

## Ins And Outs Of Iran Disclosure In SEC Filings

*Law360, New York (April 09, 2013, 9:53 AM ET)* -- On Aug. 10, 2012, President Obama signed into law the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA). Among other things, this legislation provides that any company that is required to file annual or quarterly reports under Section 13(a) of the Exchange Act (which includes companies listed on a U.S. securities exchange) must disclose in those reports whether, during the period covered by the subject report, it or any affiliate has knowingly engaged in certain sanctionable activities generally relating to Iran.[1]

### ITRA's Disclosure Requirements

ITRA requires disclosure even when the actions did not violate any provision of U.S. law. There is no materiality threshold. The required disclosure must include a description of each such activity, specifying the nature and extent of the activity, the gross revenues and net profits attributable to the activity, if any, and whether the issuer or affiliate intends to continue the activity.

The disclosure obligation imposed by ITRA became effective for quarterly and annual reports filed after Feb. 6, 2013, and now constitutes an ongoing reporting obligation. Public companies, even companies that concluded that they did not need to include ITRA disclosure in their most recent annual and quarterly reports, need to ensure that they have disclosure controls in place to determine each quarter whether any such disclosure is needed with respect to the period covered by the report.

ITRA imposes disclosure obligations with respect to affiliates, not just entities controlled by a public company. The Division of Corporation Finance issued a compliance and disclosure interpretation specifying that, for the purposes of ITRA, "affiliate" is defined as it is in Rule 12b-2 under the Securities Exchange Act of 1934, which covers any "person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified." Because such a broad definition applies, public companies may regularly need to determine whether any activities outside of their consolidated group are subject to disclosure under ITRA.

## **Recent Disclosure Practices**

As of March 25, 2013, more than 125 annual or quarterly reports were filed containing ITRA disclosure, some of which were filed by related companies.[2] Many disclosures reported that the activities described were conducted by non-U.S. companies, such as subsidiaries, sister companies or other affiliates. The disclosures often emphasized that the activities conducted complied with applicable law.

Some ITRA disclosures specified that the activities described were initiated by a company prior to its acquisition by the reporting issuer or that the activities occurred prior to ITRA's enactment. In many situations, issuers disclosed a decision to cease such activities. However, some companies stated an intention to continue activities to the extent permitted by applicable law.

The breadth of the affiliate requirement led some companies with significant shareholders to disclose activities conducted by other companies in which such shareholders also had a significant investment and/or board seats. In some cases, the disclosure was accomplished by quoting the ITRA disclosure from the other company's U.S. Securities and Exchange Commission filing. In other situations, the reporting company provided disclosures based on information received from its significant shareholder, or from the other company, noting if it had not been given specific information, such as with respect to revenues generated from the activities.

Because there is no specified location for the ITRA disclosure, companies have presented it as components of various items of the applicable report, including the business section, risk factors or legal proceedings in the applicable SEC report or separately in the "other information" item or at the end of part I of form 10-K.

## **Practical Considerations**

It is important for each public company to design and implement, and update as needed, procedures to gather the information necessary to determine whether ITRA disclosure is required. ITRA disclosure is subject to liability under Section 18 of the Exchange Act and is covered by the CEO and CFO certifications.

Although the annual reporting season has ended for many public companies, the determination whether ITRA disclosure is required must be performed on a quarterly basis. Therefore, disclosure control procedures must encompass quarterly inquiries to determine if any activities must be reported under ITRA.

The necessary due diligence for ITRA disclosure may need to extend beyond the consolidated group for which information is typically gathered when describing the business of the company in SEC filings. Because facts and circumstances regarding share ownership and director activity vary among companies, each reporting company needs to assess what procedures it needs to conduct to ascertain that it has identified any activities in which it, or any subsidiary or affiliate, knowingly engaged and which require disclosure under ITRA.

Public companies must also recognize that the SEC's definition of affiliate includes natural persons. Therefore, the disclosure controls for ITRA disclosure may need to encompass directors and executive officers.

It may be necessary for companies to make ITRA disclosure inquiries with respect to persons or entities that were former affiliates if they were affiliates during the period covered by the applicable report.

If ITRA disclosure is required, public companies will need to disclose their intentions with respect to continuation of such business activities. As a result, companies should consider whether to adopt policies with regard to activities governed by ITRA. If adopting a policy, consideration should be given to applying the policy prospectively only, as well as the difficulty in enforcing the policy if it is too broad. In addition, it will be important from a corporate governance perspective to adopt procedures to monitor compliance with this policy.

When performing due diligence for acquisitions, especially of those involving non-U.S. entities, companies may want to assess the extent to which the target, or any subsidiary or affiliate, has engaged in activities disclosable under ITRA that will continue after the acquisition has been closed.

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[1] Specifically, ITRA requires disclosure of sanctionable activities relating to:

- Development of Iran's petroleum resources, production of refined petroleum products in or exportation of refined petroleum products from Iran, or development of Iran's weapons of mass destruction (WMD) or other military capabilities, as described in Section 5(a) or (b) of the Iran Sanctions Act of 1996;
- Financial institutions facilitating terrorist organizations or acts, sanctioned-party activities, WMD development or other prohibited activities in Iran as described in the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA);
- Financial institutions engaging in transactions benefiting the Islamic Revolutionary Guard Corps, as described in Section 104(d)(1) of CISADA;
- Transfers of goods or technologies to Iran that are likely to be used to commit human rights abuses, as described in Section 105A of CISADA;

- Transactions with terrorists whose property is blocked pursuant to Executive Order 13224;
- Transactions with WMD proliferators whose property is blocked pursuant to Executive Order 13382; and
- Transactions with the government of Iran as defined in Section 560.405 of Title 31 of the Code of Federal Regulations, without specific authorization of the government of the United States.

[2] When an issuer is required to report activity pursuant to the ITRA in its annual or quarterly report, it must also separately file a notice with the SEC at the same time, indicating that such disclosure is contained in the report. Therefore, it is relatively easy to locate precedent for these disclosures by searching for these notices on the SEC's web site. For example, click on the advance search page of the EDGAR full text search ([http://searchwww.sec.gov/EDGARFSCClient/jsp/EDGAR\\_MainAccess.jsp](http://searchwww.sec.gov/EDGARFSCClient/jsp/EDGAR_MainAccess.jsp)) and, select "IRANNOTICE" in the drop down menu of the form box to pull up the list of companies that filed such notices.

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