

Memorandum

US and International Community Continue to Expand Sanctions Against Iran

February 17, 2012

On July 1, 2010, President Obama signed into law the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (“CISADA”),¹ to protect the security and interests of the United States by helping to prevent Iran from developing nuclear weapons. On Oct. 11, 2011, pursuant to Section 104(e) of CISADA, the Financial Crimes Enforcement Network (“FinCEN”), a bureau of the U.S. Treasury Department (“Treasury”), imposed a reporting obligation on all foreign banks that maintain relationships with Iranian-linked financial institutions and persons linked to Iran’s Islamic Revolutionary Guard Corps (“IRGC”) as designated under the International Emergency Economic Powers Act (“IEEPA”). Additionally, on Nov. 28, 2011, FinCEN issued a notice of proposed rulemaking, which would impose special measures against the Islamic Republic of Iran as a jurisdiction of primary money laundering concern under Section 311 of the USA PATRIOT Act of 2001 (“PATRIOT Act”).²

Further tightening the already broad-based and stringent U.S. sanctions on Iran, on Dec. 31, 2011, the President signed into law H.R. 1540, the National Defense Authorization Act for Fiscal Year 2012 (“NDAA” or the “Act”).³ “Section 1245 of the NDAA requires the President to block the property and interests in property subject to U.S. jurisdiction of all Iranian financial institutions, including the Central Bank of Iran (“CBI”). It also aims to reduce Iranian oil revenues and discourage transactions with the CBI by providing for sanctions on foreign financial institutions that knowingly conduct or facilitate certain significant financial transactions with the CBI.”⁴

Pursuant to Section 1245(c) of the NDAA, on Feb. 5, 2012, the President signed Executive Order (“E.O.” or the “Order”) 13599, blocking all property and interests in property of the Government of Iran and Iranian financial institutions, including the CBI, that are in the United States, that come within the United States or that come within the possession or control of U.S. persons.⁵ Earlier, on Nov. 19, 2011, the President had signed E.O. 13590, which targeted the supply of goods, services, technology or support (above a particular monetary

¹ Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. No. 111-195, 124 Stat. 1312 (July 1, 2010) [hereinafter *CISADA*].

² 76 Fed. Reg. 72,878 (Nov. 28, 2011) (to be codified at 31 C.F.R. §1010.657).

³ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81 (Dec. 31, 2011) [hereinafter *NDAA*].

⁴ “Frequently Asked Questions and Answers,” Treasury, <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#169> [hereinafter *OFAC FAQs*].

⁵ “Exec. Order No. 13599 — Blocking Property of the Government of Iran and Iranian Financial Institutions,” The White House, Office of the Press Secretary (Feb. 5, 2012), <http://www.whitehouse.gov/the-press-office/2012/02/06/executive-order-blocking-property-government-iran-and-iranian-financial-> [hereinafter *Exec. Order No. 13599*].

threshold) to Iran for the development of its petroleum resources and maintenance or expansion of its petrochemical industry.⁶

Consistent with the U.S. sanctions against Iran, the Financial Action Task Force (“FATF”),⁷ the United Nations and the international community, such as the European Union (“EU”) and other countries, including Canada, Japan, South Korea and Australia, have also promulgated sweeping rules to significantly limit Iran’s access to their banking and finance systems.

The goal of these efforts is to increase the pressure on Iran to discuss its nuclear program with the global community. This *Memorandum* provides an analysis of the most recent sanctions against Iran, described above, issued by the United States and the international community.

Background Information on CISADA, Including Section 104(e)

CISADA supplements and amends the Iran Sanctions Act of 1996 by expanding the list of sanctionable activities, providing for additional types of sanctions relating to Iran and requiring the government to conduct investigations should it receive “credible information” about a violation of the Iranian sanctions programs.⁸ In an effort to weaken the Iranian banking and energy sectors, CISADA places restrictions on financial institutions and energy-related businesses, imposing serious limits on foreign financial institutions’ access to the U.S. financial system if such foreign financial institutions engage in certain transactions involving Iran. The statute requires the Treasury to implement regulations that accomplish these goals.

Section 104(e) of CISADA directs the Secretary of the Treasury (the “Secretary”) to promulgate regulations establishing requirements for U.S. financial institutions, including banks and broker-dealers, that maintain correspondent accounts for foreign financial institutions in connection with the sanctionable activities described in Section 104(c)(2) of CISADA.⁹ Specifically, Section 104(e) requires the Secretary to prescribe regulations requiring a domestic financial institution maintaining a correspondent account or payable-through account in the United States for a foreign financial institution to do one or more of the following:

- Perform an audit to determine whether the foreign financial institution is engaged in any sanctionable activity;
- Report to the Treasury with respect to transactions or other financial services provided with respect to any sanctionable activity;
- Certify, to the best of the domestic financial institution’s knowledge, that the foreign financial institution is not knowingly engaged in sanctionable activity; and/or
- Establish due diligence policies, procedures and controls, such as the due diligence policies, procedures and controls described in Section 312 of the PATRIOT Act (31 U.S.C. §5318(i)), reasonably designed to detect whether the Secretary has found the foreign financial institution to knowingly engage in sanctionable activity.¹⁰

⁶ “Exec. Order No. 13590 — Iran Sanctions,” The White House, Office of the Press Secretary (Nov. 21, 2011), <http://www.whitehouse.gov/the-press-office/2011/11/21/executive-order-iran-sanctions> [hereinafter *Exec. Order No. 13590*]

⁷ FATF is an intergovernmental body, of which the United States is a member, “whose purpose is to develop and promote national and international policies to combat money laundering and terrorist financing.”

⁸ For a fuller discussion of CISADA and the Iranian Financial Sanctions Regulations (“IFSR”) (i.e., 31 C.F.R. Part 561), see prior *Client Alert*, “The Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010: The Relevant Implementing Regulations, and the Resulting Impact on Financial Institutions,” (Sept. 22, 2010), http://www.srz.com/092210_CISADA_and_OFAC_Regs/ [hereinafter *SRZ Client Alert on CISADA*]; see also “CISADA: The New U.S. Sanctions on Iran,” Treasury, http://www.treasury.gov/resource-center/sanctions/Programs/Documents/CISADA_english.pdf.

⁹ Separately, the Treasury issued regulations for Sections 104(c) and 104(d) of CISADA. The Treasury has so far not designated any foreign financial institutions that have engaged in sanctionable activities under Section 104(c).

¹⁰ CISADA §104(e)(1)(A)-(D).

To comply with this Congressional mandate, FinCEN issued a notice of proposed rulemaking on April 26, 2011 (the "Proposed Rule")¹¹ and a final rule on Oct. 11, 2011 (the "Final Rule"),¹² implementing Section 104(e)(1)(B) of CISADA, requiring a U.S. "bank"¹³ maintaining a "correspondent account"¹⁴ in the United States for a "foreign bank"¹⁵ to report to FinCEN with respect to transactions or other financial services provided with respect to sanctionable activity relating to an Iranian-linked financial institution (designated under IEEPA)¹⁶ or an IRGC-linked person (designated under IEEPA)^{17, 18} FinCEN limited the scope of the reporting requirements to "banks" with correspondent accounts for "foreign banks" in order to ensure that useful information is provided as it relates to CISADA. However, FinCEN will continue to consider whether expanding the scope of the Final Rule to include other domestic financial institutions would provide additional useful information as it relates to CISADA.¹⁹

Duty to Inquire: Under the Final Rule, a bank that maintains a correspondent account for a specified foreign bank shall, upon receiving a written request from FinCEN, inquire of such foreign bank, for the purpose of having such foreign bank certify:

- Whether it maintains a correspondent account for an Iranian-linked financial institution;
- Whether it has processed any transfer of funds within the preceding 90 calendar days for or on behalf of, directly or indirectly, an Iranian-linked financial institution, other than through a correspondent account; and
- Whether it has processed any transfer of funds within the preceding 90 calendar days for or on behalf of, directly or indirectly, an IRGC-linked person processed by such foreign bank.²⁰

Upon such inquiry, a bank shall request that the foreign bank agree to notify the bank if the foreign bank subsequently establishes a new correspondent account for an Iranian-linked financial institution designated under IEEPA at any time within 365 calendar days from the date of the foreign bank's initial response.²¹

¹¹ 76 Fed. Reg. 24,410 (May 2, 2011) (the "Proposed Rule"); see prior *Client Alert*, "FinCEN Issues Proposed CISADA Reporting Requirements Under Section 104(e)," (June 1, 2011), http://www.srz.com/060111_FinCEN_Issues_Proposed_CISADA_Reporting/.

¹² 31 C.F.R. §1060.300 (2011).

¹³ For purposes of the Final Rule, a "bank" includes "[e]ach agent, agency, branch or office within the United States of any person doing business in one or more of the [following] capacities: commercial banks or trust companies, private banks, savings and loan associations, national banks, thrift institutions, credit unions, other organizations chartered under banking laws and supervised by banking supervisors of any State, and banks organized under foreign law." 31 C.F.R. §1010.100(d). In addition, U.S. branches of foreign banks are included within the definition of a "bank." The Final Rule does not apply to any other type of non-bank financial institution that may fall within the same bank holding company structure. 76 Fed. Reg. 62,607, 62,617 (Oct. 11, 2011).

¹⁴ For purposes of the Final Rule, a "correspondent account" for a foreign bank is consistent with the definition provided under section 312 of the PATRIOT Act and its implementing regulation, i.e., 31 C.F.R. §1010.610, which is defined as "an account established for a foreign bank to receive deposits from, or to make payments or other disbursements on behalf of, the foreign bank, or to handle other financial transactions related to such foreign bank." 31 C.F.R. §1010.605(c)(1)(ii).

¹⁵ For purposes of the Final Rule, a "foreign bank" is a "bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law." 31 C.F.R. 1010.100(u).

¹⁶ For purposes of the Final Rule, an "Iranian-linked financial institution designated under IEEPA" means a financial institution designated by the U.S. government pursuant to IEEPA (or listed in an annex to an Executive order issued pursuant to such Act) in connection with Iran's proliferation of weapons of mass destruction or delivery systems for weapons of mass destruction, or in connection with Iran's support for international terrorism. 31 C.F.R. §1060.300(a)(2). The list of blocked Iranian-linked financial institution designated under IEEPA can be found on the list of Specially Designated Nationals and Blocked Persons ("SDN List") administered by Treasury's Office of Foreign Assets Control ("OFAC") at <http://www.treasury.gov/ofac/downloads/t11sdn.pdf>, and followed by the tag [IFSR].

¹⁷ For purposes of the Final Rule, an "IRGC-linked person designated under IEEPA" means Iran's Islamic Revolutionary Guard Corps or any of its agents or affiliates designated by the U.S. government pursuant to IEEPA (or listed in an annex to an Executive order issued pursuant to such Act). 31 C.F.R. §1060.300(a)(2). The list of blocked IRGC-linked person designated under IEEPA can be found on OFAC's SDN List at <http://www.treasury.gov/ofac/downloads/t11sdn.pdf>, and followed by the tag [IRGC].

¹⁸ 31 C.F.R. §1060.300(a)(1).

¹⁹ 76 Fed. Reg. at 62,617.

²⁰ 31 C.F.R. §1060.300(b).

²¹ *Id.*

Model Certification: FinCEN has published a model certification format for banks to provide to a specified foreign bank for purposes of documenting the foreign bank’s certifications and related information.²²

Filing Procedures: Upon receiving a written request from FinCEN, a bank shall report to FinCEN, in such format and manner as may be prescribed by FinCEN²³:

- The name of any specified foreign bank (and related information), for which the bank maintains a correspondent account, that certifies that:
 - It maintains a correspondent account for an Iranian-linked financial institution;
 - It has processed one or more transfers of funds within the preceding 90 calendar days for or on behalf of, directly or indirectly,²⁴ an Iranian-linked financial institution, other than through a correspondent account;
 - It has processed one or more transfers of funds within the preceding 90 calendar days for or on behalf of, directly or indirectly, an IRGC-linked person; and
 - It does not maintain a correspondent account for an Iranian-linked financial institution, and, to its knowledge,²⁵ it has not processed one or more transfers of funds within the preceding 90 calendar days for or on behalf of, directly or indirectly, an Iranian-linked financial institution, other than through a correspondent account, and/or an IRGC-linked person.
- The name of any specified foreign bank, for which the bank maintains a correspondent account, for which the bank cannot determine,²⁶ that the foreign bank:
 - Does not maintain a correspondent account for an Iranian-linked financial institution;
 - Has not processed one or more transfers of funds within the preceding 90 calendar days for or on behalf of, directly or indirectly, an Iranian-linked financial institution, other than through a correspondent account; and/or
 - Has not processed one or more transfers of funds within the preceding 90 calendar days for or on behalf of, directly or indirectly, an IRGC-linked person,
 - Together with the reason(s) for this, such as:
 - The failure of the foreign bank to respond to the inquiry by or a request from the bank;
 - The failure of the foreign bank to certify its response; or
 - The provision of information from the bank that is inconsistent with the certification.²⁷
- The name of any specified foreign bank (and related information), for which the bank maintains a correspondent account, that notifies the bank that it has established a new correspondent account for an Iranian-linked financial institution at any time within 365 calendar days from the date of the foreign bank’s initial response.

²² This model certification is available at Appendix A to the Federal Register notice, i.e. 76 Fed. Reg. at 62,626-30, App. A, and on FinCEN’s website, i.e., http://www.fincen.gov/statutes_regs/fm/pdf/CISADA_Certification.pdf.

²³ 31 C.F.R. §1060.300(c).

²⁴ 76 Fed. Reg. at 62,613, 62,618-19 (In the Final Rule, FinCEN incorporated this language, “for or on behalf of, directly or indirectly,” in place of the language, “related to,” in the Proposed Rule).

²⁵ 76 Fed. Reg. at 62,613 & 62,620 (The Proposed Rule did not include this knowledge qualifier. FinCEN incorporated it into the Final Rule.).

²⁶ *Id.* at 62,615 & 62,619. In the Final Rule, FinCEN incorporated this language, “the bank cannot determine,” in place of the language, “about which the bank has not been able to establish to its satisfaction that the foreign bank,” in the Proposed Rule.

²⁷ *Id.* (In the Final Rule, FinCEN incorporated this language, “if the bank has information that is inconsistent with the certification,” in place of the language, “if the bank knows, suspects, or has reason to suspect that the certification is incorrect,” in the Proposed Rule).

- If applicable, confirmation that the bank does not maintain a correspondent account for the specified foreign bank(s), but only in instances in which FinCEN specifically requests that the bank report such information.
- If applicable, the name of any specified foreign bank, for which the bank maintains a correspondent account, that provides a certification to the bank after the 45-calendar-day deadline, along with all applicable related information associated with that certification.

Filing Deadlines and Record Retention: The Final Rule provides that a bank shall report to FinCEN within 45 calendar days (instead of 30 calendar days,²⁸ as initially proposed) of the date of the request. The Final Rule also provides that reports based on subsequent notifications received from a foreign bank regarding the establishment of a new correspondent account for an Iranian-linked financial institution shall be due within 10 calendar days of receipt of the notification.²⁹

The Final Rule provides that a bank shall maintain for a period of five years a copy of any report filed and the original or any business record equivalent of any supporting documentation for a report, including a foreign bank certification or other responses to an inquiry from FinCEN under this Rule.³⁰

FinCEN Imposes Special Measures Against the Islamic Republic of Iran

Subsequent to these regulations, FinCEN issued a notice of proposed rulemaking on Nov. 28, 2011, proposing the imposition of special measures against the Islamic Republic of Iran as a jurisdiction of primary money laundering concern under Section 311 of the PATRIOT Act.³¹

FinCEN has attributed its identification of the Islamic Republic of Iran as a jurisdiction of primary money laundering concern to Iran's support for terrorism; pursuit of weapons of mass destruction ("WMD"); reliance on state-owned or controlled agencies to facilitate WMD proliferation; and the illicit and deceptive financial activities that Iranian financial institutions — including the CBI — and other state-controlled entities engage in to facilitate Iran's illicit conduct and evade sanctions.

In this Proposed Rule, FinCEN is seeking to impose the fifth special measure specified in Section 311 of the PATRIOT Act,³² which would prohibit banks, broker-dealers and other covered financial institutions from establishing, maintaining, administering or managing correspondent accounts for or on behalf of, an Iranian banking institution.³³ For purposes of this Proposed Rule, the Treasury defines a "correspondent account" in the same manner as such terms are defined in the regulations implementing Section 312 of the PATRIOT Act.³⁴ The Treasury defines an "Iranian banking institution" to include the following: (1) any foreign bank chartered by Iran, including any branches, offices or subsidiaries of such bank operating in any jurisdiction, and any branch or office within Iran of any foreign bank licensed by Iran; (2) the Bank Markazi Iran ("CBI"); and (3) any foreign bank of which more than 50 percent of the voting stock or analogous interest is owned by two or more foreign banks chartered by Iran.³⁵ "Legitimate pre-existing personal investments held by Iranian residents in the United States that do not involve Iranian banking institutions will be unaffected."³⁶

In the Preamble to the Proposed Rule, FinCEN indicates that prior regulations that have applied Section 311 special measures to jurisdictions of primary money laundering concern have not included the jurisdiction's

²⁸ *Id.* at 62,614 & 62,620.

²⁹ 31 C.F.R. §1060.300(c)(2)(i) & (ii). In the Final Rule, FinCEN added a 10-calendar-day deadline for banks to submit reports based on certifications received from a foreign bank after the 45-calendar-day deadline. *Id.* §1060.300(c)(2)(iii); see also 76 Fed. Reg. at 62,614-15 & 62,620.

³⁰ 31 C.F.R. §1060.300(d).

³¹ 76 Fed. Reg. 72,878 (Nov. 28, 2011) (to be codified at 31 C.F.R. §1010.657).

³² The fifth special measure specified in Section 311 of the PATRIOT Act is authorized by 31 U.S.C. §5318A(b)(5).

³³ 76 Fed. Reg. at 72,884 (to be codified at 31 C.F.R. §1010.657(b)(1)).

³⁴ See note 14, *supra*.

³⁵ 76 Fed. Reg. at 72,884 (to be codified at 31 C.F.R. §1010.657(a)(4)).

³⁶ 76 Fed. Reg. at 72,881.

central bank within the scope of the regulation. FinCEN states that its inclusion of the Islamic Republic of Iran is justified in this Proposed Rule due to the deceptive practices the CBI engages in and encourages among Iranian state-owned banks.³⁷

The Proposed Rule also requires that these covered financial institutions apply special due diligence to its correspondent accounts to guard against any indirect use by Iranian banking institutions. The special due diligence must, at a minimum, include a one-time notification by, for example, mail, fax or email, to those correspondent account holders that the covered financial institution “knows or has reason to know” provide services to Iranian banking institutions, that such correspondents generally may not provide Iranian banking institutions with access to the correspondent account maintained at the covered financial institution. FinCEN does not, however, require or expect a covered financial institution to obtain a certification from any of its correspondent account holders that indirect access will not be provided in order to comply with the notice requirement.³⁸

A covered financial institution is also required under this Proposed Rule to take reasonable steps to identify any indirect use of its correspondent accounts by Iranian banking institutions, to the extent that such indirect use can be determined from transactional records maintained in the covered financial institution’s normal course of business.³⁹ In this regard, FinCEN states, for example, a covered financial institution would be expected to apply an appropriate screening mechanism to comply with the Proposed Rule.⁴⁰

Under the Proposed Rule, a covered financial institution should take a risk-based approach to determining whether additional due diligence is necessary to prevent the indirect use by Iranian banking institutions of its correspondent accounts, based on risk factors such as the type of services it offers and the geographical location of its correspondents.⁴¹ If a covered financial institution obtains knowledge that a correspondent account it maintains for a foreign bank was being used to provide services indirectly to an Iranian banking institution, it would be obligated to take all appropriate steps to prevent such indirect access, including notifying its correspondent account holder and, where necessary, terminating the correspondent account,⁴² except to the extent that such indirect access to the correspondent accounts is necessary to conduct transactions involving Iranian banking institutions that are: (1) authorized pursuant to Executive Orders issued under IEEPA or pursuant to 31 C.F.R. Chapter V, including transactions authorized by OFAC; (2) exempted from the prohibitions of such authority; or (3) not prohibited by such authority.⁴³ A covered financial institution is required to document its compliance with the notice requirement.⁴⁴

Section 1245 of the National Defense Authorization Act

On Dec. 31, 2011, the President signed into law the NDAA, despite serious reservations regarding portions of the Act.⁴⁵ In particular, the President characterized Section 1245, among others, as a provision that “would interfere with my constitutional authority to conduct foreign relations by directing the Executive to take certain positions in negotiations or discussions with foreign governments,” causing the President to conclude that, “should any application of these provisions conflict with my constitutional authorities, I will treat the provisions as non-binding.”⁴⁶

³⁷ *Id.* at 72,882, n. 30.

³⁸ *Id.* at 72,882.

³⁹ *Id.* at 72,882-83 (to be codified at 31 C.F.R. §1010.657(b)(2)(i)(B)).

⁴⁰ 76 Fed. Reg. at 72,883.

⁴¹ *Id.*

⁴² *Id.* FinCEN indicates in the Preamble to the Proposed Rule that the covered financial institution must terminate the account within a commercially reasonable time. This means that the institution should not allow the foreign bank to establish any new positions or execute any transactions through the account, other than those necessary to close the account. *Id.*

⁴³ 76 Fed. Reg. at 72,883 (to be codified at 31 C.F.R. §1010.657(b)(2)(ii)-(iii)).

⁴⁴ 76 Fed. Reg. at 72,883 (to be codified at 31 C.F.R. §1010.657(b)(3)(i)).

⁴⁵ “Statement by the President on H.R. 1540,” The White House, Office of the Press Secretary (Dec. 31, 2011), <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>.

⁴⁶ *Id.*

Section 1245(c) of the NDAA requires that the President, pursuant to IEEPA, block all property and interests in property of all Iranian financial institutions, including the CBI, if such property and interests in property are in (or come within) the United States or the possession or control of a U.S. person, and prohibit all transactions in such blocked property.⁴⁷ The NDAA also requires that the President “prohibit the opening, and prohibit or impose strict conditions on the maintaining, in the United States of a correspondent account or a payable-through account by a foreign financial institution that the President determines has knowingly⁴⁸ conducted or facilitated any significant⁴⁹ financial transaction with the [CBI] or another Iranian financial institution designated by the Secretary” pursuant to IEEPA.⁵⁰ This requirement becomes effective 60 days after the enactment of the Act, i.e., Feb. 29, 2012. The Act also authorizes the President to impose sanctions with respect to the CBI pursuant to IEEPA, although it does not require that the President do so.⁵¹

The sanctions under Section 1245(d)(1) apply with respect to a foreign financial institution owned or controlled by the government of a foreign country, including a central bank of a foreign country, only insofar as the foreign financial institution engages in a financial transaction for the sale or purchase of petroleum or petroleum products⁵² to or from Iran conducted or facilitated on or after 180 days after the date of the enactment of this Act,” i.e., June 28, 2012.⁵³ The implementation of these sanctions regarding petroleum transactions by financial institutions of foreign governments is intended to encourage foreign governments to cease participating in petroleum transactions with Iran.

Although the sanctions on foreign financial institutions authorized by Section 1245 of the NDAA are similar to the financial sanctions under CISADA (i.e., prohibiting and/or imposing strict conditions on opening or maintaining correspondent accounts or payable-through accounts in the United States), there are differences in the scope and operation of the two statutes. The NDAA does not repeal or amend Section 104(c) of CISADA. Irrespective of the NDAA, all foreign financial institutions remain subject to Section 104(c) of CISADA and Section 561.201 of the IFSR, which calls for sanctions on foreign financial institutions that are found to have knowingly engaged in facilitating significant transactions for specific Iranian-linked individuals and entities.⁵⁴

A “waiver” provision under Section 1245(d)(5) provides the President with the authority to waive the imposition of sanctions referred to above under paragraph (d)(1) of Section 1245 for a period of not more than 120 days, which is renewable for additional periods of not more than 120 days, if the President: (1) determines that such a waiver is in the national security interest of the United States; and (2) submits to Congress a report

⁴⁷ NDAA §1245(c).

⁴⁸ The Treasury anticipates closely modeling the definition of “knowingly” for NDAA purposes on the IFSR, which implement Section 104(c) of CISADA, and defines “knowingly” with respect to “conduct, a circumstance, or a result, to mean that an entity or individual had actual knowledge, or should have known, about the conduct, the circumstance, or the result. 31 C.F.R. § 561.314.” *OFAC FAQs*.

⁴⁹ The Treasury anticipates closely modeling the definition of “significant” for NDAA purposes on the IFSR, which “identify factors to be used in determining what is significant (as it relates to transactions) in 31 C.F.R § 561.404, which allows the Secretary of the Treasury to consider the ‘totality of the facts and circumstances’ while providing a list of seven broad factors that can play a role in the determination, including: (1) the size, number, and frequency of transactions; (2) the nature of the transaction(s); (3) the level of awareness of management and whether the transaction(s) are part of a pattern of conduct; (4) the nexus between the transaction(s) and a blocked person; (5) the impact of the transaction(s) on statutory objectives; (6) whether the transaction(s) involve deceptive practices; and (7) such other factors that the Secretary deems relevant on a case-by-case basis.” *OFAC FAQs*.

⁵⁰ NDAA §1245(d)(1)(A).

⁵¹ *Id.* §1245(d)(1)(B). The NDAA contains an exception to the above sanctions provided under the authority of Section 1245(d)(1) with respect to the sale of food, medicine and medical devices, in that the President may not impose sanctions “with respect to any person for conducting or facilitating a transaction for the sale of food, medicine, or medical devices to Iran.” *Id.* §1245(d)(2). However, this exception does not apply to the blocking provision set forth above under Section 1245(c) of the Act.

⁵² “As defined by the U.S. Energy Information Administration (EIA), ‘petroleum products’ include unfinished oils, liquefied petroleum gases, pentanes plus, aviation gasoline, motor gasoline, naphtha-type jet fuel, kerosene-type jet fuel, kerosene, distillate fuel oil, residual fuel oil, petrochemical feedstocks, special naphthas, lubricants, waxes, petroleum coke, asphalt, road oil, still gas, and miscellaneous products obtained from the processing of crude oil (including lease condensate), natural gas, and other hydrocarbon compounds. In keeping with the EIA’s standard definition, petroleum products do not include natural gas, liquefied natural gas, biofuels, methanol, and other non-petroleum fuels.” *OFAC FAQs*.

⁵³ NDAA §1245(d)(3).

⁵⁴ See *OFAC FAQs*; see also “CISADA: The New U.S. Sanctions on Iran,” Treasury, http://www.treasury.gov/resource-center/sanctions/Programs/Documents/CISADA_english.pdf.

providing a justification for the waiver and including any concrete cooperation the President has received or expects to receive as a result of the waiver.⁵⁵

Pursuant to a multilateral diplomacy initiative under Section 1245(e) of the Act, the President must carry out an initiative of multilateral diplomacy to persuade countries purchasing oil from Iran: (1) to limit the use by Iran of revenue from purchases of oil to purchases of non-luxury consumer goods from the country purchasing the oil; and (2) to prohibit purchases by Iran of military or dual-use technology and any other item that could contribute to Iran's weapon program.⁵⁶

New Sanctions on Iran Under Executive Orders

Executive Order 13599: Pursuant to Section 1245(c) of the NDAA, on Feb. 5, 2012, the President signed E.O. 13599, blocking (i.e., "freezing") all property and interests in property of the Government of Iran and Iranian financial institutions, including the CBI, regardless of whether the financial institution is part of the Government of Iran, that are in the United States, that come within the United States or that come within the possession or control of U.S. persons (including any foreign branch).⁵⁷ In addition, E.O. 13599 blocks all property and interests in property that are (or come within) the United States, or that come within the possession or control of U.S. persons (including any foreign branch) of any person determined by the Secretary, in consultation with the Secretary of State, to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this Order.⁵⁸

Under E.O. 13599, all entities that meet the existing definition of "Government of Iran," such as Iranian ministries, state-owned entities and commercial firms owned or controlled by the Government of Iran, are blocked, unless exempt or otherwise authorized. This includes entities bearing the [IRAN] tag on OFAC's SDN List.⁵⁹ In addition, the E.O. broadly defines an "Iranian financial institution" to include a "financial institution organized under the laws of Iran or any jurisdiction within Iran (including foreign branches), any financial institution in Iran, any financial institution wherever located, owned or controlled by the Government of Iran, and any financial institution wherever located, owned or controlled by any of the foregoing."⁶⁰

This new E.O. is sharply distinguished from prior Orders dealing with Iran, which require that U.S. persons "reject," rather than "block," Iranian transactions.⁶¹ E.O. 13599 does not change the sanctions that may be applied against foreign financial institutions engaging in arm's-length transactions with certain Iranian financial institutions, including the CBI. Those foreign financial institutions remain at risk of U.S. sanctions if they engage in certain significant financial transactions with the CBI or certain other designated Iranian financial institutions pursuant to the NDAA or CISADA.⁶²

In connection with this new Order, OFAC issued two general licenses (i.e., General License A and General License B). General License A provides that certain transactions otherwise authorized under general or specific licenses pursuant to 31 C.F.R. Chapter V are authorized under E.O. 13599. Specifically, the general license provides that all transactions involving property and interests in property of the Government of Iran or Iranian financial institutions under general licenses set forth in the Iranian Transactions Regulations, 31 C.F.R. Part 560 (the "ITR"), are authorized under E.O. 13599,⁶³ except as set forth below:

⁵⁵ NDAA §1245(d)(5).

⁵⁶ *Id.* §1245(e)(1)(A).

⁵⁷ *Exec. Order No. 13599*, §1(a)&(b).

⁵⁸ *Id.* §1(c).

⁵⁹ *Exec. Order No. 13599*, §7(d); see also "Fact Sheet: Implementation of National Defense Authorization Act Sanctions on Iran," (Feb. 6, 2012), <http://www.treasury.gov/press-center/press-releases/Pages/tq1409.aspx> [hereinafter *Fact Sheet*].

⁶⁰ *Exec. Order No. 13599*, §7(f).

⁶¹ See *Fact Sheet*.

⁶² See *Fact Sheet for Exec. Order No. 13599*.

⁶³ General License A to *Exec. Order No. 13599*, §(a), Treasury (Feb. 3, 2012) [hereinafter *General License A*].

- This general license does not authorize any transactions authorized by 31 C.F.R. §560.517(a)(3) or (b)(2) of the ITR.⁶⁴ Such transactions involving the property and interests in property of the Government of Iran or an Iranian financial institution are prohibited by E.O. 13599,⁶⁵ and
- This general license does not authorize any payments from blocked funds or debits to blocked accounts, except for payments from funds or debits to accounts blocked pursuant to the Iranian Assets Control Regulations, i.e., 31 C.F.R. Part 535, that are authorized by specific licenses issued pursuant to 31 C.F.R. Chapter V.⁶⁶

The general license also provides that all transactions involving property and interests in property of the Government of Iran or Iranian financial institutions authorized under specific licenses issued pursuant to any part of 31 C.F.R. Chapter V, including specific licenses issued pursuant to the Trade Sanctions Reform and Export Enhancement Act of 2000 (22 U.S.C. §§ 7201-7211), are authorized under E.O. 13599, and that such specific licenses remain in effect according to their terms, provided that such specific licenses have an expiration date.⁶⁷

General License B authorizes certain noncommercial, personal remittances to or from Iran.⁶⁸ Specifically, U.S. depository institutions and registered broker-dealers are authorized to process transfers of funds to or from Iran or for or on behalf of an individual ordinarily resident in Iran who is not included within the term “Government of Iran,” to the extent the transfer is otherwise prohibited by E.O. 13599, in cases in which the transfer involves a noncommercial, personal remittance, provided the transfer is not by, to, or through any of the following:

- A person whose property and interests in property are blocked pursuant to the Weapons of Mass Destruction Proliferators Sanctions Regulations (“WMDPSR”), 31 C.F.R. Part 544, or the Global Terrorism Sanctions Regulations (“GTSR”), 31 C.F.R. Part 594; or
- A person whose property and interests in property are blocked pursuant to any other part of 31 C.F.R. Chapter V, or any Executive Order, except an Iranian financial institution whose property and interests in property are blocked solely pursuant to the E.O. 13599.⁶⁹

According to General License B, the transferring institutions may rely on the originator of a funds transfer with regard to compliance with this general license, provided that the transferring institution does not know or have reason to know that the funds transfer is not in compliance with this General License.⁷⁰ For example, a U.S. depository institution may transmit a noncommercial, personal remittance from a customer in the United States to her mother in Iran, provided the remittance is routed through a third-country financial institution to an Iranian financial institution (not designated under the WMDPSR or the GTSR or any other part of 31 C.F.R.

⁶⁴ Under 31 C.F.R. §560.517(a)(3) and (b)(2), U.S. depository institutions and registered broker-dealers are prohibited from performing services with respect to Iranian accounts, except for providing and being compensated for services and incidental transactions with respect to, at the request of the account party, the closing of Iranian accounts (for registered broker-dealers, through the one-time liquidation of all assets in the account at fair market value) and the lump-sum transfer only to the account party of all remaining funds and other assets in the account (including all proceeds derived therefrom).

⁶⁵ *General License A* §(c).

⁶⁶ *Id.* §(d).

⁶⁷ *Id.* §(b)(1)&(2). In the event that a specific license does not have an expiration date, if the specific license was issued pursuant to: (1) any part(s) of 31 C.F.R. Chapter V, but not under 31 C.F.R. Part 535, then all transactions involving property and interests in property of the Government of Iran or Iranian financial institutions authorized under such a specific license are hereby authorized under E.O. 13599 until April 6, 2012; and (2) 31 C.F.R. Part 535, including a specific license issued pursuant to 31 C.F.R. Part 535 and another part(s) of 31 C.F.R. Chapter V, then all transactions involving property and interests in property of the Government of Iran or Iranian financial institutions authorized under such a specific license are hereby authorized under E.O. 13599, and such a specific license shall remain in effect according to its terms.

⁶⁸ General License B to Exec. Order No. 13599, §(a), OFAC (Feb. 3, 2012) [hereafter *General License B*]. For purposes of this new Executive Order, “noncommercial, personal remittances” do not include charitable donations to or for the benefit of an entity or funds transfers for use in supporting or operating a business, including a family-owned enterprise. Charitable donations of funds to or for the benefit of an entity in Iran require a specific license. *General License B* §(b).

⁶⁹ *General License B*, §(a)(1)&(2).

⁷⁰ *Id.* §(c).

Chapter V, or any Executive Order) but whose property and interests in property are blocked solely under E.O. 13599.⁷¹

“As a general matter, OFAC expects financial institutions to conduct due diligence on their own direct customers (including, for example, their ownership structure) to confirm that those customers are not persons whose property and interests in property are blocked” pursuant to the laws, regulations and Orders administered by OFAC, including but not limited to E.O. 13599.⁷²

Executive Order 13590: Prior to E.O. 13599, on Nov. 19, 2011, the President had signed E.O. 13590, effectively expanding U.S. sanctions against Iran by targeting the supply of goods, services, technology or support (above certain monetary thresholds) to Iran for the development of its petroleum resources and maintenance or expansion of its petrochemical industry.⁷³

E.O. 13590 authorizes sanctions against persons that knowingly sell, lease or provide goods, services, technology or support to Iran that has a fair market value of:

- \$1 million or more, or that, during a 12-month period, has an aggregate fair market value of \$5 million, and that could directly and significantly contribute to the maintenance or enhancement of Iran’s ability “to develop petroleum resources” located in Iran;⁷⁴ and
- \$250,000 or more or that, during a 12-month period, has an aggregate fair market value of \$1 million or more, and that could directly and significantly contribute to the maintenance or expansion of Iran’s domestic production of petrochemical products.⁷⁵

These sanctions also apply to a successor entity to an entity engaged in the above sanctionable activity.⁷⁶ Additionally, these sanctions apply to a U.S. or non-U.S. person or entity that: (1) “owns or controls” a person or entity engaged in the above sanctionable activity, and “had actual knowledge or should have known” that the person or entity engaged in such sanctionable activity; or (2) is “owned or controlled by, or under common ownership or control with,” a person or entity engaged in the above sanctionable activity, and “knowingly participated” in such sanctionable activities.⁷⁷

If a person is found to have provided a good, service, technology or support described in E.O. 13590, the Secretary of State, in consultation with other agencies, has the authority to impose sanctions, including:

- Prohibiting any U.S. financial institution from making loans or providing credits to the sanctioned person or entity totaling more than \$10,000,000 in any 12-month period unless such person or entity is engaged in activities to relieve human suffering and the loans or credits are provided for such activities;
- Prohibiting any transactions in foreign exchange that are subject to U.S. jurisdiction and in which the sanctioned person or entity has any interest;
- Prohibiting any transfers of credit or payments between financial institutions or by, through or to any financial institution, to the extent that such transfers or payments are subject to U.S. jurisdiction and involve any interest of the sanctioned person or entity;

⁷¹ *Id.* §(d).

⁷² OFAC FAQs.

⁷³ “Fact Sheet: New Sanctions on Iran,” Treasury: Press Center (Nov. 21, 2011), <http://www.treasury.gov/press-center/press-releases/Pages/tq1367.aspx>.

⁷⁴ *Exec. Order No. 13590*, §1(a). The phrase “to develop petroleum resources” means “to explore for, or to extract, refine, or transport by pipeline, petroleum resources,” i.e., “petroleum, oil, natural gas, liquefied natural gas, and refined petroleum products.” For purposes of this definition, “refined petroleum products” means “diesel, gasoline, jet fuel ... and aviation gasoline.” *Id.* §5(g), (k) & (l).

⁷⁵ *Id.* §1(b). The term “petrochemical products” includes “any aromatic, olefin, and synthesis gas, and any of their derivatives, including ethylene, propylene, butadiene, benzene, toluene, xylene, ammonia, methanol, and urea.” *Id.* §5(m).

⁷⁶ *Id.* §1(c).

⁷⁷ *Id.* §1(d)&(e).

- Blocking all property and interests in property that are in the United States, that come within the United States, or that are, or come within, the possession or control of any U.S. person or entity, including any foreign branch, of the sanctioned person or entity, and providing that such property and interests in property may not be transferred, paid, exported, withdrawn or otherwise dealt in; or
- Restricting or prohibiting imports of goods, technology or services, directly or indirectly, into the United States from the sanctioned person or entity.⁷⁸

International Sanctions Against Iran

The U.S. sanctions against Iran, including CISADA, were built upon the measures taken by both FATF and the United Nations Security Council (“UNCSR”) to impose greater economic sanctions on Iran.⁷⁹ Most recently, as of Jan. 23, 2012, the European Union has agreed to the following “unprecedented package of sanctions against Iran”:

- An asset freeze of further Iranian entities and individuals, including the CBI and Bank Tejarat;
- A ban on the sale, purchase, transportation or brokering of gold, precious metals and diamonds to, from or for the Government of Iran; and
- A ban on oil purchases from Iran.⁸⁰

The 27 EU member countries, which account for approximately a fifth of Iran’s oil exports, have agreed to not sign any new oil contracts with Iran and to end its existing oil contracts with Iran by July 1, 2012, and freeze any assets of Iran’s central bank held in those jurisdictions. The ban will cover imports of crude oil, petroleum products and petrochemical products, as well as exports of major equipment and technology for the sector.⁸¹

Conclusion

Iran faces an unprecedented level of pressure due to intensified sanctions applied by the United States and complementary actions by FATF, the United Nations and the European Union and many other countries around the world. The United States and international sanctions against Iran represent a concerted, dramatic increase on the part of the global community to increase the pressure on Iran, to prevent Iran from acquiring nuclear weapons and to engage in discussions with the global community on its nuclear program.⁸²

The United States has strengthened its sanctions against Iran with its implementation of CISADA and implementing regulations, the President’s signing into law of Section 1245 of the NDAA and Executive Orders 13590 and 13599, and the designation of numerous Iranian entities, including its central bank, on OFAC’s SDN List. Moreover, the United States intends to strengthen its measures against Iran through its notice of proposed rulemaking to impose special measures against the Islamic Republic of Iran under Section 311 of the PATRIOT Act. These actions underscore the United States’ resolve to hold the Iranian regime accountable for its failure to meet its international obligations regarding the nature of its nuclear program. The industry should continue to expect additional initiatives by Treasury (i.e., FinCEN and OFAC), in consultation with the U.S. State Department and other government agencies, with respect to Iran, including ongoing additions to the SDN List of Iranian entities, such as, for example, Treasury’s designation of the Iranian

⁷⁸ *Id.* §3(a); see also “Fact Sheet: New Sanctions on Iran,” Treasury: Press Center (Nov. 21, 2011), <http://www.treasury.gov/press-center/press-releases/Pages/tq1367.aspx>.

⁷⁹ See discussion of economic sanctions imposed by FATF and UNCSR on Iran in *SRZ Client Alert on CISADA*.

⁸⁰ Council Decision 2012/35/CFSP of Jan. 23, 2012 amending Decision 2010/413/CFSP concerning restrictive measures against Iran, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:019:0022:0030:EN:PDF> [hereinafter *Council Decision*]; see Stephen Castle and Alan Cowell, *Europe and U.S. Tighten Vise of Sanctions on Iran*, N.Y. Times, Jan. 23, 2012, <http://www.nytimes.com/2012/01/24/world/middleeast/iran-urged-to-negotiate-as-west-readies-new-sanctions.html> [hereinafter *NY Times Article*].

⁸¹ See *Council Decision*; *NY Times Article*.

⁸² See “Joint Statement by Secretary Geithner and Secretary Clinton Welcoming Additional EU Sanctions on Iran,” Treasury, Jan. 23, 2012.

Ministry of Intelligence and Security (“MOIS”), Iran’s primary intelligence organization, pursuant to E.O. 13224 and 13553.⁸³

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⁸³ “Treasury Designates Iranian Ministry of Intelligence and Security for Human Rights Abuses and Support for Terrorism,” Treasury, Press Center (Feb. 16, 2012), <http://www.treasury.gov/press-center/press-releases/Pages/tg1424.aspx>; see also *Exec. Order No. 13224* (Terrorism) and 13553 (Iran Human Rights Abuses).