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## EXPANSION OF THE IRAN SANCTIONS ACT OF 1996 AND OTHER NEW SANCTIONS AND LEGAL PROVISIONS RELATING TO IRAN; RECENT APPROPRIATION LIMITATIONS APPLICABLE TO THE EXPORT-IMPORT BANK OF THE UNITED STATES

President Obama signed into law the “Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010” (PL 111-195) on Thursday, July 1, 2010. PL 111-195 will substantially expand the sanctions imposed by the United States against Iran under the Iran Sanctions Act of 1996 (the “**Original Act**”) by amending the Original Act (as so amended, the “**Amended Act**”) and by providing for new sanctions beyond those imposed under the Amended Act. PL 111-195 was passed in a climate of mounting concern by the United States government over Iran’s nuclear program and the widespread human rights violations that have occurred in Iran since the Iranian presidential election of June 12, 2009, among other things. PL 111-195 is also part of an ongoing, concerted effort by the United States government to encourage action against Iran following on from the imposition by the UN Security Council on June 9, 2010 of additional multilateral sanctions against Iran growing out of its nuclear program.

The Amended Act differs significantly from the prior House and Senate versions of the legislation. For instance, the Amended Act expressly excludes “a government or governmental entity that is not operating as a business entity” from the definition of “person.” This is significant because both the House and Senate versions of the legislation contained explicit provisions making export credit agencies potentially subject to sanction. Also, the Amended Act differs in that the three new sanctions previously mandatorily applicable to refinery and refined sales activities under the House and Senate versions are now, under the Amended Act, just three more sanctions, out of a total of ten possibilities, that the President can choose from.

Under the Amended Act, the monetary thresholds applicable to sanctioned investments which “directly and significantly contribute.. to the enhancement of Iran’s ability to develop

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petroleum resources” have been halved.<sup>1</sup> The Amended Act additionally expands the scope of sanctionable activities to include, subject to relatively low threshold amounts,<sup>2</sup>:

- (1) The sale of any refined petroleum products to Iran and
- (2) The provision of “goods, services, technology, information, or support” that could directly and significantly:

(A) 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

(B) contribute to the enhancement of Iran’s ability to import refined petroleum products. The Amended Act also establishes mandatory sanctions applicable to any country having jurisdiction over a person found to have exported or transferred (or facilitated the export or transfer) to Iran of chemical, biological or nuclear weapons technology or of “destabilizing numbers and types” of conventional weapons.

The Original Act was set to expire on December 31, 2011. The Amended Act extends effectiveness of the Original Act through December 31, 2016, and is effective as of July 1, 2010 (the “**Effective Date**”), with the exception of certain provisions of the Amended Act for which PL 111-195 sets a different effective date. In general, the amendments with respect to the imposition of sanctions under the Amended Act take effect as of the Effective Date, while ongoing violations under the Original Act are subject to the provisions of the Original Act as in effect on the day before the Effective Date of the Amended Act.

### **I. Overview of Iran Sanctions Regime Under the Original Act**

The Original Act authorized the President to impose sanctions against persons<sup>3</sup> who with “actual knowledge” (i) make investments that directly and significantly contribute to the enhancement of Iran’s ability to develop petroleum resources of Iran in excess of the original stipulated monetary thresholds described above or (ii) export, transfer, or otherwise provide to Iran any goods, services, technology or other items knowing that such acts may contribute materially to Iran’s ability to acquire or

develop chemical, biological, or nuclear weapons or destabilizing numbers and types of advanced conventional weapons.

The Original Act required the President to impose two or more of the following seven sanctions on persons that the President determined to have carried out activities prohibited by the Original Act, as well as on any parent, subsidiary or affiliate of such person if such parent, subsidiary or affiliate itself with actual knowledge engaged in activities prohibited by the Original Act:

- (1) Prohibition on obtaining financing from US Exim for the export of its goods or services;
- (2) Denial of licenses and grants of specific permission or authority by United States government agencies under the Export Administration Act of 1979, the Arms Export Control Act, the Atomic Energy Act of 1954, and related statutes;
- (3) Prohibition on obtaining loans or other credits from any United States financial institution totaling more than \$10 million in any 12-month period (with a limited exception for loans or credits related to the relief of human suffering);
- (4) For a person who is a financial institution, prohibition on acting as a primary dealer in United States Government funds;
- (5) For a person who is a financial institution, prohibition on serving as an agent of the United States government or as a repository for United States government funds;
- (6) Inability to enter procurement contracts with the United States government; and
- (7) Restriction on imports with respect to such person, in accordance with the International Emergency Economic Powers Act (50 U.S.C. 1701 and following).

The President’s right to waive the application of sanctions or otherwise grant exemptions under the Original Act was reflected in various provisions, including (i) Section 4(c) which authorized the President, on a case-by-case basis, to waive the application of sanctions against the national of any country from the obligation to comply with the restrictions applicable to the development of Iran’s petroleum resources in cases where

<sup>1</sup> The threshold under the Original Act such activities was \$40 million in any combination of investments of at least \$10 million each during any 12 month period, which has been halved to \$20 million and \$5 million, respectively, under the Amended Act. See Section 102(a) of PL 111-195.

<sup>2</sup> As discussed in Section II.B below, the applicable thresholds under the Amended Act for prohibited transactions are \$1 million or more for individual sales and, during a 12-month period, an aggregate fair market value of \$5 million or more.

<sup>3</sup> § 14(13) of the Original Act defines a “person” as “(A) a natural person; (B) a corporation, business association, partnership, society, trust, any other nongovernmental entity, organization, or group, and any governmental entity operating as a business enterprise; and (C) any successor to any entity described in subparagraph (B).”

the President determined that it was “vital to the national security interests of the United States” to do so<sup>4</sup>; (ii) Section 9(c) which gave the President discretionary authority to waive sanctions in cases “important” to the national interest of the United States<sup>5</sup>; and (iii) Section 5(f) which allowed the President to exempt certain defined transactions from sanction.<sup>6</sup>

## II. Changes Under the Amended Act

### A. “Persons” Subject to Sanction Under the Amended Act

The Amended Act amends the definition of “person” subject to sanction by explicitly including persons who own or control any person engaged in activities proscribed by the Amended Act as long as the owning or controlling persons knew or had reason to know of the proscribed activity by the owned or controlled person. This is significant because under the Original Act a parent company was only subject to sanction if that parent company itself knowingly engaged in prohibited conduct. Additionally, the term “person” has been expanded to include any financial institution, insurer, underwriter and guarantor in order to give effect to the application of sanctions to these persons in connection with refinery and refined petroleum sales activities (as more specifically described in Section II.B below).

Lastly, the Amended Act expressly excludes “a government or governmental entity that is not operating as a business entity” from the definition of “person.” This is significant because both the separate House and Senate versions of the legislation contained explicit provisions making export credit agencies potentially subject to sanction. The inclusion of the presidential reporting requirements described below in Section III.F relating to foreign ECA’s and the Export-Import Bank of the United States appear to reflect the political compromise reached between the executive and legislative branches in order to keep foreign export credit agencies outside the scope of sanction.

### B. Reduction of Monetary Thresholds Applicable to Petroleum Resources Development; Expansion of Definition of “Petroleum Resources”

In addition to halving the monetary thresholds applicable to previously sanctionable investment in Iran that

“directly and significantly contributes to” the enhancement of Iran’s ability to develop its petroleum resources, the Amended Act expands the definition of “petroleum resources” covered by these thresholds. The Original Act defined petroleum resources as “petroleum and natural gas resources.” The Amended Act defines petroleum resources as: “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.”

### C. Extension of Sanctions to Refined Petroleum Sales and Refinery Activities

The Amended Act restricts for the first time the following activities:

- (i) Selling or providing to Iran refined petroleum products, and selling, leasing or providing goods, services, technology, information or support that “directly and significantly” contributes to the enhancement of Iran’s ability to import refined petroleum products, in any case that has a fair market value of \$1 million or more or, during a 12-month period, has an aggregate fair market value of \$5 million or more. Significantly, this restriction expressly includes
  - (1) underwriting or entering into a contract to provide insurance or reinsurance for the sale, lease, or provision of such goods, services, technology, information, or support (with a limited exception for underwriters, insurers and reinsurers who the President determines have “exercised due diligence in establishing and enforcing official policies, procedures, and controls to ensure” against violation of the Amended Act that” it does not violate the Amended Act);
  - (2) financing or brokering any such sale, lease, or provision; and
  - (3) providing ships or shipping services to deliver refined petroleum products to Iran; and
- (ii) Selling, leasing or providing goods, services, technology, information or support that “directly and significantly” facilitates the maintenance or expansion of Iran’s domestic production of refined petroleum products,<sup>7</sup> including any direct and significant assistance with respect to the construction, modernization or repair of petroleum

<sup>4</sup> Waiver under Section 4(c) of the Original Act was valid for a period of up to six months, subject to renewals for subsequent periods of six months each.

<sup>5</sup> Waiver under Section 9(c) of the Original Act was for an indefinite period of time.

<sup>6</sup> The President’s authority to exempt from sanction included, among other things, “products, technology, or services provided under contracts entered into before the date on which the President publishes in the Federal Register the name of the person on whom the sanctions are to be imposed”. § 5(f)(3) of the Original Act. There are a number of other exemptions available to the President for procurement of defense

articles and services; procurement of certain eligible products under the Trade Agreements Act of 1979; spare parts and component parts (not finished products) which are essential to United States products or production; routine servicing and maintenance of products, if alternative sources are not reasonably available; information and technology essential to United States products or production; and medicines, medical supplies, or other humanitarian items. See §5(f) of the Original Act.

<sup>7</sup> The Amended Act defines “refined petroleum products” to mean diesel, gasoline, jet fuel (including naphtha-type and kerosene-type jet fuel), and aviation gasoline. See § 102(f)(7) of PL 111-195.

refineries, any of which has a fair market value of \$1 million or more or, during a 12-month period, has an aggregate fair market value of \$5 million or more;

*D. Sanctions Applicable to Activities Related to the Transfer of Weapons Technology Under the Amended Act*

The Amended Act continues to flatly prohibit the export, transfer or other provision by any person to Iran of any goods, services, technology, or other items that could materially contribute to the ability of Iran to acquire or develop chemical, biological, or nuclear weapons or related technologies or to acquire or develop destabilizing numbers and types of advanced conventional weapons. Any such person would be subject to three or more of the sanctions available to the President and described in sub-paragraph E below. The Amended Act additionally provides that “no license may be issued for the export, and no approval may be given for the transfer or retransfer, directly or indirectly, to the country the government of which has primary jurisdiction over the person who has violated the Amended Act on or after the Effective Date, of any nuclear material, facilities, components, or other goods, services, or technology that are or would be subject to an agreement for cooperation between the United States and that government.”

Under the Amended Act, the President can waive application of these additional mandatory country sanctions upon his determination and notification to the appropriate congressional committees “that the government of the relevant country: (i) does not know or have reason to know about the activity; or (ii) has taken, or is taking, all reasonable steps necessary to prevent a recurrence of the activity and to penalize the person for the activity.”

Furthermore, “the President may, on a case-by-case basis, approve the issuance of a license for the export, or approve the transfer or retransfer, of any nuclear material, facilities, components, or other goods, services, or technology that are or would be subject to an agreement for cooperation” if the President “(i) determines that such approval is vital to the national security interests of the United States; and (ii) not later than 15 days before issuing such license or approving such transfer or retransfer, submits to the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate the justification for approving such license, transfer, or retransfer.”

*E. Expansion of Potential Sanctions Available to the President Under the Amended Act*

The Original Act required the President to select and impose two or more sanctions out of a list of seven on persons determined by the President to have violated the Original Act. The Amended Act increases the number of sanctions that the

President is required to impose on these persons from two or more to three or more for violations committed on or after the Effective Date. The Amended Act also expands the menu of available sanctions by adding the following three new sanctions:

1. The President may, pursuant to such regulations as the executive may prescribe, prohibit any transactions in foreign exchange that are subject to the jurisdiction of the United States and in which the sanctioned person has any interest;
2. The President may, pursuant to such regulations as the executive may prescribe, prohibit “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 the jurisdiction of the United States and involve any interest of the sanctioned person;” and
3. The President may, pursuant to such regulations as the executive may prescribe, prohibit any person from engaging in any of the following property transactions:
  - (A) “acquiring, holding, withholding, using, transferring, withdrawing, transporting, importing, or exporting any property that is subject to the jurisdiction of the United States and with respect to which the sanctioned person has any interest;
  - (B) dealing in or exercising any right, power, or privilege with respect to such property; or
  - (C) conducting any transaction involving such property.”

*F. Definition of “Knowingly” Under the Amended Act*

The imposition of sanctions under the Original Act required establishing that the sanctioned person had “actual knowledge” of its prohibited conduct, while the Amended Act only requires that a person “knowingly” engage in the prohibited conduct. The Amended Act defines “knowingly” to include “that a person has actual knowledge, **or should have known**, of the conduct, the circumstance, or the result.” Accordingly, if a person should have been aware that its actions were violating the Amended Act, sanctions can be imposed on that person even if actual knowledge cannot be established.

*G. Expansion of the President’s Waiver Authority Under the Amended Act*

*i. General Waiver Authority under Section 4(c) of the Amended Act*

The Amended Act expands the general waiver authority granted to the President under Section 4(c) of the Original Act by including the following two new and otherwise sanctionable practices under the President’s waiver authority umbrella:

(1) the production of refined petroleum products in Iran; and (2) the exportation of refined petroleum products to Iran. As in the Original Act, each waiver period is for six months, subject to renewals for subsequent periods of six months each.

*ii. Presidential Waiver Authority under Section 9(c) of the Amended Act*

Under the Amended Act, the President retains general waiver authority as described in Section 9(c) of the Original Act. However, the standard applicable to the exercise of such authority has been changed from “vital” to the national security interest of the United States (under the Original Act) to “necessary” to the national security interest of the United States (under the Amended Act). This general waiver authority applies to all sanctionable activity under the Amended Act. The waiver under Section 9(c) is for an indefinite period of time.

*iii. Waiver With Respect to Persons in Countries that Cooperate in Multilateral Efforts with Respect to Iran*

In addition to the other exemptions previously described in respect the new country sanctions relating to weapons proliferation, the Amended Act allows the President to waive application of those country sanctions for a period of up to 12 months, subject to renewal for subsequent periods of up to 12 months each. In order to exercise this expanded exemption authority, the President must certify to the appropriate congressional committees that “(I) the government with primary jurisdiction over the person is closely cooperating with the United States in multilateral efforts to prevent Iran from . . . acquiring or developing chemical, biological, or nuclear weapons or related technologies; or . . . acquiring or developing destabilizing numbers and types of advanced conventional weapons; and (II) such a waiver is vital to the national security interests of the United States.” The President must also identify the person who is the subject of the exercise of his exemption authority in a report to the appropriate congressional committees.

*H. Additional Measure Relating to Government Contracts*

The Amended Act changes the Federal Acquisition Regulations by requiring that any person seeking to be a contractor for the federal government certify to the appropriate executive agency that it, as well as any persons owned or controlled by it, does not engage in any activity subject to sanction under the Amended Act. The Amended Act requires that the Federal Acquisition Regulation issued pursuant to section 25 of the Office of Federal Procurement Policy be revised within 90 days of enactment of the Amended Act to require this certification with respect to contracts for which solicitations are issued on or after the date that is 90 days after the date of enactment of the Amended Act. The President may

waive this requirement on a case-by-case basis if the President determines that it is in the national interest to do so and certifies this determination in writing to the appropriate congressional committees, the Committee on Armed Services of the Senate, and the Committee on Armed Services of the House of Representatives. The consequences of a false certification include termination of the contract, or debarment or suspension from eligibility for federal contracts for a period of up to three years, subject to the procedures set forth in the Federal Acquisition Regulations, as well as other remedies that may be available to the head of an executive agency or other official of the federal government. Contracts for the procurement of eligible products from a foreign country or instrumentality designated under the Trade Agreements Act of 1974 (19 U.S.C. section 2501 and continuing) are exempted from these penalties. The Amended Act directs the Administrator of General Services to include on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs maintained by it, any party debarred, suspended, or proposed for debarment or suspension by the head of an executive agency on the basis of a determination that the party provided a false certification.

### III. Additional Relevant Provisions Under PL 111-195

*A. Initiation of Investigations*

Section 102(h) of PL 111-195 eliminates executive discretion as to whether to open an investigation of a person upon receipt of credible information that the person is engaged in prohibited activity under the Amended Act. The Original Act stated that the President “should” initiate an investigation of persons engaged in prohibited activity in Iran; under Section 102(h) of PL 111-195 the President “shall” initiate such an investigation. However, “the President need not initiate an investigation, and may terminate an investigation . . . if the President certifies in writing to the appropriate congressional committees that—(A) the person whose activity was the basis for the investigation is no longer engaging in the activity or has taken significant verifiable steps toward stopping the activity; and (B) the President has received reliable assurances that the person will not knowingly engage in” sanctionable activity in the future.

Under Section 102(h) of PL 111-195, executive discretion is eliminated as of the Effective Date as to whether to open an investigation into the investment in the development of Iran’s petroleum resources under the Amended Act. However, the President retains executive discretion, for one year from the Effective Date, of whether to open an investigation with relation to the production or exportation of refined petroleum products. Presidential discretion could be further retained depending on whether the President timely submits a certification to Congress detailing the diplomatic efforts of the President to (1) dissuade foreign persons from engaging in the production or exportation

of refined petroleum products, and (2) encourage other governments to dissuade persons over which those governments have jurisdiction from engaging in such activities.

The certification is additionally supposed to describe the successes and failures of the efforts described in (1) and (2) above, and also describe each investigation currently in effect. If the President certifies that there is a substantial reduction in the production or exportation of refined petroleum products, then the President retains executive discretion of whether to open an investigation for an additional 180 day period.

### *B. New Economic Sanctions Relating to Iran*

Section 103(b)(1) of PL 111-195 provides that “no good or service of Iranian origin may be imported directly or indirectly into the United States.” Exceptions to this blanket prohibition include the exceptions provided for in section 203(b) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)).<sup>8</sup>

Section 103(b)(2) of PL 111-195 provides that “no good, service, or technology of United States origin may be exported to Iran from the United States or by a United States person, wherever located.” Exceptions include: (1) information and informational materials, (2) food, medicine, and humanitarian assistance, (3) internet communications, (4) goods, services, or technologies necessary to ensure the safe operation of commercial aircraft, (5) goods services, or technologies exported to support international organizations (including the International Atomic Energy Agency), and (6) exports in the national interest.

Penalties for violation of the above are provided for in subsections (b) and (c) of section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705).<sup>9</sup>

### *C. Mandatory Sanctions with Respect to Financial Institutions that Engage in Certain Transactions*

#### *i. Prohibitions and Conditions with Respect to Certain Accounts Held by Foreign Financial Institutions*

Section 104(c) of PL 111-195 states that, within “90 days of the enactment [of PL 111-195], the Secretary of the

Treasury shall prescribe regulations to prohibit, or impose strict conditions on, the opening or maintaining in the United States of a correspondent account or a payable-through account by a foreign financial institution” that the Secretary finds to have engaged in certain Iran-related activities.<sup>10</sup> These activities include: (1) facilitating the efforts of the Government of Iran to (A) acquire or develop weapons of mass destruction or delivery systems of such weapons or (B) to provide support for organizations designated as foreign terrorist organizations; (2) facilitates the activities of a person subject to financial sanctions pursuant to certain UN Security Council Resolutions; (3) engages in money laundering; (4) facilitates efforts by the Central Bank of Iran or other Iranian financial institution to carry out (A) and (B) above; or (5) facilitates a significant transaction providing significant financial services for Iran’s Revolutionary Guard, or a financial institution whose property interests are blocked pursuant to the International Emergency Economic Powers Act.

Penalties for violation of the above are provided for in subsections (b) and (c) of section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705).<sup>11</sup>

Under Section 104(f) of PL 111-195, the Secretary of the Treasury may waive the application of a prohibition or condition imposed with respect to a foreign financial institution pursuant to subsection (c) after the Secretary: (1) determines that such a waiver is necessary to the national interests of the United States; and (2) submits to the appropriate congressional committees a report describing the reasons for the determination.

#### *ii. Penalties for Domestic Financial Institutions for Actions of Persons Owned or Controlled by Such Financial Institutions*

Section 104(d) of PL 111-195 states that, within “90 days of the enactment [of PL 111-195], the Secretary of the Treasury shall prescribe regulations to prohibit any person owned or controlled by a domestic financial institution from knowingly engaging in a transaction or transactions with or benefitting Iran’s Revolutionary Guard Corps or any of its agents or affiliates whose property or interests in property” are blocked by the International Emergency Powers Act.<sup>12</sup>

<sup>8</sup> The exceptions under 50 U.S.C. 1702(b) include: (1) postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value; (2) the importation, whether commercial or otherwise, of any information or information materials (including publications, films, poster, photos, tapes, CD ROMs, artworks, or news wire deeds); and (3) transactions ordinarily incident to travel.

<sup>9</sup> The civil penalty is the greater of: (1) a fine of \$250,000, or (2) an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed. 50 U.S.C. 1705(b). Criminal penalties, under certain circumstances, include a fine

of \$1 million, imprisonment for not more than 20 years, or both. 50 U.S.C. 1705(c).

<sup>10</sup> As of the date hereof, the Secretary of the Treasury has not promulgated any such regulations.

<sup>11</sup> See footnote 9, *supra*.

<sup>12</sup> As of the date hereof, the Secretary of the Treasury has not promulgated any such regulations.

Penalties for violation of the above are provided for in section 206(b) of the International Emergency Economic Powers Act (50 U.S.C. 1705) will apply to a domestic financial institution to the same extent that such penalties apply to a person that commits an unlawful act described in section 206(a) of that Act if: (1) a person owned or controlled by the domestic institution violates the above, or (2) the domestic financial institution knew or should have known that the person violated the above.

Under Section 104(f) of PL 111-195, the Secretary of the Treasury may waive the application of a prohibition or condition imposed with respect to the imposition of a penalty under subsection (d) with respect to a domestic financial institution after the Secretary: (1) determines that such a waiver is necessary to the national interests of the United States; and (2) submits to the appropriate congressional committees a report describing the reasons for the determination.

*iii. Requirements for Financial Institutions Maintaining Accounts for Foreign Financial Institutions*

Section 104(e) of PL 111-195 states that the Secretary of the Treasury shall prescribe regulations to require 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: (1) perform an audit of activities described in Section 102(c) (2) (described above); (2) report to the Department of the Treasury with respect to transactions or other financial services provided with respect to any such activity; (3) certify, to the best of the knowledge of the domestic financial institution, that the foreign financial institution is not knowingly engaging in any such activity; or (4) establish due diligence policies, procedures and controls reasonably designed to detect whether the Secretary of the Treasury has found the foreign financial institution to knowingly engage in any such activity.<sup>13</sup>

Penalties for violation of the above are provided for in sections 5321(a) and 5322 of title 31, United States Code.<sup>14</sup>

*D. Prohibition on Procurement Contracts with Persons that Export Sensitive Technology to Iran*

Under Section 106 of PL 111-195, at any time after the 90th day following enactment of PL 111-195, the head of a Federal executive agency may not enter into or renew any contract for the procurement of goods or services with a person that exports “sensitive technology” to Iran.<sup>15</sup> The President is authorized to exempt from the prohibition only eligible products, as defined in section 308(4) of the Trade Agreements Act of 1979, of any foreign country or instrumentality designated under section 301(b) of that Act.<sup>16</sup>

*E. Reports on Investments in the Energy Sector of Iran*

Section 110 of PL 111-195 requires the President to submit, within 90 days of the enactment of PL 111-195, a report on investments in the energy sector of Iran that were made during the period beginning on January 1, 2006 and ending on the date that is 60 days after the date of the enactment of PL 111-195. The President is thereafter required to update the report every 180 days for activities occurring since the previous Presidential Section 110 report.

Such report is to contain: (1) an estimate of the volume of energy-related resources (other than refined petroleum), including ethanol, that Iran imported; (2) a list of all significant known energy-related joint ventures, investments, and partnerships located outside Iran that involve Iranian entities in partnership with entities from other countries; and (3) an estimate of (A) the total value of each such joint venture, investment, and partnership; and (B) the percentage of each such joint venture, investment, and partnership owned by an Iranian entity.

*F. Reports on Certain Activities of Foreign Export Credit Agencies and of US Exim*

Section 111 of PL 111-195 requires the President to submit within 90 days after the date of enactment of PL 111-195 a report to the appropriate congressional committees on any

<sup>13</sup> As of the date hereof, the Secretary of the Treasury has not promulgated any such regulations.

<sup>14</sup> The civil penalties under 31 U.S.C. 5321(a) are complex, and may include fines of up to \$100,000, or up to fifty percent of the full amount of the transaction in question, whichever is greater. Criminal penalties under 31 U.S.C. 5322 include fines of up to \$1 million for financial institutions, and fines of up to \$500,000 and up to 10 years’ imprisonment for violations by individuals.

<sup>15</sup> The term “sensitive technology” is defined to mean “hardware, software, telecommunications equipment, or any other technology that the President determines is to be used specifically— (A) to restrict the

free flow of unbiased information in Iran; or (B) to disrupt, monitor, or otherwise restrict speech of the people of Iran.” “Sensitive technology” does not include information or informational materials, however.

<sup>16</sup> Under the Trade Agreements Act of 1979, “eligible product” will mean different things for different countries depending on whether that country is party to a free trade agreement with the United States that is listed in Section 308(4) of the Act. If the country in question is party to such an agreement, then an “eligible product” is any product or service of that country which is covered under such trade agreement. If the country is not party to a free trade agreement listed in Section 308(4) of the Act, then the President is not authorized to exempt any products or services of that country.

activity “comparable to an activity described” in Section 5(a) or 5(b) of the Amended Act regarding activities of export credit agencies of foreign countries.<sup>17</sup> Such “comparable” foreign export credit agency activity would (i) include the provision of “support” for sales of refinery-related goods and services and for sales of refined petroleum products and related goods and services (the provision of financing is expressly included as a sanctionable activity relating to sales of refined petroleum products and related goods and services) and (ii) likely also includes participation by such export credit agency in sanctionable weapons or technology sales to Iran.

The precise period of activity to be covered by the initial Section 111 Presidential report is not crystal clear, although based on the general effectiveness provisions of the Amended Act we believe it likely that the President will interpret the period to begin with the effectiveness of the Amended Act. Section 111 of PL 111-195 additionally requires the President to report to the appropriate congressional committees any proposed co-financing by US Exim (including loans, guarantees, other credits, insurance, and reinsurance) alongside an export credit agency of a foreign country identified in a Presidential Section 111 report. Such proposed co-financing by US Exim must be reported not later than 30 days (or, in extraordinary circumstances, not later than 15 days) before US Exim approves such cofinancing and must identify the relevant foreign export credit agency and the beneficiaries of the co-financing in question.

*G. Identification of Countries of Concern with Respect to the Diversion of Certain Goods, Services, and Technologies to or Through Iran and Destinations of Diversion Concerns*

Section 302 of PL 111-195 states that, within 180 days of the enactment of PL 111-195, “the Director of National Intelligence shall submit to the President... and the appropriate congressional committees a report that identifies each country

the government of which the Director believes, based on all information available to the Director, is allowing the diversion through the country of good services, or technologies” to Iranian end-users or Iranian intermediaries.<sup>18</sup> The Director of National Intelligence is required to update such report as new information becomes available, and in any event not less than annually.

Section 303 further requires that the President shall designate a country as a “Destination of Diversion Concern” if the President determines that the government of the country allows substantial diversion of goods, services, or technologies described above through the country to Iranian end-users or Iranian intermediaries.<sup>19</sup> Upon designating a country as a “Destination of Diversion Control”, the President is required to submit to the appropriate congressional committees a report: (1) notifying those committees of the designation of the country; and (2) containing a list of the goods, services, and technologies that the President determines are diverted through the country to Iranian end-users or Iranian intermediaries.

No later than 45 days after submitting such a report with respect to a country designated as a Destination of Diversion Concern, the President is required to condition any export to the designated country of any listed goods, services, and technologies upon the issuance of a license under the Export Administration Regulations or the International Traffic in Arms Regulations (as applicable), with the “presumption that any application for such a license will be denied.”<sup>20</sup>

The designation of a country as a “Destination of Diversion Concern” terminates on the date on which the President determines, and certifies to the appropriate congressional committees, that the country has adequately strengthened the export control system of the country to prevent the diversion of goods, services, and technologies to Iranian end-users or Iranian intermediaries.

<sup>17</sup> The President is required to update this report as new information becomes available with respect to the activities of export credit agencies of foreign countries.

<sup>18</sup> For purposes of this subsection, “goods, services, and technologies” are those: (1) that (A) originated in the United States; (B) would make a material contribution to Iran’s (i) development of nuclear, chemical, or biological weapons, (ii) ballistic missile or advanced conventional weapons capabilities, or (iii) support for international terrorism; and (C) are (i) items on the Commerce Control List or services related to those items, or (ii) defense articles or defense services on the United States Munitions List; or (2) that are prohibited for export to Iran under a resolution of the United Nations Security Council.

<sup>19</sup> For purposes of this subsection, the test for substantiality is based on criteria that include: (1) the volume of such goods, services, and technologies that are diverted through the country to such end-users or intermediaries; (2) the inadequacy of the export controls of the country; (3) the unwillingness or demonstrated inability of the government of the country to control the diversion of such goods, services, and technologies to such end-users or intermediaries; and

(4) the unwillingness or inability of the government of the country to cooperate with the United States in efforts to interdict the diversion of such goods, services, or technologies to such end-users or intermediaries.

<sup>20</sup> The President may delay, for 12 months, the imposition of the licensing required with respect to a country designated as a Destination of Diversion Concern, if the President determines that the country is taking steps (1) to institute an export control system or strengthen its export control system, (2) to interdict the diversion of goods, services, or technologies through the country to Iranian end-users or Iranian intermediaries, and (3) to comply with and enforce certain UN Security Council Resolutions. The President must further determine that it is appropriate to carry out government-to-government activities to strengthen the export control system of the country, and additionally submit to the appropriate congressional committees a report describing the above-listed efforts being taken by the government of the country. The 12 month delay may be extended for additional 12 month periods so long as the President complies with the above requirements every 12 months.

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#### IV. Consolidated Appropriations Act, 2010

The Consolidated Appropriations Act, 2010, PL 111-117 (the “**Appropriations Act**”), which became law on December 16, 2009, appropriates funds for US Exim and in connection with the appropriation of these funds, restricts the activities of US Exim with respect to projects controlled by energy producers or refiners engaging in specified activities with Iran. The funds remain available until 2025 for the disbursement of direct loans, loan guarantees, insurance and tied-aid grants obligated in fiscal years 2010-2013.

The Appropriations Act precludes US Exim from authorizing any new guarantee, insurance, or extension of credit “for any project controlled by an energy producer or refiner that continues to:

- provide Iran with significant refined petroleum resources;

- materially contribute to Iran’s capability to import refined petroleum resources; or
- allow Iran to maintain or expand, in any material respect, its domestic production of refined petroleum resources, including any assistance in refinery construction, modernization or repair.”

The restrictions contained in the Appropriations Act may be waived by the President of the United States if the President determines that doing so is important to the national security interests of the United States, and the Secretary of State may exempt private entities whose home jurisdictions are cooperating with the United States’ policy efforts related to Iran.

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