

July 9, 2010

MEMORANDUM

RE: President Obama Signs into Law the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010

On July 1, 2010, President Obama signed into law the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Pub. L. No. 111-195) (the "Iran Act"), which seeks to increase the economic pressures placed on the Iranian government. As discussed in more detail below, the Iran Act is similar, but not identical to, the earlier Sudan Accountability and Divestment Act of 2007 (the "Sudan Act"), and includes several important amendments to the Sudan Act.

Among other provisions, Title II of the Iran Act encourages the divestment of state and local monies from Iran in a number of ways, some of which have important implications for public plan trustees and public officials. This memorandum provides an overview of these implications. A copy of the Iran Act is enclosed for your reference.

I. Implications for Public Plans

Section 202 of the Iran Act provides state and local governments with the legal authority to divest their assets, including public plan assets, from any person who engages in certain "investment activities" in Iran. As with the earlier Sudan Act, the Iran Act applies to public pension funds that are "controlled by a state or local government," which raises similar questions regarding whether the Iran Act applies to the public plans that are held in trust.

The Iran Act defines covered "investment activities" as those investments of \$20 million or more in the energy sector of Iran, including individuals and corporations that provide goods used in the development and transport of oil and liquefied natural gas. "Investment activities" also encompass any financial institution that extends credit of \$20 million or more to another person for 45 days or more if that credit will be used in Iran's energy sector.

As with the Sudan Act, the Iran Act requires that the state or local government provides an opportunity for any person whose investment activities might result in divestment to comment in writing to demonstrate that the person does not engage in covered investment activities in Iran. The Iran Act also requires notice to the Department of Justice within 30 days of the adoption of an Iran divestment measure.

Divestment measures adopted prior to enactment of the Iran Act may still be enforced, regardless of their compliance with the "investment activities" definition of the Iran Act. However, the Iran Act requires such pre-existing measures to comply with the notice, timing, and written comment requirements contemplated by the Iran Act beginning on and after July 1, 2012.

II. Implications for ERISA Plans

Section 204 of the Iran Act protects ERISA plan fiduciaries by providing that the decision to divest plan assets (or to avoid certain investments) will not result in a breach of the prudent person and exclusive benefit rules under ERISA sections 404(a)(1)(A) and (B). However, no similar relief is provided with regard to ERISA's diversification and plan document requirements under ERISA sections 404(a)(1)(C) and (D).¹

As with the Sudan Act, ERISA plan fiduciaries will only be protected if they effectively comply with the "everything is equal" standard relating to fiduciary responsibility in considering economically targeted investments most recently articulated by the U.S. Department of Labor in Interpretive Bulletin 08-1, 29 C.F.R. § 2509.08-1. This standard, as stated in the Iran Act and incorporated into the Sudan Act via an amendment, requires ERISA plan fiduciaries to prudently determine that the divestment decisions will not provide the plan with a lower rate of return than alternative investments with commensurate degrees of risk or a higher degree of risk than alternative investments with commensurate rates of return.

III. Implications for Asset Managers

Section 203 of the Iran Act amends section 13(c)(1) Investment Company Act of 1940, 15 U.S.C. § 80a-13(c)(1), to expand the relief previously provided by the Sudan Act for asset managers from criminal or civil suit by the federal and state governments to include Iran divestment actions. The Iran Act also amends section 13(c)(2)(A) of the Investment Company Act, 15 U.S.C. § 80a-13(c)(2)(A), to make clear that nothing in this safe harbor provision "shall be construed to create, imply, diminish, change or affect in any way whether or not a private right of action exists." Act § 205(b)(1). While this change eliminates some uncertainty created by the Sudan Act regarding the government's ability to bring fiduciary breach actions, it reinforces the notion that asset managers have potential liability when operating outside of the scope of the divestment provisions of the Iran Act and Sudan Act. The change also leaves the potential for private actions by plan participants, which means that asset managers may therefore still be liable for divestment actions taken in reliance of the Iran Act and Sudan Act.

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Please call one of the following, or your regular Groom attorney contact, if you have any questions about this matter.²

Ian D. Lanoff	ilanoff@groom.com	(202) 861-6638
J. Matthew Calloway	mcalloway@groom.com	(202) 861-0178

¹ The Iran Act also includes conforming amendments to the Sudan Act, which previously extended relief to the entirety of ERISA section 404.

² Ryan C. Temme, a rising third year law student at the University of Virginia School of Law and Summer Associate at Groom, also contributed to this memorandum.