

# KIRKLAND ALERT

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## State-Government Sanctions Trend Gains Steam as New York Bans Contractors Linked to Iran

The U.S. federal government's steps to impose sanctions on Iran have been well-documented. With far less fanfare, efforts to restrict business with Iran have spread to the state level, with very real implications for government contractors. This month, New York joined California and Florida in banning government contracts with companies that are deemed, based on publicly reported information, to have impermissible business ties to Iran.

As discussed below, these state measures require increased vigilance by businesses that enter into contracts with public entities — vigilance not only in ensuring compliance with sanctions, but also in monitoring and, where necessary, correcting public reports alleging sanctions violations.

### **Background: U.S. Congress Authorizes State and Local Governments to Ban Iran-Linked Contractors**

Until recently, state-government efforts to exert economic pressure on Iran focused primarily on banning the investment of public funds, such as government employees' benefit plans, in Iran-linked entities. In 2007, for example, California lawmakers passed the California Public Divest From Iran Act, which prohibits state pension funds from investing in companies that do energy-, defense-, or nuclear-related business in Iran; Florida lawmakers passed the Protecting Florida's Investment Act ("PFIA"), which requires the Florida State Board of Administration to withdraw investments from companies that do substantial oil-related business in Iran; and New York State Comptroller Thomas DiNapoli announced plans to divest investments by the New York State Common Retirement Fund from companies identified as doing business with Iran's energy or defense sector.

In 2010, a new federal statute made clear that state and local governments could, under certain conditions, take the additional step of refusing to award government contracts to certain companies with ties to Iran. The Comprehensive Iran Sanctions, Accountability, and Divestment Act ("CISADA"), codified at 22 U.S.C. §§ 8501–8551, which the Senate and House of Representatives passed by overwhelming majorities before President Barack Obama signed it into law in July 2010, authorizes state and local governments to "divest the assets of the State or local government from, or prohibit investment of the assets of the State or local government in, any person that the State or local government determines, *using credible information available to the public*, engages in investment activities in Iran." *Id.* § 8532(b) (emphasis added). An entity "engages in investment activities in Iran," and therefore is subject to sanctions, if it "(1) has an investment of \$20,000,000 or more in the energy sector of Iran, including in a person that provides oil or liquefied natural gas tankers, or products used to construct or maintain pipelines used to transport oil or liquefied natural gas, for the energy sector of Iran; or (2) is a financial institution that extends \$20,000,000 or more in credit to another person, for 45 days or more, if that person will use the credit for investment in the energy sector of Iran." *Id.* § 8532(c). If authorized under CISADA, which requires state and local governments to implement procedural safeguards before imposing sanctions, *see id.* § 8532(d), the state or local measure cannot be preempted by federal laws or regulations, *see id.* § 8532(f).

CISADA's expansive definitional provisions ensure that the scope of permissible non-federal sanctions against Iran will be broad. For example:

- The “State or local government[s]” allowed to enact sanctions include a wide range of public entities, from “any agency or instrumentality” of a state or local government, 22 U.S.C. § 8531(6)(A)-(B), to “any public institution of higher education within the meaning of the Higher Education Act of 1965,” *id.* § 8531(6)(D).
- The type of “investment” that a state or local government may ban includes not only “a commitment or contribution of funds or property,” *id.* § 8532(g)(2)(A), or “a loan or other extension of credit,” *id.* § 8532(g)(2)(B), but also “*the entry into or renewal of a contract for goods and services,*” *id.* § 8532(g)(2)(C) (emphasis added), meaning restrictions on hiring Iran-linked contractors are allowed.
- Prohibitions may reach not only an entity that “engages in investment activities in Iran” directly, but also “any *successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control* with” that entity. § 8531(4)(C) (emphasis added).

Despite this definitional guidance, some language in CISADA remains subject to various interpretations. Notably, the statute authorizes state and local governments to act based on “credible information available to the public,” but does not identify a particular source for that information.

### Recent Trend: State Responses

In response to local pressure, states are relying on CISADA to implement bans on Iran-linked contractors.

California has enacted the Iran Contracting Act (“ICA”), which bans any contractor who “engages in investment activities in Iran,” as defined in CISADA, from bidding on, entering into, or renewing a contract worth \$1 million or more with a public entity. *See* Cal. Pub. Cont. Code §§ 2200–2208. Under the ICA, which took effect in 2011, the state’s Department of General Services must “us[e] credible infor-

mation available to the public[] [to] develop, or contract to develop, a list of persons it determines engage in investment activities in Iran,” *id.* § 2203(b)(1), and most contractors seeking business with a public entity in California must certify that they do not appear on that list, *see id.* § 2204.

Similarly, Florida’s Scrutinized Companies Act, which also took effect in 2011, prohibits public contracts of \$1 million or more with entities that appear on the “Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List” created by Florida’s public fund pursuant to the state’s 2007 divestment legislation. *See* Fla. Stat. § 287.135. The public fund compiles the list in part by “[r]eviewing and relying, as appropriate in the public fund’s judgment, on publicly available information ... , including information provided by nonprofit organizations, research firms, international organizations, and government entities,” *see id.* § 215.473(2)(a)(1), in order to identify companies with ties to Iran similar to those described in CISADA, *see id.* § 215.473(1)(t)(4).

New York now has its own ban on contractors with business in Iran. The Iran Divestment Act of 2012 became law earlier this month, and will take effect in April. In material respects, the bill mirrors the provisions in California’s ICA, including the requirement that a list of entities that invest in Iran be created “using credible information available to the public.”

### Looking Ahead: The Need to Monitor Reports Alleging Business Ties to Iran

The influence that publicly reported information will have in driving enforcement of state sanctions against Iran merits emphasis. Lacking the sort of global-intelligence and foreign-affairs resources available to federal regulators, states understandably must instead learn about business connections to Iran largely from public information.

One effect will likely be a bigger role for non-government organizations in shaping how sanctions are enforced. Perhaps the most vocal such organization is the nonprofit advocacy group United Against Nuclear Iran (“UANI”), which has campaigned in favor of non-federal legislation aimed at Iran-linked government contractors. Led by Mark Wallace, who previously served as a U.S. ambassador to the United

Nations and as principal legal advisor to the Department of Homeland Security's Bureau of Immigration and Customs Enforcement, UANI maintains the widely cited Iranian Business Registry, a database of reports linking international businesses to Iran.

Companies should act promptly to rebut and correct any erroneous reports, on UANI's registry or elsewhere, about business activity in Iran. With the rise of state-government sanctions discussed above, failing to correct misinformation could affect a company's ability to bid on and enter into valuable government contracts.

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