

Update

US sanctions: are foreign insurers soon to be “US Persons”?

Effective as of 1 July 2013, foreign insurers will face broad new sanctions exposures under the US Iran Freedom and Counter-Proliferation Act (“IFCA”). (See our **January 2013 update**). Most of the IFCA provisions follow the steady expansion of US-Iran sanctions that began in mid-2010. Two, however, appear to significantly close the gap between foreign insurers and their US counterparts (“US Persons”), which have long been strictly prohibited from almost all dealings involving Iran.

This update examines these two IFCA provisions, found in Sections 1246 and 1253.

IFCA Section 1246

Subject to limited exceptions, Section 1246 **requires** the US President to impose at least five sanctions from a list of 12¹ upon persons determined to have knowingly, on or after 1 July 2013, provided “underwriting services or insurance or reinsurance”:

- (a) *for any activity with respect to Iran for which sanctions have been imposed under [IFCA] . . . or any other provision of law relating to the imposition of sanctions with respect to Iran*
- (b) *to or for any person –*
 - (i) *with respect to, or for the benefit of any activity in the energy, shipping, or shipbuilding sectors of Iran for which sanctions are imposed under [IFCA]*

- (ii) *for the sale, supply, or transfer to or from Iran of [graphite, raw or semi-finished metals, coal and software for integrating industrial processes] for which sanctions have been imposed under [IFCA]*

- (iii) *designated for imposition of sanctions [in connection with Iran’s proliferation of weapons of mass destruction or their delivery systems, or support for terrorism]*

- (c) *to or for any Iranian person included on the list of specially designated nationals and blocked persons [except certain Iranian banks]*

The sanctions in Sections 1246(B) and (C) have been the subject of much discussion since the enactment of IFCA in January 2013, and rightly so, as they apply to broad sectors of the Iranian economy and significant areas of Iranian trade.

¹ The 12 sanctions include denial of loans from US banks, prohibitions against transactions in foreign exchange in the US, prohibitions against transfers of credit or payments through US banks, prohibitions upon acquiring, holding, or transferring property in the US, a ban on investment in equity or debt of the sanctioned entity, and denial of entry into the US of corporate officers of the sanctioned entity.

Further information

If you would like further information on any issue raised in this update please get in touch with any of the key contacts listed on our sanctions microsite, sanctions.clydeco.com or contact:

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However, Section 1246(A) - which has received surprisingly little attention - is arguably far more expansive. Because Section 1246(A) calls for sanctions against foreign insurers that knowingly provide insurance or reinsurance "for any activity with respect to Iran for which sanctions have been imposed," and because activities prohibited by US Persons are ones "with respect to Iran for which sanctions have been imposed," it appears that foreign insurers will thus become subject to sanctions if they knowingly engage in any of the activities prohibited by US Persons.

Although the foregoing seems clear from the terms of Section 1246(A), it makes little sense when Sections 1246(B) and (C) are considered. If Section 1246(A) is intended to subject foreign insurers to the Iran prohibitions applicable to US Persons (subject to a knowledge requirement), then Sections 1246(B) and (C) would become superfluous, as US Persons are already prohibited from engaging in the conduct described in those provisions. For this reason, Section 1246(A) arguably must be interpreted more narrowly, although it is difficult to devise how this is to be done.

IFCA Section 1253

IFCA Section 1253(b) provides that the penalties in Section 206(b) and (c) of the International Emergency Economic Powers Act ("IEEPA"):

shall apply to a person that violates, attempts to violate, conspires to violate, or causes a violation of [IFCA] or regulations prescribed under [IFCA] to the same extent that such penalties apply to a person that commits an unlawful act described in section 206(a) of that Act

IEEPA Sections 206(b) and (c) provide the basis for imposition of sanctions penalties against US Persons under nearly all US sanctions programs. IEEPA Section 206(b) provides for civil penalties of USD 250,000 per violation or twice the amount of the transaction at issue. IEEPA Section

206(c) provides for the imposition of criminal fines of up to USD 1 million and imprisonment for up to 20 years.

As noted, IFCA Section 1246 provides for the imposition of five or more sanctions (from a list of 12) against foreign insurers that engage in the conduct described in that section. As Section 1253 separately provides that IEEPA penalties "apply to a person that violates" IFCA provisions, it thus appears that penalties in both IFCA Section 1246 and IEEPA can be imposed against foreign insurers.

Conclusion

IFCA is a product of the US Congress, which is not required to explain the meaning of its laws or determine how they are to be enforced. For IFCA, these tasks now fall to the President and his sanctions enforcement agencies, principally the Treasury Department's Office of Foreign Assets Controls, better known as "OFAC".

Unfortunately, it is unlikely that either President Obama or OFAC will offer guidance before the IFCA sanctions come into force on 1 July 2013. If previous form dictates process, on that day we can expect the President to issue an executive order to implement the new sanctions, followed months later by promulgation of related OFAC regulations. These actions may (or may not) provide some clarity as to how broadly IFCA Section 1246(A) will be interpreted and enforced, whether foreign insurers that violate IFCA Section 1246 will face penalties under both that provision and IEEPA, and just how the US intends to impose civil and criminal fines and penalties against foreign insurers, some of which may have little or no contact with the US.

Meanwhile, foreign insurers are left in the unsettling position of not knowing whether they will soon become subject to (almost) the same prohibitions and penalties that apply to US Persons.