New Law Requires Issuers to Disclose Certain Iran-Related Transactions

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On August 10, 2012, President Obama signed into law the **Iran Threat Reduction and Syria Human Rights Act of 2012** (Public Law 112-158 — the "**Act**"). The Act strengthens existing sanctions on Iran, especially those aimed at third-country nationals engaging in business with Iran, and includes measures relating to human rights abuses in Iran and Syria. The Act is primarily intended to compel Iran to abandon its pursuit of nuclear weapons and support for terrorism and terrorist regimes. Among its many provisions, the Act imposes new reporting obligations on issuers required to file annual or quarterly reports with the Securities and Exchange Commission (the "**SEC**"), including both U.S. domestic and foreign private issuers. The SEC-related provisions apply to reports due to be filed on or after February 6, 2013.

The Act obliges each SEC-reporting issuer to disclose information regarding certain activities relating to Iran, particularly new investments or new transactions relating to the Iranian petroleum, petrochemical or marine transport sectors.

Issuers Subject to Disclosure Obligations.

Section 219 of the Act amends Section 13 of the Securities Exchange Act of 1934 (the "**Exchange Act**") to provide that each issuer must include in its quarterly and annual reports to the SEC certain information if, during the period covered by the report, the issuer or any affiliate of the issuer:

(A) knowingly engaged in an activity described in Section 5(a) or (b) of the Iran Sanctions Act, as amended, including significant investments in or transactions that could develop the Iranian petroleum or petrochemical sectors. Specified activities include those involving:

- the energy sector of Iran, including:
  - investments in the development of petroleum resources in Iran
  - exportation of refined petroleum products to Iran
  - participation in certain joint ventures relating to developing petroleum resources outside of Iran in which the Government of Iran (the "**GOI**") is a substantial partner or pursuant to which Iran could receive valuable technological knowledge or equipment
  - support for the development of petroleum resources or the domestic production of refined petroleum products or petrochemical products in Iran
  - transportation of crude oil from Iran
  - concealment of the Iranian origin of crude oil and refined petroleum products transported on vessels
- Iran's development of weapons of mass destruction ("**WMD**") or other military capabilities, including:
  - exports, transfers and transshipments of items to Iran that would assist Iran's acquisition or development of WMD or other military capabilities

- participation in joint ventures with the GOI relating to the mining, production or transportation of uranium.

(B) knowingly engaged in an activity described in the following sections of the Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010, as amended ("**CISADA**"):

(i) Section 104(c)(2), which relates to foreign financial institutions that facilitate the efforts of the GOI to acquire or develop WMD or provide support for international terrorism; assist persons subject to United Nations Security Council sanctions resolutions relating to Iran; engage in money laundering related to, or facilitate efforts by the Central Bank of Iran or another Iranian financial institution to carry out, one of the activities described above in this subparagraph (i); or facilitate a significant transaction or provide significant financial services for Iran's Revolutionary Guard Corps (the "**IRGC**") or any person whose property is blocked in connection with Iran's WMD proliferation or support for international terrorism;

(ii) 104(d)(1), which prohibits persons owned or controlled by U.S. financial institutions from knowingly engaging in a transaction with the IRGC; or

(iii) 105A(b)(2), which relates to the transfer of goods, technologies or services likely to be used by the GOI to commit serious human rights abuses against the people of Iran, including, among other things, firearms or ammunition, surveillance technology or sensitive technology. "Sensitive technology" is defined in Section 106(c) of CISADA, as amended, to mean, with certain exceptions, "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."

(C) knowingly conducted any transaction or dealing with (i) any person whose property and interests in property are blocked pursuant to Executive Order ("**E.O.**") 13224 (relating to terrorism) or E.O. 13382 (relating to WMD proliferation) or (ii) any person identified as constituting part of the GOI under Section 560.304 of the Iranian Transactions Regulations (the "**ITR**") "without the specific authorization of a Federal department or agency."

Information to be Disclosed.

Compliant disclosures must contain a detailed description of each activity referenced above, including (i) the nature and extent of the activity; (ii) the gross revenues and net profits, if any, attributable to such activity; and (iii) whether the issuer or affiliate of the issuer intends to continue the activity. If an issuer reports that it or an affiliate has knowingly engaged in any activities described above, the issuer is required to separately file with the SEC a notice that the disclosure of that activity has been included in the issuer's annual or quarterly report. Upon receipt of such a notice, the SEC is required to transmit the report to the President and certain congressional committees, and to post the information provided in the disclosure and the notice on the SEC's website.

Pursuant to amended Section 13 of the Exchange Act, upon receipt of a report that includes disclosure of an activity described in clauses (A), (B) or (C) above (except a transaction or dealing with the GOI), the President is required to initiate an investigation into the possible imposition of sanctions under specified laws and executive orders. No more than 180 days after initiating an investigation, the President must determine whether sanctions should be imposed with respect to the issuer or the affiliate of the issuer.

The Act requires issuers to disclose any dealings with the GOI, regardless of whether those dealings are otherwise sanctionable, unless the activity is conducted with the specific authorization of a Federal department or agency. (Under Section 560.304 of the ITR, the "GOI" includes not only all political subdivisions, agencies and instrumentalities thereof, but also all entities owned or controlled directly or indirectly by the foregoing, as well as persons acting directly or indirectly on behalf of any of the

foregoing, and any person or entity specifically designated by the Secretary of the Treasury as being part of the GOI.) The Act does not explain what constitutes "specific authorization" of a Federal department or agency. The use of the word "specific" may indicate that for an issuer that is a U.S. person, and perhaps for non-U.S. subsidiaries of a U.S. person, transactions with the GOI will be excepted from the disclosure requirements only if they are conducted pursuant to a specific license, such as a specific license from the Treasury Department's Office of Foreign Assets Control ("**OFAC**"). For purposes of U.S. sanctions, U.S. persons include entities organized under U.S. law, including their non-U.S. branches, as well as any U.S.-located branch, agency, representative office or other U.S. location of a foreign entity. In addition, under Section 218 of the Act, non-U.S. subsidiaries of U.S. persons will be prohibited from knowingly engaging in any transaction directly or indirectly with the GOI or any person subject to the jurisdiction of the GOI that would be prohibited by an order or regulation issued pursuant to the International Emergency Economic Powers Act, as amended (the primary statutory authority for Iran sanctions), if the transaction were engaged in by a U.S. person or in the United States. Such non-U.S. persons will therefore need an OFAC license to engage in certain activities involving Iran.

A broader reading of the relevant language in Section 219 of the Act would suggest that perhaps transactions conducted pursuant to an OFAC general license or an exemption under the OFAC regulations would be considered "specifically authorized" and therefore not disclosable. Until this ambiguity is resolved, it will be unclear, for example, whether an issuer that is a U.S. person that renews a patent in Iran (which is permitted by an OFAC general license) must disclose such activity in its filings with the SEC. The Act does not prescribe the issuance of new SEC rules to implement the amended language in Section 13 of the Exchange Act. However, the SEC staff may decide to issue guidance through a Compliance and Disclosure Interpretation (a "**CDI**") or other form of guidance to shed some light on its interpretation of the statute, as they have done with other statutes, such as the JOBS Act. For an issuer that is not a U.S. person or a subsidiary of a U.S. person, it appears that virtually all transactions with the GOI must be disclosed, as there is typically no basis on which a Federal department or agency would authorize such foreign persons' activities with Iran that are not within U.S. jurisdiction. Thus, for example, a non-U.S. issuer would presumably have to disclose its dealings with an Iranian regulator in connection with the shipment of medicine to Iran.

Implications.

The new disclosure requirements in the Act go beyond the current efforts of the SEC's Office of Global Security Risk ("**OGSR**"), which examines issuers' disclosure documents with respect to their activities that may relate to one or more countries designated by the State Department as "State Sponsors of Terrorism" (currently Cuba, Iran, Sudan and Syria). The OGSR routinely sends comment letters to issuers asking them to describe any quantitatively or qualitatively material contacts they have with State Sponsors of Terrorism. In certain cases, the OGSR seeks additional information even when a company's filings do not describe any such contacts, if the OGSR has learned of possible contacts through other sources, such as company websites, media reports or online search engines.

The far-reaching nature of the Act's amendments to Section 13 of the Exchange Act (in particular the requirement to disclose almost all dealings with the GOI, which information will be posted on the SEC's website) is reminiscent of a short-lived SEC initiative in 2007 which added a software tool to the SEC's website permitting users to obtain information from company annual reports about a company's business interests in State Sponsors of Terrorism. The initiative was intended to highlight these companies' activities in countries sponsoring terrorism, without regard to whether that involvement was consistent or inconsistent with U.S. foreign and sanctions policy toward the specified country. For example, certain companies' posted reports indicated that their activities were conducted pursuant to U.S. Government licenses; others stated that they had divested the interest for which they were listed. The web tool's multiple shortcomings caused such an outcry that it was suspended within a month of being introduced and has not been reinstated. The newest disclosure and web posting requirements are imposed by the

Act; the SEC does not have discretion to eliminate the disclosure requirement or decline to post the information on its website. As noted above, however, the SEC staff could issue guidance or the SEC could conduct rulemaking to further define the contours of these requirements.

Issuers should begin to prepare for the new disclosure requirements that will come into effect early next year by reviewing all Iran-related transactions and activities that they and their affiliates engage in to determine whether the activities fall within the scope of amended Section 13 of the Exchange Act. We would be happy to assist you in analyzing potential obligations under the Act.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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