ALAN WILSON
ATTORNEY GENERAL

May 4, 2018

The Honorable Alan D. Clemmons, Member
South Carolina House of Representatives
P.O. Box 11867
Columbia, SC 29211

Dear Representative Clemmons:

You seek our opinion "with respect to the proper interpretation and implementation of South Carolina's Iran Divestment Act of 2014, S.C. Code Ann. §§ 11-57-10 et seq." By way of background, you provide the following information:

> In response to concerns about Iran's nuclear program, Congress enacted the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA"), which expanded existing United States sanctions against Iran to include sanctions against non-U.S. persons for activities related to Iran's oil, gas, and petrochemical sectors. CISADA also authorized states to adopt measures to divest or prohibit the investment of their assets in persons engaging in investment activities in Iran's energy sector. 22 U.S.C.A. § 8532.
>
> To do its part to protect national and state interests, pursuant to this federal authority. South Carolina enacted the Iran Divestment Act of 2014. 2014 S.C. Acts 2507. The Act requires the State Fiscal Accountability Authority to compile and publish a list of persons that it determines engage in investment activities in Iran's energy sector and debars and prohibits state contracts with those listed persons. S.C. Code Ann. § 11-57-310. The restrictions provided for in the Act apply until: (1) the President or Congress declares that divestment of the type provided for in the Act interferes with the conduct of U.S. foreign policy; or (2) the United States revokes its current sanctions against Iran. S.C. Code Ann. § 11-57-740.
>
> On July 14, 2015, the United States, China, France, Germany, Russia, the United Kingdom, the European Union, and Iran reached a joint Comprehensive Plan of Action ("JCPOA") to ensure Iran's nuclear program remains exclusively peaceful. The JCPOA was intended to "produce the comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions related to Iran's nuclear programme, including steps on access in areas of trade, technology, finance, and energy." Id.
>
> Pursuant to the commitments made in the JCPOA, on January 16, 2016, President Obama issued an Executive Order revoking Executive Orders 13574, 13590, 13622, and 13645, which authorized the nuclear-related sanctions against

Iran's energy and petrochemical sectors. Ex. Ord. No. 13716, 81 FR 3693, 3693-94 (January 16, 2016) (the "Revocation Order"). The Revocation Order also amended Executive Order No. 13628 of October 9, 2012, 77 FR 62139, by revoking sections 5 through 7, which authorized the imposition of sanctions against persons related to the provision of goods or services related to Iran's production of petroleum products. Ex. Ord. No. 13628, 77 FR 62139, 62142-43 (October 9, 2012).

The Revocation Order revoked the United States' nuclear-related sanctions against Iran and lifted the secondary sanctions against non-U.S. persons, which were authorized by CISADA and in effect when South Carolina's law was enacted. The Act explicitly states that the restrictions provided for in the Act will no longer apply if "the United States revokes its current sanctions against Iran."

A question has arisen about whether an investment activity that would have been sanctionable under CISADA and the Act prior to the Revocation Order was undertaken after the Revocation Order would it still be sanctionable under the Act? In other words, if the United States has revoked its current sanctions against Iran such that the restrictions in the Act no longer apply against an entity after January 16, 2016, the date the United States lifted and revoked its sanctions, is previously sanctionable conduct still subject to debarment and sanction under the Act if undertaken after January 16, 2016? If not, would an erroneous and mistaken imposition of sanctions by the State under the Act be considered void ab initio?

In view of the foregoing, I respectfully request the opinion of your office with respect to the continuing applicability of the restrictions contained in the Act and the effect of any restrictions leveled against an entity subsequent to the United States lifting its sanctions. Given the impact that the Act's restrictions may have on an entity engaging in otherwise lawful activities, your advice would be appreciated at the earliest possible date.

Background

Enacted in 2010, the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 ("CISADA") expanded existing United States' sanctions against Iran to include sanctions against non-U.S. persons for activities related to Iran's oil, gas, and petrochemical sectors ("secondary sanctions"). In addition to authorizing secondary sanctions on the national level, CIS AD A authorized states to adopt measures providing for divestment of the assets of the State or prohibiting the investment of the assets of the State in any person that the State determines engages in specified investment activities in Iran. 22 U.S.C.A. § 8532.

While CISADA is not the first Congressional enactment authorizing the imposition of sanctions against Iran, it is the only Iran sanctions action granting states the authority to impose their own secondary sanctions. The authority given to states under CISADA is limited to divestment or debarment based on the subject person's sanctionable investment activities in the energy sector of Iran. 22 U.S.C.A. § 8532(b). Further, Congress cautioned states adopting measures authorized by CISADA to make "every effort to avoid erroneously targeting" a person for divestment or debarment. 22 U.S.C.A. § 8532(d).

Pursuant to the authority granted in CISADA, South Carolina enacted the Iran Divestment Act of 2014, S.C. Code Ann. §§ 11-57-10 et seq. The Act is intended "to fully implement the authority granted under Section 202 [22 U.S.C.A. § 8532] of CISADA. S.C. Code Ann. § 11-57-20(8). The Act requires the State Fiscal Accountability Authority ("SFAA") to compile a list of persons that it determines engage in investment activities in Iran's energy sector and prohibits state contracts with persons identified on the list. S.C. Code Ann. § 11 -57-310. The restrictions provided for in the Act apply only until: (1) the President or Congress declares that divestment of the type provided for in the Act interferes with the conduct of United States foreign policy; or (2) the United States revokes its current sanctions against Iran. S.C. Code Ann. § 11-57-740.

The General Assembly expressly recognized in the Act that "the serious and urgent nature of the threat from Iran demands that states, local governments, and private institutions work together with the federal government and American allies" to address security concerns related to Iran obtaining nuclear weapon capability. S.C. Code Ann. § 11-57-20(4). Further, the Act recognized that CISADA's express authorization to states and local governments concerned the secondary sanctions against "companies operating in Iran's energy sector with investments that have the result of directly or indirectly supporting the efforts of the Government of Iran to achieve nuclear weapons capability." S.C. Code Aim. § 11-57-20(3).

On July 14, 2015, the United States, China, France, Germany, Russia, the United Kingdom, the European Union, and Iran reached a Joint Comprehensive Plan of Action ("JCPOA") to ensure that Iran's nuclear program remains exclusively peaceful. JCPOA, at 2. The JCPOA was intended to "produce the comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions related to Iran's nuclear programme, including steps on access in areas of trade, technology, finance, and energy." Id. On January 16, 2016, "Implementation Day" under the JCPOA, the United States "lifted nuclear-related sanctions on Iran, by terminating a number of Executive Orders that had been issued pursuant to this national emergency and by taking other actions. Though these measures constitute a significant change in our sanctions posture, comprehensive non-nuclear-related sanctions with respect to Iran remain in place." Continuation of the National Emergency With Respect to Iran, 83 Fed. Reg. 11393 (Pres. Notice, March 12, 2018); see also Continuation of the National Emergency With Respect to Iran, 81 Fed. Reg. 12793 (Pres. Notice, March 9,2016).

The JCPOA

> protects the national security of the United States and our partners and allies overseas. And Implementation Day was a significant milestone of the JCPOA. In exchange for Iran verifiably completing its key nuclear-related commitments under the JCPOA, which closed off all of its pathways to a nuclear weapon and put in place robust monitoring and transparency measures going forward, we lifted nuclear-related sanctions on Iran.

Test, of Acting Dir. of the Off. Of Foreign Assets Control John Smith Before the H. Comm. on For. Affairs on the Jt. Comprehensive Plan of Action (JCPOA) Implementation Day and Continuing Monitoring, Treas. JL-0349 (Feb. 11, 2016) (hereinafter "Smith Testimony"). "Ensuring the continued implementation of the JCPOA is a top strategic objective for the United States and for our allies and partners around the world." Statement by the Press Secretary on H.R. 6297 – Iran Sanctions Extension Act, 2016 WL 7239733, at * 1. (Dec. 15, 2015).

The JCPOA committed the United States to cease all sanctions against non-U.S. persons for the following activities: investment, including participation in joint ventures, goods, services, information, technology and technical expertise and support for Iran's oil, gas, and petrochemical sectors; the purchase, acquisition, sale, transportation, or marketing of petroleum, petrochemical products and natural gas from Iran; and transactions with Iran's energy sector. Section 4.3 of Annex II to the JCPOA. The lifting of these nuclear-related secondary sanctions has been described as the most significant action taken pursuant to the JCPOA. Smith Testimony.

As part of the JCPOA, the United States also removed 400 individuals and entities set out in Attachment 3 to Annex II from the Specially Designated Nationals and Blocked Persons List ("SDN List"), "meaning that secondary sanctions no longer attach to significant transactions with, or of material support to, those individuals and entities." Id. In addition, the United States agreed to "actively encourage officials at the state or local level to take into account the changes in the U.S. policy reflected in the lifting of sanctions under this JCPOA and to refrain from actions inconsistent with this change in policy." JCPOA at 10, ¶ 25.

Pursuant to the commitments made in the JCPOA, on January 16, 2016, President Obama issued an Executive Order revoking the following Executive Orders:

- Executive Order 13574 of May 23, 2011, 76 Fed. Reg. 30505 (Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Sanctions Act of 1996, as Amended);
- Executive Order 13590 of November 20, 2011, 76 Fed. Reg. 72609 (Authorizing the Imposition of Certain Sanctions with Respect to the Provision of Goods, Services, Technology, or Support for Iran's Energy and Petrochemical Sectors);
- Executive Order 13622 of July 30, 2012, 77 Fed. Reg. 45897 (Authorizing Additional Sanctions With Respect to Iran); and
- Executive Order 13645 of June 3, 2013, 78 Fed. Reg. 62139 (Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Freedom and Counter-Proliferation Act of 2012 and Additional Sanctions with Respect to Iran).

Ex. Or . No. 13716, 81 Fed. Reg. 3693, 3693-94 (Jan. 16, 2016) ("Revocation Order"). The Revocation Order also amended Executive Order No. 13628 of October 9, 2012, 77 Fed. Reg. 62139, by revoking sections 5 through 7, which authorized the imposition of sanctions against persons related to the provision of goods or services related to Iran's production of petroleum products. Ex. Ord. No. 13628,77 Fed. Reg. 62139, 62142-43 (Oct. 9, 2012).

The Revocation Order was issued "[i]n order to give effect to the United States commitments to lift its sanctions with respect to sanctions described in section 4 of Annex II and section 17.4 of Annex V of the JCPOA." Ex. Ord. No. 13716, 81 Fed. Reg. 3693, 3693-94 (Jan. 16, 2016). As discussed above, the referenced JCPOA sections required cessation of U.S.-nuclear-related secondary sanctions for investment activities in Iran's energy and petrochemical sectors (see sections 4.3 of Annex II and 17.1 of Annex V of the JCPOA).

As a result of the Revocation Order, the nuclear-related sanctions against Iran were revoked and the secondary sanctions against non-U.S. persons, which were authorized by CIS ADA and in effect when South Carolina's law was enacted, were lifted. Smith Testimony. The nuclear-related sanctions against Iran, including the secondary sanctions for investment activities in Iran's energy and petrochemical sectors, remain lifted, and the United States has not implemented any additional sanctions related to Iran's energy and petrochemical sectors subsequent to the issuance of the Revocation Order. Continuation of the National Emergency With Respect to Iran, 83 Fed. Reg. 11393 (Pres. Notice, March 12, 2018).

Law/Analysis

In order to determine whether the restrictions set forth in the Act are no longer applicable, we must first look to the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible."). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will" and "courts are bound to give effect to the expressed intent of the legislature." Media General Communications, Inc. v. South Carolina Dep't of Revenue, 388 S.C. 138, 148, 694 S.C. 2d 525, 530 (2010); Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002). When determining the effect of words utilized in a statute, a court looks to the "plain meaning" of the words. City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011). Finally, because the Act was intended to implement the State's authority granted under CISADA, it should be interpreted in a manner that is consistent with CISADA's framework. Op. S.C. Att'y General, 2014 WL 7505273 (Dec. 29, 2014).

Mindful of the purpose and intent of the enactment of the Act, in applying these principles of statutory construction, we believe the proper construction of the Act is that its restrictions are no longer currently applicable because the United States has revoked sanctions against Iran which meet the Act's definition of "current sanctions." The restrictions provided for in the Act "apply only until: (1) the President or Congress of the United States, by means including, but not limited to, legislation, executive order, or written certification, declares that divestment of the type provided for in this chapter interferes with the conduct of United States foreign policy; or (2) the United States revokes its current sanctions against Iran." S.C. Code Ann. § 11-57-740 (emphasis added). We believe the Revocation Order effectively revoked the "current sanctions against Iran" as that phrase is used in the Act, thus triggering the termination provision provided in Section 11- 57-740(2).

The Revocation Order was issued "[i]n order to give effect to the United States commitments" with respect to sanctions related to Iran's nuclear program, including steps on access in areas of trade, technology, finance, and energy. Ex. Ord. No. 13716, 81 Fed. Reg. 3693, 3693-94 (Jan. 16,2016); JPCOA, at 2. As discussed above, the revoked Executive Orders imposed the energy sector-related secondary sanctions authorized by CISADA, while the corresponding sections of the JCPOA referenced in the Revocation Order concerned the United States' cessation of those sanctions. The revoked Executive Orders, all of which were in effect in 2014, provided the only authorization for assessing energy-related secondary sanctions under CISADA at the time of the Act's enactment. 2014 S.C. Acts 2507. Further, although Congress has previously authorized sanctions against Iran, this is the only time Congress has authorized states to pursue their own sanctions, and that authority related solely to investment activities in Iran's energy sector. Giving effect to the plain meaning of the words in the statute, we believe that the revoked Executive Orders constitute the "current sanctions against Iran" described in the Act.

Generally, state statutes applying sanctions on foreign nations are preempted by the Supremacy Clause. See Crosby v. Nat'l For. Trade Council, 530 U.S. 363,377 (2000); Odebrecht Construction, Inc. v. Secretary, Florida Dep't of Transp., 715 F.3d 1268 (11th Cir. 2013). This is because the state statutes may undermine the President's authority pertaining to international relations. For example, in Crosby v. National Foreign Trade Council, the Supreme Court struck down a Massachusetts law prohibiting state contracts with companies conducting business with Burma because it was more expansive and imposed longer sanctions than the sanctions subsequently passed by Congress. Crosby, 530 U.S. at 377. The Court reasoned that the state statute would undermine the President's authority to act in the national interest regarding lifting sanctions:

> This unyielding application undermines the President's intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy when he may choose to take the discretionary action open to him, whether he believes that the national interest requires sanctions to be lifted, or believes that the promise of lifting sanctions would move the Burmese regime in the democratic direction. Quite simply, if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence.

Id. Although CISADA has no specific preemption provision, it is readily apparent under the statutes that the federal sanctions set the outer limits of the state's authority, such that applying the state sanctions after the President has lifted them and explicitly authorized the conduct would likely run afoul of the Supremacy Clause.

Because the Act explicitly states that the restrictions provided for in the Act will no longer apply if "the United States revokes its current sanctions against Iran," and the Revocation Order revoked all nuclear-related sanctions against Iran that were in effect in 2014, including the only sanctions pertaining to non-U.S. persons who engage in investment activities in the energy

sector of Iran, we believe the proper interpretation of the Act is that its restriction on contracting with persons engaged in investment activities in the energy sector of Iran is no longer applicable.

Therefore, as of January 16, 2016, the secondary sanctions provided for in CISADA were lifted and investments (including purchases) by non-U.S. persons in Iran's energy or petrochemical sectors, as described in the referenced JCPOA sections, do not violate United States or South Carolina law and are no longer considered sanctionable activities. Thus, any sanctions or restrictions leveled against a person for engaging in investment activities which occurred after January 16, 2016 and, thus, were lawful, would be void ab initio. In authorizing state action in this arena. Congress cautioned states to make "every effort to avoid erroneously targeting" a person for divestment or debarment. 22 U.S.C.A. § 8532(d). In light of the foregoing, we believe applying state-level restrictions for lawful activities that the United States has declared non-sanctionable and for which the United States has revoked its sanctions authorizations would be contrary to this Congressional mandate.

Conclusion

In our opinion, the enactment of the Iran Divestment Act was one of those cases in which the Legislature's "reference to a system or body of law referred to not only in their contemporary form but as they may be changed. . . ." Palermo v. Stockton Theatres, 195 P.2d 1, 5 (Cal. 1948). Because the General Assembly, through Section 11-57-740, intended for the restrictions provided for in the Act to cease once the United States revoked its sanctions related to investment in Iran's energy sector, (consistent with federal law and the United States Constitution), the proper interpretation of the Act is that the Revocation Order constituted a revocation of the United States' "current sanctions against Iran" under Section 11-57-740(2). In short, we believe the Iran Divestment Act's restrictions currently are no longer applicable. Further, to the extent that any restrictions were placed pursuant to the Act after the date that the United States revoked these sanctions, those restrictions would be void ab initio as they were imposed without legal authority.

Sincerely,

Robert D. Cook
Solicitor General