



Memorandum

VIA EMAIL

Date: January 10, 2012

To: Clients and Friends

From: Stanley J. Marcuss
George F. Murphy

Re: The New U.S. Sanctions Against Iran

Bryan Cave LLP
1155 F Street, NW
Washington, DC 20004
Tel (202) 508-6000
Fax (202) 508-6200
www.bryancave.com

The new economic sanctions legislation signed by the President on December 31st is part of a 565 page defense authorization bill. In signing the legislation, the President issued a statement saying that the legislation's Iranian sanctions provisions "would interfere with my constitutional authority to conduct foreign relations by directing the Executive [Branch] to take certain positions in negotiations or discussions with foreign governments" and "that should any application of these provisions conflict with my constitutional authorities, I will treat the provisions as non-binding." Statement by the President on H.R. 1540, Office of the Press Secretary (Dec. 31, 2010) (available at <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>) emphasis supplied).

The legislation is aimed mainly at Iran's petroleum sector and professes to reflect concerns about the Iranian government's "pursuit of nuclear weapons, support for international terrorism [and] efforts to deceive responsible financial institutions and evade sanctions" through money laundering activities engaged in by Iran's "financial sector, including the Central Bank of Iran." National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1245 (b), (d)(2) (Dec. 31, 2011) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1540enr/pdf/BILLS-112hr1540enr.pdf>).

The two main provisions of the legislation consist of:

(A) a mandate that the President "block and prohibit all transactions in all property and interests in property of an Iranian financial institution if such property and interests in property are in the United States, come within the United States, or are or come within the possession or control of a United States person;"

and

(B) a requirement that the President, within 60 days of enactment, “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 knowingly conducted or facilitated any significant financial transaction with the Central Bank of Iran or another Iranian financial institution designated by the Secretary of the Treasury for the imposition of sanctions” but,

(1) in the case of a foreign financial institution owned or controlled by a foreign government, “only insofar as it engages in a financial transaction for the sale or purchase of petroleum or petroleum products to or from Iran” 180 days after enactment or

(2) in the case of transactions occurring 180 days after enactment by any foreign financial institution (a) only if the President determines “that there is a sufficient supply of petroleum and petroleum products from countries other than Iran to permit a significant reduction in the volume of petroleum and petroleum products purchased from Iran by or through foreign financial institutions and (b) not if the President (i) determines “that the country with primary jurisdiction over the foreign financial institution has significantly reduced its volume of crude oil purchases from Iran” or (ii) waives the imposition of these sanctions in “the national security interest” and justifies the waiver in a report to Congress.

Id. § 1245 (c), (d)(1), (d)(3), (d)(4)(C), (d)(4)(D), (d)(5).

OFAC’s Iranian Transactions Regulations already prohibit imports of Iranian-origin goods and services into the United States, the export or supply of goods, technology or services to Iran from the United States or by U.S. persons wherever located, transactions by U.S. persons related to goods or services of Iranian origin or goods, technology or services for exportation to Iran and the approval or facilitation of a non-U.S. person’s transactions with Iran if impermissible for a U.S. person or performed within the United States. It is, therefore, difficult to see what a freeze order would add except to require a U.S. person or someone in the United States who has possession or control of the property or property interests of an Iranian financial institution to hold such property and report its possession or control to OFAC instead of simply refusing to engage in transactions involving such property. Because the legislation does not specify when the President is to issue the mandated freeze order, moreover, it remains to be seen whether the President will do so, especially given what he said in his signing statement.

OFAC’s Iranian Financial Sanctions Regulations, moreover, already authorize the Secretary of the Treasury to impose conditions on a foreign financial institution’s opening or maintaining correspondent accounts or a payable-through accounts if the financial institution facilitates Iran’s acquisition of weapons of mass destruction, facilitates transactions with terrorists, engages in money laundering or facilitates transactions with persons whose property or interests in property are blocked pursuant to U.S. law. It is, therefore, likewise difficult to see what the new

legislation's provisions on the maintenance of correspondent or payable-through accounts in the United States adds to the existing array of sanctions under U.S. law.

Indeed, this complex and convoluted legislation appears to be little more than chest-thumping by Congress and an attempt to force the Administration to appear to be tougher on Iran than it already is. It is, however, filled with essentially indefinable terms governing its implementation, like "a sufficient supply of" petroleum products, a "significant reduction in the volume of" petroleum products purchased from Iran, "significantly reduced its volume of crude oil purchased from Iran" or "national security." These will leave the President with a great deal of latitude in deciding what to do.

The adverse foreign policy consequences of restricting U.S. correspondent or payable-through accounts of foreign institutions engaged in transactions with Iranian financial institutions, moreover, could also be profound with respect to countries that do not share the U.S. view of how to address the Iranian situation. The Administration will need to weigh those consequences carefully in deciding how to proceed.

In the meanwhile, the legislation has roiled the Iranian currency markets. This is undoubtedly due in part to the uncertainty it has created. It may be some time before that uncertainty is resolved.