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A Path To Safety For Companies Dealing With Iran

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Law360, New York (November 12, 2010) -- Under the Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 (CISADA or the act), the president is required to initiate an investigation upon receipt of credible evidence that a company may be engaged in certain types of sanctionable business activities involving Iran.

Such investigations may lead to the imposition of mandatory sanctions against the targeted company, if the investigation confirms the alleged activities. However, CISADA includes a "Special Rule" that authorizes the U.S. government to cease pending investigations (or forgo the initiation of new investigations) of companies able to demonstrate that they are halting sanctionable activities involving Iran.

Given the increasing pressure on the Obama administration from Congress and private organizations to proceed with investigations and the imposition of sanctions under CISADA, companies currently engaged in potentially sanctionable business activities with Iran should consider pursuing proactive efforts to take advantage of the special rule.

Overview of CISADA

Designed to significantly expand the extraterritorial bite of the existing U.S. sanctions against Iran under the Iran Sanctions Act of 1996 (ISA), CISADA broadens the scope of

activities by non-U.S. companies that may lead to the imposition of sanctions by the U.S. government.

In particular, sanctionable activities include efforts by foreign firms to knowingly 1) sell, lease or provide to Iran any goods, services, technology, information or support that would allow Iran to maintain or expand its domestic petroleum refineries; or 2) to supply refined petroleum products to Iran.

Such activities are subject to sanctions only when they “directly or significantly” assist Iran in the development or importation of petroleum resources, and only when the value of the activities exceeds the specified threshold amounts of \$1 million in value for any single transaction or an aggregate of \$5 million or more for multiple transactions within a 12-month period.

As a result, the scope of companies that are potentially subject to sanctions now includes entities in any business sector capable of providing support to Iran's petroleum refineries, such as financial services, telecommunications, logistics, consulting and business services.

CISADA also expands the sanctions that are required to be imposed against companies found to be engaged in sanctionable activities. Under the existing provisions of the ISA, the president was required to impose two out of a menu of six sanctions against a sanctioned entity. CISADA adds three new sanctions and requires the president to impose three sanctions out of a total of nine.

The three new sanctions applicable vis-à-vis sanctioned entities are 1) a prohibition on foreign exchange transactions subject to U.S. jurisdiction; 2) a prohibition on banking transactions; and 3) a prohibition on transactions involving property of the sanctioned entity.

One of the perceived weaknesses of the existing ISA was that the executive branch was not under an affirmative obligation to investigate allegations that a company was engaged in sanctionable activities and therefore could avoid politically or diplomatically sensitive situations simply by not conducting an investigation of the company involved.

CISADA seeks to address that issue by requiring the president to initiate investigations into the possible imposition of sanctions upon receipt of credible information that a person is engaged in sanctionable activities. Pursuant to a Sept. 23, 2010, presidential memorandum, the president has delegated authority to conduct such investigations to the U.S. Department of State.

Within the State Department, the sanctions investigations are being handled by the Office of Terrorism Finance and Economic Sanctions Policy. (This office has not issued regulations or formal guidance regarding its procedures for investigations or the application of the special rule under CISADA, and has indicated that it does not currently plan to do so.)

With members of Congress, the news media and private groups such as United Against Nuclear Iran (UANI) seeking to expose companies engaged in business with Iran, the administration is under increasing pressure to proceed with such investigations of sanctionable business activities.

Special Rule for Companies Halting Sanctionable Business Activities

In an effort to encourage companies to proactively withdraw from Iran, Congress included a "Special Rule" under CISADA that offers companies an opportunity to avoid an otherwise mandatory investigation by demonstrating that they are halting potentially sanctionable business activities.

Section 102(g) of CISADA states that the president need not initiate or may terminate an investigation if the president certifies in writing to the responsible congressional committees that 1) the company subject to the investigation is no longer engaging in the activity at issue or has taken "significant verifiable steps toward stopping the activity; and 2) has provided assurances that it will not knowingly engage in sanctionable activity in the future.

The conference report issued by the Congressional Conference Committee in connection with the passage of CISADA states that firms seeking to take advantage of the "Special Rule" should also be "strongly encouraged to provide the president with a detailed catalog of their existing activities in Iran, and a plan for winding down" any sanctionable activity "as soon as possible." Moreover, the conference report states that any continuing activities should be pursuant solely to a contract or other legally binding commitment.

At least four major oil companies already have taken advantage of the special rule. On Sept. 30, 2010, Deputy Secretary of State James Steinberg announced that Royal Dutch Shell PLC, Total SA, Statoil ASA and Italy ENI SPA all would cease sanctionable activities involving Iran, and therefore would not be subject to investigations or sanctions under CISADA.

At the same time, Deputy Secretary Steinberg announced that Naftiran Intertrade Company, a Swiss company ultimately owned by National Iranian Oil Company, would be the first entity to be sanctioned under CISADA. While other companies have not been named, it was clear from Deputy Secretary Steinberg's comments that there are a number of other ongoing investigations under CISADA.

Obama Administration Faces Increasing Pressure to Investigate Companies

Frustrated by the pace with which the Obama administration has moved to impose sanctions under CISADA, members of Congress are increasingly seeking to pressure the administration to initiate investigations of non-U.S. companies.

On Sept. 22, 2010, 30 Republican members of Congress (including Representative John Boehner of Ohio, who is expected to become the Speaker of the House in January) sent a letter to President Obama that specifically named a number of companies allegedly engaged in sanctionable activities involving Iran.

The letter requested that the president “fully and expeditiously implement and enforce” the provisions of CISADA. With Republicans taking over control of the House in January, Congress will continue to push the administration to act, which in turn will increase pressure on companies to proactively withdraw from Iran.

At the same time, a number of other groups are taking steps to encourage companies to halt business activities against Iran, including state legislatures, nonprofit organizations, and pension and investment funds.

In addition, the U.S. Securities and Exchange Commission, through its Office of Global Security Risk, regularly inquires about the activities of publicly traded companies involving Iran (and other countries subject to U.S. sanctions). Moreover, the European Union, Canada, Japan, Australia, North Korea and other countries are adding to the pressure by enacting their own sanctions against Iran.

Companies Should Consider Proactive Efforts to Use the Special Rule

In the wake of CISADA, pressure is building on companies to withdraw from Iran and on the Obama administration to impose sanctions against companies that do not do so.

Under these circumstances, non-U.S. companies should carefully consider whether to halt existing business activities that may be sanctionable under CISADA, and whether to initiate discussions proactively with the State Department regarding qualification for the special rule. By doing so, such companies may be able to avoid the initiation of an investigation by the

State Department that could be damaging to their reputations and that could result in costly sanctions.

Given the complexities of the U.S. sanctions against Iran, companies seeking to take advantage of CISADA's special rule may benefit from the assistance of counsel in navigating the process with the U.S. government.

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