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Insurers Too Must Heed Iran Sanctions

Law360, New York (April 05, 2013, 11:27 AM ET) -- On Jan. 2, 2013, President Obama signed into law the Iran Freedom and Counter-Proliferation Act of 2012 (IFCPA), as part of the National Defense Authorization Act of 2013. IFCPA is the most recent attempt by the Obama administration and Congress, through increasingly broad and creative measures, to induce Iran to abandon its efforts to develop nuclear weapons.

Among other things, these recent measures make clear that U.S. sanctions can drastically impact non-U.S. entities. Further, at a recent symposium, the Treasury Department's Office of Foreign Assets Control made clear that it is taking a very broad view of IFCPA and related measures, specifically mentioning that activities undertaken by insurance brokers may be within the reach of such sanctions.

These developments suggest that even foreign owned and operated insurance and reinsurance brokers should pause and carefully consider whether their business activities implicate these new provisions.

Expanding Reach of OFAC Sanctions

The U.S. has a more aggressive Iran sanctions regime than virtually any other country in the world. Such sanctions date back to the Tehran hostage crisis of 1979, but have been stepped up dramatically since 2010 in response to growing concern over Iran's nuclear program.

Sanctions Regime Prior to 2010

The Iran Sanctions Act of 1996 (ISA) was the first attempt by the U.S. to impose sanctions against non-U.S. companies participating in Iran's energy sector. It provided for U.S. sanctions against foreign entities who made investments of more than $20 million per year in Iran's energy sector. However, it appears that OFAC had little input with respect to the activities of foreign persons with respect to Iran under ISA — despite the extraterritorial reach of ISA, successive administrations declined to make a single sanctions determination under its provisions from 1998 until September 2010.

Post-2010 — A Changing Approach

In the last three years, as concerns relating to Iran's efforts to develop nuclear weapons have increased dramatically, Congress has passed four statutes designed to intensify U.S. pressure on entities doing business with Iran — regardless of whether that entity is owned by or affiliated with a U.S. company or operating within a U.S. jurisdiction.

Coupled with increased enforcement of existing sanctions provisions, the Comprehensive Iran Sanctions, Accountability and Divestment Act (CISADA), Section 1245 of the National Defense Authorization Act of 2012, the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA) and IFCPA greatly strengthen and expand the reach of U.S. sanctions with respect to Iran. For example:

- The statutes provide the president with broad authority to impose sanctions on companies that engage in a range of activities involving Iran. Such sanctions can include barring access to the U.S. financial system and restricting the ability of companies to open or maintain a U.S. bank account. Foreign financial institutions are specifically targeted under the statutes and may be most vulnerable due to the wide range of activities that are now sanctionable.

- ITRA prohibits the foreign subsidiaries of U.S. companies from engaging in any activity that would be prohibited in the United States or for a U.S. Person. The act provides for the imposition of civil penalties on the U.S. parent company if its subsidiary violates these provisions.

- ITRA added a new Section 13(r) to the Securities Exchange Act of 1934, requiring that any issuer that must file an annual or quarterly report under Section 13(a) of the act must disclose if the issuer or any affiliate of the issuer has engaged in specified activities related to Iran, including activities that are legal and not otherwise reached by U.S. sanctions laws. Such disclosures will prompt an investigation by the president into the possible imposition of sanctions.

Enforcement efforts and penalties also have been stepped up. Since 2010, the types of possible sanctions that the president may impose have increased from six to 12; and the number of sanctions that the president must impose after determining that an entity has engaged in a sanctionable activity has increased from two to five.

Such new sanctions include the prohibition of transactions involving property subject to U.S. jurisdiction in which a sanctioned person has an interest, and the denial of a visa to corporate officers or controlling shareholders of sanctioned entities. CISADA also mandated for the first time that the President actually investigate sanctions against a person when there is “credible information” that such person is engaged in sanctionable activity. In addition, the new regime restricts the President’s authority to waive sanctions in particular cases.

Implications for Insurance Brokers

Beginning with CISADA, Congress and the administration acknowledged the critical role that insurance plays in Iran’s energy and shipping industries — which in turn support Iran’s nuclear proliferation activities. Accordingly, for the first time, the statutes specifically target the insurance and reinsurance industry, imposing sanctions on insurers and reinsurers who knowingly provide “underwriting services or insurance or reinsurance” for a wide variety of activities involving Iran or to or for persons listed as a Specially Designated National or Blocked Person (SDN) by OFAC. Indeed, the activities of insurers and reinsurers have been a focus of recent OFAC enforcement efforts. In the area of insurance alone, there have been 324 OFAC investigations into possible sanctions violations since 2006.

The applicability of these new sanctions provisions to brokers is not yet clear. The relevant legislation does not specifically define “underwriting services.” Although the term is well understood in the

industry and is generally not considered to include insurance brokerage activities, recent guidance from OFAC suggests that foreign insurance brokers are not immune from the reach of the new sanctions.

At a recent presentation on OFAC Compliance for the Insurance Industry, the OFAC presenter agreed that, under the traditional usage, “underwriting services” would not include insurance brokering, but then stated that “underwriting services” could be interpreted to include insurance brokerage under OFAC’s broad reading of the statutes, particularly if any risk assessment or analysis is provided by the broker in connection with the placement of insurance.

Thus, while brokers who are foreign owned, controlled and operated may have been outside the reach of such sanctions previously, that may now change. In addition, sanctions clauses in insurance and reinsurance policies, or in the terms of trade between brokers and their clients, may no longer suffice to avoid scrutiny from OFAC.

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