



## ECONOMIC SANCTIONS INSIGHT

March 31, 2010

### The Friend of My Enemy is My Enemy

#### ***Economic Sanctions, International Law Update***

#### **New Iran Sanctions Legislation Pending in the US Congress Targets Iran's Supporters**

The "crippling sanctions" against Iran which Secretary of State Hillary Clinton and US Congressional supporters of additional sanctions against Iran refer to are those sanctions which might be imposed under proposed legislation currently pending in the US Congress. If passed and implemented, the additional sanctions in these pending bills will ratchet-up the sanctions pressure on Iran by, in great part, imposing US sanctions on non-US and non-Iranian entities that trade with or invest in Iran.

The proposed legislation, currently consisting of three bills, would, in their current state, amend the existing Iran Sanctions Act of 1996 (ISA) and broaden the President's authority and mandate to impose additional sanctions against non-US third parties upon the occurrence of specified sanctions-triggering activity.

#### **The Iran Sanctions Act**

ISA's goal is to deter investments of \$20 million or more in Iran's oil sector, and to prevent the supply of certain technology and weapons to Iran by non-US companies. Under ISA, the President is required to impose two of any of the six available sanctions against persons determined to have engaged in activities sought to be deterred by ISA, the sanctions target(s). The six sanctions which may be currently imposed against sanctions targets under ISA are:

- denial of US Export-Import Bank credits for US exports;
- denial of licenses for US exports of military technology;
- denial of US bank loans in excess of \$10 million per year;

- prohibition on a financial institution serving as a primary dealer in US government bonds and as a repository for US government funds;
- prohibition on participation in US government procurement; and
- restrictions on certain imports into the United States from the sanctions target.

**Note:** ISA and the pending legislation are to be distinguished from current comprehensive US economic sanctions against Iran applicable to US companies and individuals who are already prohibited from investing in or trading with Iran pursuant to relevant Presidential Executive Orders, the Iranian Transactions Regulations and certain nuclear non-proliferation sanctions.

It must be borne in mind that the passage of the legislation pending in Congress is not necessary for the US Treasury Department to tighten existing US sanctions against Iran and those that it may designate as Iranian sanctions targets. Current Executive Orders dealing with Iran and nuclear proliferation, which have already been used against targeted Iranian banks and other entities, can be used again by the Treasury against a wider universe of entities to expand US sanctions against Iran.

#### The Proposed Iran Sanctions Legislation

The three Iran sanctions bills currently pending in the US Congress are:

##### HR 2194 - Iran Refined Petroleum Sanctions Act of 2009 (IRPSA)

HR 2194, which passed the House of Representatives on December 15, 2009, seeks to add authority for the imposition of sanctions against those foreign (*i.e.*, non-US) persons (entities and individuals) that sell refined petroleum to Iran; provide shipping insurance or other services for the delivery of refined petroleum to Iran, or supply equipment to or perform the construction of oil refineries, pipelines and similar facilities in Iran.

##### S 2799 - Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2009

S 2799 passed the Senate on January 28, 2010 and is the Senate version of HR 2194. S 2799 includes the main elements of HR 2194 and also encapsulates a range of additional sanctions against Iran (or Iran's suppliers).

##### S 908 - Iran Refined Petroleum Sanctions Act (IRPSA)

S 908, which has the elements contained in HR 2194 and elements of S 2799, was introduced in the Senate on April 28, 2009 and thereafter referred to the relevant Senate committee where it has remained. It may be assumed that provisions of S 908 have now been subsumed within HR 2194, as passed by the Senate. It is expected that other similar introduced bills such as HR 3183, HR 2574, HR 1327, S 1065, and HR 3832 will suffer a similar fate.

#### The Senate's Passage of HR 2194 with Amendments Combines HR 2194 and S 2799

On March 11, 2010, the US Senate passed HR 2194 with amendments that incorporate the additional sanctions contained within the original senate bill of S 2799. The Senate action reflects Senate and House agreement on the common elements of HR 2194 and S 2799, subject now to the agreement of the House of Representatives to the amendments of HR 2194 put forth by the Senate on March 11.

A conference committee must now reconcile the original House bill HR 2194 with the version of HR 2194 that was passed by the Senate. After the two versions of the bill are reconciled, a final bill will be sent to the President for his signature and enactment into law.

### The Main Provisions of the Proposed New Sanctions

Both HR 2194 and the Senate's version of HR 2194 would require the imposition sanctions on any foreign (non-US) entity that:

- exports refined petroleum products to Iran; or
- provides Iran with goods or services that support and enhance Iran's ability to produce refined petroleum products. Sanctions-triggering activity in this regard would include not only the exportation or reexportation of certain goods, but also activities such as insurance, reinsurance, underwriting, and brokering related to the supply of such goods and services.

The sanctions required to be imposed under both HR 2194 and HR 2194 as passed by the Senate, ranges from:

- a prohibition on foreign exchange and funds transfers transactions with sanctions targets to the more severe:
- comprehensive ban on financial transactions with sanctions targets and the freezing of sanctions target property within US jurisdiction. This latter drastic measure would effectively deprive sanctions targets of their assets in the United States and cut-off sanctions targets from all business with the United States and US companies.

### The Sanctions Measures Left to be Agreed Upon

Briefly, the additional sanctions against Iran and its supporters, *i.e.*, third country entities that engage in the transactions and activities involving Iran specified in the proposed legislation, that the House of Representatives and the Senate have still yet to agree on and that will need to be reconciled by the conference committee include:

- codification (enactment into law) of certain aspects of the existing sanctions, which were imposed by the President and which are governed by regulations promulgated and administered by the U.S. Treasury Department;
- extension of sanctions to (targeting of) certain individuals such as Iranian diplomats and to members of the Iran's Revolutionary Guard Corps;
- extension of sanctions to and the express creation of US parent company liability for sanctions-triggering acts engaged in by US and foreign subsidiaries owned or controlled by the US parent company;
- prohibition on US government procurement contracts with foreign entities that export sensitive technology to Iran;
- sanctions against the Central Bank of Iran as a supporter of nuclear proliferation;
- grant of authorization for US state and local governments to divest from certain companies that invest in or extend credit to Iran (designed to address/counter US court decisions, including a US Supreme Court decision, which prohibit such activity because of US federal law preemption in this area); and
- the imposition of sanctions measures against countries (Destinations of Diversion Concern) that permit or turn a blind eye to certain sensitive goods diverted or exported to Iran – sanctions would subject US exports of such goods to that country to export licensing requirements even though no

licensing was previously required. This provision is designed to deter sanctions-triggering activities in certain countries on the US radar as diversion points for exports to Iran. The media has widely reported that the United Arab Emirates (Dubai) and Malaysia are countries which serve as diversion points for exports to Iran.

It remains to be seen whether the final bill which emerges from the reconciliation process and is presented to the President for signature will reflect all of the above proposed sanctions.

#### **The Likelihood and Timing of Consensus on the New Sanctions Legislation**

The pace at which the pending legislation is reconciled and it moves through the remaining process in Congress depends on Iranian actions and the status of US efforts at the United Nations and with US allies for the imposition of additional multilateral sanctions against Iran. The proposed new sanctions in Congress, are designed to support multilateral and diplomatic efforts with respect to Iran. They provide the United States with additional leverage with respect to on-going efforts to impose sanctions multilaterally by indicating what the United States may do unilaterally if these multilateral efforts fail.

#### **Funding for the Administration and Enforcement of Sanctions**

Notably, in its current state, HR 2194, as amended and passed by the Senate, provides a generous allotment of funding for the administration and enforcement of the sanctions – \$64.6 million for the US Treasury's Office of Terrorism and Financial Intelligence, which includes funding for the Treasury's Office of Foreign Assets Control (OFAC); and \$104 million for the US Treasury's Financial Crimes Enforcement Network (Fin Cen). It can therefore be expected that the enacted legislation and relevant regulations will be vigorously enforced.

#### **Comments and Observations**

The reconciliation process is likely to continue to involve input from the White House, as well as the State and Treasury Departments with respect to the final shaping of the legislation and its progress in Congress.

Aspects of the pending legislation that the Obama Administration is likely to be concerned about are the numerous additional sanctions measures included by the Senate and also the degree to which the new sanctions legislation would tie the President's hands, removing his flexibility in any given case. If it were to choose, the White House is likely to favor, with some modification; the more limited and streamlined sanctions to which the Senate and House have already agreed.

The White House is also likely to be sensitive to any impingement of the new legislation on the President's foreign affairs power under the US Constitution. A grant/preservation of a relatively low-standard waiver authority for the imposition of some of the tougher sanctions foreseen under the proposed legislation or licensing authority would address this concern. ISA currently provides the President with authority to waive the imposition of sanctions if he certifies that doing so would be in the national interest. All expectations are that the Obama Administration will seek to preserve this authority with respect to all the new sanctions foreseen by the US Congress, notwithstanding a recent pronouncement by a leading US Senator and proponent of the sanctions legislation that the new sanctions against Iran must be imposed – “no ifs ands, or buts.” This waiver authority will be especially important in any sensitive case where the imposition of “crippling sanctions” may be inconsistent with whatever consensus is achieved at the multilateral UN level, and also where “crippling sanctions” could provoke a desperate defensive or preemptive reaction by the Iranian regime rather than having the intended purpose of pressuring Iran to curb or stop its nuclear program.

The White House will also probably be concerned about some aspects of the extra-territorial effect of the proposed sanctions. The proposed sanctions will almost certainly have an impact on US relations with the governments of the entities or states against which sanctions may be imposed, who agree with the

goal of stopping Iran's nuclear activities, but disagree with the US view of the utility of additional sanctions against Iran of the type envisioned by the proposed amendments to ISA.

If Congressionally-mandated sanctions legislation is indeed passed and enacted into law, another issue for the administration, as noted above, will be the extent to which the sanctions required to be imposed are different from or are tougher than multilateral sanctions against Iran. In this regard, especially as it relates to potential sanctions targets in the European Union, US law and policy makers will need to be especially mindful of and take into account *Council Regulation (EC) no. 2271/96 of 22 November 1996*, which is designed to protect European Union trading interests and to counteract the effects of the extra-territorial application of foreign legislation such as ISA and actions based thereon or resulting therefrom.

Passage and enactment into law of the proposed Iran sanctions legislation would create the situation similar to that which existed between the United States and the European Union in the aftermath of the enactment of ISA in 1996, after efforts to impose multilateral sanctions against Iran failed. The European Union staunchly opposed ISA. The disagreement over ISA culminated in an agreement between the US and the EU with respect to ISA resulting in President Clinton's waiver of the imposition of ISA sanctions against three oil companies which were determined to be engaging in ISA sanctions-triggering activity – Total (France), Gazprom (Russia), and Petronas (Malaysia).

In sum, the final shaping of the legislation, and the timing of its presentation to the President for signature will depend on Iranian actions, pressure from domestic constituent groups, US efforts at the UN level to get buy-in for multilateral sanctions against Iran as "crippling" as those which are currently contemplated by the US Congress, and the success of White House input into the reconciliation process.

The Obama Administration has a formidable challenge before it. It must balance the, to some extent, the competing demands of the US Congress and that of multilateral sanctions partners while at the same time ensuring that any additional sanctions that may be imposed against Iran are effective.

In remarks to the press yesterday with French President Sarkozy, President Obama indicated that "the international community is more united than ever on the need for Iran to uphold its obligations" and that it is for this reason that the international community is "pursuing strong sanctions through the UN Security Council." When asked about a deadline for the imposition of new sanctions, President Obama stated that he was interested in seeing a sanctions "regime in place in weeks."

It is noteworthy that the pending sanctions legislation in Congress has already had some of its intended effect. Developments in Iran and the accelerated pace of its nuclear program, the expectation that new US sanctions legislation will be passed, the risk of being designated as a sanctions target, and the opprobrium attached by the United States and its allies to commercial dealings with Iran have already caused some non-U.S. companies to inoculate themselves against the possible imposition of any future US sanctions by ceasing or preparing to cease activity with Iran of the type sought to be curtailed by the pending Iran sanctions legislation – a US sanctions victory without even firing a US sanctions shot.

The Eren Law Firm will continue to very closely monitor the progress of the proposed legislation, and if enacted into law, its regulatory implementation by the designated enforcement agencies of the US Government.

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For more information or questions regarding the subjects covered in this EconomicSanctionsInsight, please contact:

Hal Eren	Washington, DC	+ 1 202 429 9883	hal.eren@erenlaw.com
Steven Pinter	Washington, DC	+ 1 202 429 1881	steven.pinter@erenlaw.com

The Eren Law Firm is an economic sanctions boutique whose other core areas of concentration and practice include corporate transactions, and international dispute resolution, anti-money laundering, and international trade regulation. The Firm's clients from around the world include, among others, banks and financial institutions; insurance, reinsurance and other financial services companies; natural resource extraction, transportation, and other multinational corporations; sovereign government; foreign state enterprises; and individuals.

Mr. Pinter and Mr. Eren of the Firm served at the U.S. Treasury's Office of Foreign Assets Control (OFAC), the US government agency that administers and enforces US economic sanctions, for a combined 25 years prior to entering private law practice, respectively 7 and 9 years ago. While at OFAC, Mr. Eren and Mr. Pinter participated in analyses and deliberations with respect to ISA sanctions -triggering investment in Iran by Total, Gazprom, and Petronas. Mr. Pinter was OFAC's Chief of Licensing for 17.5 years and was a prime arbiter of all major OFAC decisions. Prior to entering private law practice, Mr. Comras of the Firm, a former diplomat of the United States, served at the US State Department, where he was in charge of numerous economic sanctions programs and issues, most notably in the context of the past multilateral sanctions against the former Yugoslavia and those against Iraq. For more information about the Firm, please visit: [www.erenlaw.com](http://www.erenlaw.com).

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