone who knowingly provides, on or after 180 days after the enactment of the Act, underwriting services, insurance or reinsurance for any sanctioned activity to or for certain SDNs, or to or for any person "with respect to, or for the benefit of, any activity in the energy, shipping, or shipbuilding sectors." However, Section 1246(d) provides a safe harbor similar to that in CISADA if the President determines that the person has exercised due diligence in establishing and enforcing official policies, procedures and controls to ensure that the person does not underwrite or enter into a contract to provide insurance or reinsurance for a prohibited activity or person.

Other Provisions

In addition, the Amendment designates the Islamic Republic of Iran Broadcasting and its President as human rights abusers. Consistent with the Trade Sanctions Reform and Export Enforcement Act (TSRA), the Amendment also provides for exceptions for the provision to Iran of food, agricultural commodities, medicine, medical devices and other humanitarian goods. Finally, the Amendment provides exceptions with respect to purchases of petroleum and petroleum products from Iran and certain transactions with respect to natural gas, consistent with CISADA and the NDAA 2012.

Important Considerations for Financial Institutions, Insurers and Companies that Deal with Iran's Energy, Port, Shipping and Shipbuilding Sectors

The new measures on Iran's energy, port, shipping and shipbuilding sectors not only ramp up existing sanctions on Iran's financial and energy sectors, but also aim to close the loophole of Iran's circumventing sanctions by bartering oil for precious metals. Most significantly, the restrictions on financial institutions are broadly framed to potentially reach both U.S. and foreign financial institutions that deal with Iran's energy, port, shipping and shipbuilding sectors or other designated entities. As the Amendment applies to prohibited activities that are still taking place 180 days following enactment, it would potentially reach financings that have not been completely wound down and terminated within the 180-day time frame. Therefore, financial institutions and other potentially affected companies should immediately begin to review their transactions to assess the impact of the new rules.

In addition, the basis on which global insurers could potentially be subjected to damaging sanctions is broad, and, on its face, is not limited by any requirement of significance or materiality. Incidental or secondary coverage of vessels or business activities outside of Iran could potentially give rise to sanctions. Thus, underwriters and insurers of risk that may benefit or relate to the energy, shipping or shipbuilding sectors of Iran should review their procedures and controls to minimize the risk of performing services that could give rise to sanctions and to maximize the likelihood of the applicability of the safe harbor in the event that particular underwriting services or insurance or reinsurance policies are alleged to relate to or benefit the Iranian energy, shipping or shipbuilding sectors.

Lastly, the threat of blocked property and ISA sanctions being imposed by the President on anyone who sells, supplies or transfers to or from Iran significant goods or services used in connection with Iran's energy, shipping or shipbuilding sectors of Iran should cause non-U.S. companies to evaluate any dealings they may have with Iran.

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