



ECONOMIC SANCTIONS UPDATE

February 5, 2011

The United States Government Issues Iran Sanctions Guidance for the International Shipping and Maritime Insurance Industry

Background

On July 1, 2010, President Obama signed into law, *the Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010* (CISADA).

CISADA amends the Iran Sanctions Act, strengthens existing U.S. economic sanctions against Iran governed by the Iranian Transactions Regulations (the "ITR") administered by the U.S. Treasury's Office of Foreign Assets Control ("OFAC"), and most notably but not surprisingly, CISADA goes beyond the sanctions against Iran required by UN Security Council Resolution 1929 of June 9, 2010.

CISADA contains provisions to ratchet-up the sanctions pressure on Iran by imposing U.S. sanctions on non-U.S. and non-Iranian persons that make certain investments in Iran or that engage in certain trade/transactions with or involving Iran. The sanctions under CISADA with respect to Iran's petroleum sector are directed toward non-U.S. companies. U.S. companies are already prohibited by existing U.S. sanctions from investing in and trading with Iran under the ITR.

For further information on CISADA's provisions impacting the international shipping and maritime insurance industry, please see: *Eren Lawyers – Economic Sanctions Update*, July 24, 2010, available at: http://www.erenlaw.com/pdfs/Iran_Sanctions_Maritime.pdf

CISADA Guidance for the Shipping and Maritime Insurance Industry

In response to questions and issues raised by the international shipping and insurance industry with respect to the impact and implementation of CISADA, the United States Department of State, on February 3, 2011, released *CISADA Shipping and Maritime Insurance Considerations*, (the "CISADA Guidance").

The CISADA Guidance addresses concerns that the industry and their legal representatives have raised. While the CISADA Guidance does not address all scenarios, the U.S. Department of State believes that it provides clarity regarding some of the more common issues that have been encountered since the enactment of CISADA.

Significantly, the CISADA Guidance elaborates upon what insurers can do to avoid sanctions liability, by way of policy exclusions and other methods, and seems to confirm that services in relation to the transportation and delivery of refined petroleum products to Iran, as well as insurance, transportation, and brokerage services in relation to deliveries of goods to be used to maintain or expand Iran's refineries, such as refinery equipment constitute sanctionable activity under CISADA (even though a reasonable textual and contextual reading of CISADA would conclude that insurance services with respect to the delivery or transportation of goods to be used to maintain or expand Iran's refineries would not be covered).

Interestingly, with respect to policy exclusions for insurers, the CISADA Guidance suggests that P&I Clubs excluding coverage for CISADA-offending voyages could revoke the membership of any members seeking such coverage from other sources – in effect suggesting that P&I insurers impose sanctions on their members engaging in activities CISADA sanctionable activities.

The U.S. State Department recognizes that the shipping and insurance industries are dynamic, and the State Department's aim is to update the CISADA Guidance periodically to include new information that will address emerging trends and outstanding issues. In this regard, with respect to P&I Clubs, it is expected that the Department of State will address remaining problems and issues such as those in relation to liability under blue cards. For purposes of calculating the value of insurance and/or reinsurance services under CISADA, the CISADA Guidance does not provide elaboration upon the issue of whether the value of insurance services is the relevant premium value, *i.e.*, the annual premium prorated for the sanctions-offending voyages.

While the CISADA Guidance highlights the *knowing or reason to know* standard of CISADA and touches upon what diligence is due for insurers to avoid CISADA liability, the CISADA Guidance does not address what due diligence ship owners, whose vessels may be transporting sealed containers to Iran, must conduct to ensure that their vessels do not offload containers in Iran containing goods that can be used to maintain or expand Iran's refineries.

The entire text (verbatim) of the CISADA Guidance released by the U.S. Department of State is as follows:¹

CISADA SHIPPING AND MARITIME INSURANCE CONSIDERATIONS

On July 1, 2010, President Obama signed into law the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA), which expands significantly the energy-related activities that are sanctionable under the Iran Sanctions Act of 1996 (ISA). We urge companies, including those in the shipping and insurance sectors, to minimize their exposure to the Iranian energy sector and to exercise as much due diligence as possible in doing business, directly or indirectly, with Iranian entities. The information in this document will be updated periodically to reflect changes in legislation or industry practice.

Nature of Insurance/Ownership/Liability:

Any party that, among other activities, knowingly sells, leases, or provides goods, services, technology, information, or support that could “directly and significantly” contribute to the enhancement of Iran’s ability to import refined petroleum or facilitate the maintenance or expansion of Iran’s domestic production of refined petroleum products could be subject to sanctions under ISA. Sanctions may apply to goods or services provided they have a fair market value of at least \$1 million or aggregate of at least \$5 million in twelve months. Whether goods or services could have a direct and significant contribution to Iran’s ability to import refined petroleum will be evaluated on a case-by-case basis.

Potentially sanctionable activities, as explicitly described in ISA, include: 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; financing or brokering such sale, lease, or provision; or providing ships or shipping services to deliver refined petroleum products to Iran. Other potentially sanctionable activities could include, for example, maritime transport (ship owners and charters) and related ship services (operators and technical managers), ship brokering (sale, charter, and container), ship suppliers (for sale of ships both used and new), and financial services related to maritime transportation services (including insurance and reinsurance). Cargo insurance and reinsurance, protection and indemnity (P&I) insurance and reinsurance, hull insurance and reinsurance, contract frustration insurance and reinsurance, and

¹ The CISADA Guidance was released on February 3, 2011 as a plain document to interested parties. The CISADA Guidance is expected to be published in the *Federal Register*, the official gazette of the United States Government.

any other insurance or reinsurance associated with the shipment of refined petroleum products to Iran may also be sanctionable.

The ISA defines “knowingly” to mean that a person has actual knowledge, or should have known in the circumstances, meaning companies can be subjected to sanctions if they knew or *should have known* that they were providing qualifying goods or services to Iran. As insurance providers and ship owners/managers/operators may not be familiar with all goods and services that could be assisting Iran’s petroleum sector, insurance providers and ship owners should undertake due diligence and know their customers in order to reduce the risk that they will engage in potentially sanctionable activities.

ISA Exception for Underwriters and Insurance Providers Exercising Due Diligence:

The ISA contains an exception whereby the Secretary of State may not impose sanctions, with respect to activities that contribute to the enhancement of Iran’s ability to import refined petroleum products, on a company that provides underwriting services or insurance or reinsurance if the Secretary determines that the person has exercised due diligence in establishing and enforcing official policies, procedures, and controls to ensure that the person does not underwrite or enter into a contract to provide insurance or reinsurance for the sale, lease, or provision of goods, services, technology, information, or support that could directly and significantly contribute to the enhancement of Iran’s ability to import refined petroleum products. Companies are strongly encouraged to diligently and strictly implement such official policies, procedures, and controls to avoid any activity that could be subject to sanctions under ISA. Policies, procedures, and controls should be appropriate based on the type of activities in which a company engages.

Methods to Assist in Preventing Sanctionable Activity:

Companies should consider employing measures that can assist in preventing sanctionable activity. Such measures could include the following:

Coverage Exclusions:

We encourage companies to write insurance policies with coverage exclusions for losses associated with the delivery of refined petroleum products or related goods to Iran. If coverage exclusions are not commercially feasible, insurers could establish strict underwriting policies and procedures that scrutinize the business activity of prospective insured persons and decline risks that present a probability of insuring deliveries of refined petroleum products or related goods to Iran. In the case of P&I Clubs, membership could be revoked if members seek special coverage to insure risks barred by an Iranian refined petroleum coverage exclusion.

Policies and Procedures:

Insurers should exercise due diligence in the marketing and underwriting of coverages for international trade transactions that intentionally or unintentionally assume risks associated with the delivery of refined petroleum products or related products to Iran. The policies and procedures may include affirmative, rigorously applied company rules against engaging in such activity, instruction of employees regarding prohibited and sanctionable activity with Iran, active monitoring, inspection, and diligence on customers' activities, and other appropriate measures.

Policies, procedures, and controls should take into account various comprehensive sanctions measures, including other provisions of ISA and CISADA, which are in process of refinement and evolution. The Department of State emphasizes that any decision on sanctionable activity will ultimately be made by the Secretary of State or her designee and will depend on the facts of a particular case.

Involvement of U.S. Persons:

In addition to the provisions of the ISA and CISADA, additional restrictions apply to U.S. persons and transactions subject to U.S. jurisdiction. United States persons are prohibited from almost all business with Iran, under the Iranian Transactions Regulations (ITR). United States persons and others conducting transactions subject to U.S. jurisdiction should consult the ITR, administered by the Department of Treasury's Office of Foreign Assets Control, before providing, directly or indirectly, goods, technology, or services to Iran.

Effective Date of CISADA and Pre-Existing Contracts:

The CISADA makes sanctionable a person who "sells, leases, or provides to Iran" refined petroleum products and/or qualifying goods or services above certain monetary thresholds "on or after the date of enactment," July 1, 2010. A "sale", "lease", or "provision" of goods or services is considered to have commenced at the time the contract for the "sale", "lease", or "provision" became legally binding.

Examples of Potentially Sanctionable Activity under CISADA

Below are examples of activity the Secretary of State may consider to be sanctionable under CISADA. The examples are illustrative, but not exhaustive.

Product and Chemical Tankers

- Use of a ship, controlled by ownership or charter agreement, to provide shipping services to supply Iran with gasoline, diesel, jet fuel, or aviation gasoline.

- Charter of a ship to another company that is using the ship to supply Iran with gasoline, diesel, jet fuel, or aviation gasoline. The ship owner may still have engaged in sanctionable activity even if it does not have full control of the ship under the charter agreement.
- Facilitation (e.g., by brokering) of the provision of a ship, either by sale or charter, to a company for the transportation of refined petroleum products to Iran. Brokers are considered to be facilitating or “providing” the goods or services that they have sourced for clients. In the case of a ship sale or provision of insurance, the broker is considered to have provided the entire value of the goods or services.
- Provision of insurance to a company for the transportation of refined petroleum products to Iran, if the insurance premiums are above threshold amounts. Insurance can include cargo insurance, P&I insurance, hull insurance, and contract frustration insurance.
- Facilitation (e.g., by brokering) of the provision of insurance for the transportation of refined petroleum products to Iran.

Bulk Cargo

- Use of a ship, controlled by ownership or charter agreement, to provide shipping services for the purpose of supplying goods to be used to maintain or expand Iran’s refineries, such as refinery equipment.
- Facilitation (e.g., by brokering) of the provision of cargo or insurance to a company for the purpose of supplying goods or to facilitate the transportation of goods to maintain or expand Iran’s refineries.
- Provision of insurance to a company for the transportation of goods to maintain or expand Iran’s refineries.

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The Eren Law Firm will continue to very closely monitor CISADA’s interpretation and implementation by the designated agencies of the U.S. government, continue to interface with the policy-making as well as the enforcement offices of the U.S. government to address issues with respect to CISADA, and advise clients on CISADA compliance, and/or imposition of CISADA sanctions risk reduction strategies.

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Our Firm

The Eren Law Firm is an economic sanctions boutique. Its 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 banks and financial institutions; insurance, reinsurance and other financial services companies; natural resource extraction companies, industrial companies, marine and air transportation companies; sovereign governments; foreign state enterprises; and individuals. The Firm has deep knowledge and experience in advising insurers and ship owners with respect to the impact of U.S. sanctions on their activities.

Our Lawyers

Mr. Pinter and Mr. Eren of the Firm served at the U.S. Treasury's Office of Foreign Assets Control (OFAC), the U.S. government agency that administers and enforces U.S. economic sanctions, for a combined 25 years prior to entering private law practice, respectively 9 and 11 years ago. While at OFAC, Mr. Eren and Mr. Pinter played a major role in analyses and deliberations with respect to numerous issues related to sanctions against Iran and other countries, provided interpretations of sanctions prohibitions, and reached determinations with respect to exceptions to sanctions prohibitions. The major portion of Mr. Eren's portfolio at Treasury consisted of issues and matters arising under the U.S. sanctions against Iran and the former Yugoslavia. Mr. Pinter was a prime arbiter of all major OFAC decisions.

Mr. Comras of the Firm, a former diplomat of the United States, served at the U.S. 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, and sanctions issues arising under the Iran Sanctions Act. Mr. Comras has also served at the United Nations and he is a former member of the UN Panel of Experts dealing with sanctions against North Korea.

For more information about the Firm, and its lawyers, please visit: www.erenlaw.com.

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