

North Carolina’s Iran Divestment Act: *Questions and Answers for NC Local Governments*

*Norma Houston
UNC School of Government¹*

During the 2015 legislative session, the North Carolina General Assembly enacted the Iran Divestment Act ([S.L. 2015-118; SB455](#))² (“the Act”) which prohibits state agencies and local governments from entering into contracts with an entity that has been identified by the North Carolina State Treasurer as being engaged in certain investment activities in the Iranian energy sector. The State Treasurer’s Office is required to publish a list of entities it has identified as engaging in these activities and must update the list every 180 days. An entity identified on the Treasurer’s list (called the “Final Divestment List”) is prohibited from contracting with a state agency or any local governments. In addition, all entities contracting with the State and local governments are prohibited from subcontracting with any entity included on the Final Divestment List. Contracts entered into in violation of the Act are rendered void by operation of statute. State agencies and local governments must require entities to certify that they are not included on the Final Divestment List.

The following pages provide answers to frequently asked questions as well as examples of certification provisions developed by local governments to comply with Act. The text of the legislation can be accessed at this link: [S.L. 2015-118; SB455](#). For the reader’s convenience, specific questions may be accessed directly by clicking on the question in the table of contents below.

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² S.L. 2015-118 enacts a new Article 6A of G.S. Chapter 143C (G.S. 143C-6A-1 through 6A-9, hereinafter G.S.).

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I. Overview of the Iran Divestment Act

1. What is the Iran Divestment Act?

The General Assembly enacted the Iran Divestment Act during the 2015 legislative session. The purpose of the Act is to implement the authority granted to states by federal law³ to impose state-level sanctions against companies that engage in certain investment activities in the energy sector of Iran.

The Act imposes two sanctions. First, the State Treasurer is prohibited from investing funds held by the North Carolina Retirement Systems or the Department of the State Treasurer with any entities the Treasurer finds to be engaging in certain investment activities in Iran.⁴ Second, entities found by the Treasurer to be engaging in these activities are prohibited from contracting with state agencies and political subdivisions of the state, and all contractors under State and local government contracts are prohibited from subcontracting with these entities. The second sanction is the topic of this publication.

³ The authority to impose state-level sanctions is granted under Section 202 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Public Law 111-195).

⁴ G.S. 143C-6A-4.

The Act remains in effect until the President or U.S. Congress declares that the divestments required under the Act interfere with U.S. foreign policy, grants exceptions for any specific investment activities, or Congress revokes the authority for state-level sanctions. According to the State Treasurer's office, at this time neither the President nor Congress have issued a certification or waiver that suspends the authority granted by federal law.⁵ In addition, because the federal Treasury Department has indicated that the Joint Comprehensive Plan of Action process implemented on January 16, 2016 did not lift sanctions for U.S. persons, there appears not to have been any implicit Presidential order that suspends this authority.⁶

2. What are the investment activities that trigger the Act's prohibitions?

The Act defines "investment activities in Iran" as

- providing \$20 million or more in goods or services to the energy sector in Iran (developing petroleum, natural gas, or nuclear power); or
- extending credit or financing of \$20 million or more to anyone providing goods or services to the energy sector in Iran (this second activity is limited to financial institutions).⁷

Any person the State Treasurer identifies as engaging in either of these activities is subject to the Act's prohibitions.

3. What entities might be subject to the Act's prohibitions?

The Act imposes the prohibitions discussed above on "persons" engaging in investment activities in the Iranian energy sector. These "persons"⁸ are:

- A natural person, corporation, company, limited liability company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group.
- Any governmental entity or instrumentality of a government, including a multilateral development institution, as defined in section 1701(c)(3) of the International Financial Institutions Act (22 U.S.C. § 262r(c)(3)).⁹

⁵ § 202(b) of PL 111-195.

⁶ See pages 2 to 3 of the Implementation Guide published at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/implement_guide_jcpoa.pdf.

⁷ G.S. 143C-6A-3(4).

⁸ G.S. 143C-6A-4(6).

⁹ The international financial institutions included in this definition are the International Bank for Reconstruction and Development, European Bank for Reconstruction and Development, International Development Association, International Finance Corporation, Multilateral Investment Guarantee Agency, African Development Bank, African Development Fund, Asian Development Bank, Inter-American Development Bank, Bank for Economic Cooperation and Development in the Middle East and North Africa, and Inter-American Investment Corporation (22 U.S.C. § 262r(c)(2)).

- Any successor, parent entity owning more than 20%, or majority-owned subunit or subsidiary of any entity described above.

Under this broad definition, the prohibitions of the Act could apply to any individual person, corporation or business, nonprofit or other non-governmental entity, the specific financial institutions listed in the federal law cited in the second bullet above, and any other entity that owns more than 20% of any these or is a majority-owned subunit or subsidiary of any of these. Despite the breadth of this definition, however, it is important to keep in mind that the Act's prohibitions will only be triggered if the Treasurer determines that the person is engaging in investment activities in the Iranian energy sector valued at \$20 million or more.

4. How do we know what companies the Treasurer has determined are engaging in investment activities in Iran?

The Treasurer's office is required to publish a list of all persons it has determined are engaging in investment activities in the Iranian energy sector valued at \$20 million or more, and to update the list every 180 days (6 months). This list is referred to as the Final Divestment List ("the Iran List"). The Iran List is available on the Treasurer's website at <https://www.nctreasurer.com/inside-the-department/OpenGovernment/Pages/Iran-Divestment-Act-Resources.aspx>.

The Treasurer's office has developed two lists, both of which are available at the website listed above. The Final Divestment List provides the names of persons engaging directly in investment activities in the Iranian energy sector. The Iran Parent and Subsidiary Guidance lists the names of companies that own more than 20% of or are a majority-owned subunit or subsidiary of a person on the Final Divestment List. Entities identified on *both* lists are subject to the Act's prohibitions, and local governments cannot enter into contracts with them.

5. What units of local government does the Act apply to?

All units of local government are subject to the Act. While the legislation uses the term "State agency," that term is defined in the Act as "any board, commission, department, executive department, officer, institution, and *any political subdivision of the State.*"¹⁰ This means *all* units of local government, including cities, counties, school districts, water and sewer authorities, transit authorities, public housing authorities, public hospitals, sanitary districts, airport authorities, and tourism development authorities (TDA) as well as departments, offices, and other subunits of political subdivisions.

6. What are local governments prohibited from doing?

Local governments are prohibited from entering into contracts (including contract renewals and assignments) with any person identified in the Treasurer's Final Divestment List or Iran

¹⁰ G.S. 143C-6A-3(7).

Parent and Subsidiary Guidance.¹¹ A contract with any person on either list (“the Iran List”) is rendered void by operation of the statute.¹² Any existing contract with a person added to the Iran List while the contract is still in effect will be allowed to expire in accordance with the contract’s terms.¹³

7. What are local governments required to do?

Local governments must require a person who “attempts to contract” with them to certify that the person is not identified on the Iran List. This certification must be included in what the Act refers to as the “procurement record” (presumably this means records such as the bid, project, contract file, or even within the terms and conditions of a contract or purchase order).¹⁴ Specific questions about the certification requirement are discussed in Section II.

II. Application of Iran Divestment Act to Local Government Contracts

8. What types of contracts are subject to the Act?

The Act consistently uses the term “contract” and does not limit this term in any way, such as “contracts for goods and services.” Because there is no limiting language in the Act, it presumably applies to *all* contracts entered into by units of local government unless one of three exceptions applies (see Question 9 for discussion of exceptions). The Act also applies to contract renewals and assignments.¹⁵

Examples of local government contracts subject to the Act include:

- Purchase and construction or repair in the informal bidding ranges
- Purchase and construction or repair in the formal bidding ranges
- Purchase and construction or repair below the informal bid threshold
- Grants awarded to and received from nongovernmental entities
- Leases (both as lessor and as lessee)
- Real property acquisition and sale
- Surplus personal property disposal
- Contracts with non-profits
- Service contracts, including all general services, audit, and legal contracts
- Contracts subject to the Mini-Brooks Act (architectural, engineering, surveying, and alternative construction delivery methods)
- Bond issuances, borrowing contracts, and other financing agreements with private financial institutions

¹¹ G.S. 143C-6A-6(a).

¹² G.S. 143C-6A-6(b).

¹³ G.S. 143C-6A-6(c).

¹⁴ G.S. 143C-6A-5(a).

¹⁵ G.S. 143C-6A-5(c).

9. Are there any exceptions?

Yes. The Act exempts three categories of contracts:¹⁶

- a) Contracts valued at \$1,000 or less.
- b) Contracts with persons who the Treasurer has determined are currently withdrawing from investment activities in the Iranian energy sector. The Treasurer is required to publish a “Substantial Positive Action Exception List” of these persons, and to update the list every 180 days.
- c) Contracts with persons listed on the Iran List that provide commodities or services which the local government determines are necessary to perform its functions and which the local government would not be able to obtain otherwise.

Note that the last exception is more narrow than the sole source exception to competitive bidding requirements for purchase contracts under G.S. 143-129(e)(6). The “necessary commodities or services” exception to the Act requires the local government to make its determination of necessity in good faith on a case-by-case basis, and to enter its determination into the procurement record. The determination of necessity contemplates a specific commodity or service that is essential to governmental functions.

10. Does the cost of sales tax and other taxes or fees count toward the \$1,000 exemption threshold?

Yes. The Act exempts “contracts valued at one thousand dollars (\$1,000) or less.”¹⁷ Because a local government is legally obligated to pay sales tax and other applicable taxes or fees related to the purchase, the amount of taxes and fees become part of the contract.

11. What is the certification requirement?

For all contracts covered under the Act, the local government must require the person with whom it is contracting to certify that the person is not included on the Iran List.

12. Is a vendor or contractor required to certify that it will not hire any subcontractors who are on the Final Divestment list?

While the Act prohibits vendors and contractors from hiring subcontractors who are on the Iran List,¹⁸ they are not required to certify that they will not do so. Vendors and contractors are only required to certify that they themselves are not on the list.¹⁹ Nonetheless, it is prudent for local governments to require vendors and contractors to certify that they will not engage subcontractors who are on the Iran List.

¹⁶ G.S. 143C-6A-7.

¹⁷ G.S. 143C-6A-7.

¹⁸ G.S. 143C-6A-5(b).

¹⁹ G.S. 143C-6A-5(a).

13. Must the vendor or contractor actually sign the certification?

No. The Act requires the vendor or contractor to “certify,” but does not require the certification be signed or notarized. As discussed in more detail below, acceptance by the vendor or contractor of a certification statement contained in the terms and conditions of a contract, purchase order, or the unit’s bid specifications when submitting a bid can constitute certification by the vendor. Absent using these or similar processes, the local government should obtain a certification signed by the contractor.

14. How long must we keep the certification on file?

The Act requires local governments to include certification information in the “procurement record” but does not indicate the time period this information must be retained. Since the certification information is related to a local government contract, the local government should retain it for the time period required for that type of contract under the public records retention schedule adopted by the governing board.²⁰

15. Is it sufficient to include a certification statement in the contract with the winning bidder in lieu of obtaining separate certifications from all bidders?

Yes. Under the Act, local governments are required to obtain certification that a person is not included on the Iran List “at the time the bid is submitted or the contract is entered into, renewed, or assigned.”²¹ Because the word “or” is used, local governments may elect to obtain certifications on contracts subject to competitive bidding requirements (or which the local government chooses to bid even if not legally required to do so) from all bidders during the bid process or from the winning bidder only. If the contract is entered into without bidding (such as service contracts or purchase and construction or repair contracts below the competitive bidding threshold), the local government must obtain the certification when it enters into the contract.

16. Is it sufficient to include a certification statement in the bid specifications in lieu of obtaining separate certifications from all bidders?

Yes. A local government may include in its bid specifications a statement to the effect that, by submitting a bid, the bidder certifies that neither it nor its subcontractors are included on the Iran List.

²⁰ Local governments must adopt public records retention schedules consistent with those published by the North Carolina Department of Natural and Cultural Resources (G.S. 121-5). For most local governments, records relating to construction or repair contracts must be retained for six years; records relating to all other contracts must be retained for three years. The Department’s records retention schedule is available at <http://archives.ncdcr.gov/For-Government/Retention-Schedules/Local-Schedules>.

²¹ G.S. 143C-6A-5(a); emphasis added.

17. Is it sufficient to include a certification statement in the standard terms and conditions of purchase orders and other similar documents in lieu of obtaining a separate certification from vendors?

Yes. A local government may include a certification statement in the standard terms and conditions of its purchase orders that, by accepting the order, the vendor certifies that neither it nor its subcontractors are included on the Iran List.

18. What about purchase orders that are processed electronically and do not require a vendor's signature?

As discussed in Question 13, the Act does not require the vendor to sign or notarize the certification. This does not, however, alleviate the local government's obligation under the Act to obtain certification from the vendor. To satisfy this requirement, the local government may include certification language in the standard terms and conditions of its purchase orders (see Question 17).

19. Is it sufficient to simply check the Final Divestment List or must we still obtain a certification from a vendor even if that vendor isn't on the Iran List?

It is not legally sufficient to check the Iran List in lieu of obtaining a certification from the person with whom the local government enters into a contract. The Act places an affirmative obligation on local governments to require certification. Merely checking the Iran List before awarding the contract is not sufficient.

20. What about purchases with P-cards, credit cards, fuel cards, etc.? Must we get a certification with each purchase?

No. Purchases made with cards such as P-cards, credit cards, and fuel cards are NOT subject to the Act because transactions of this nature require that payment to the vendor be made by the card-issuing institution, not the local government. A local government's contract with the card-issuing institution is subject to the Act, so the local government must obtain certification from that institution and would be prohibited from entering into a contract with any institution that is included on the Iran List. Keep in mind that purchases costing less than \$1,000 are exempt from the Act (See Question 9).

21. What about purchases made under a master contract or blanket purchase order? Must we get a certification with each purchase?

No. Since the local government must obtain certification from the vendor when it enters into the master contract or blanket purchase order, purchases made under that contract will be covered by the certification for the master contract or blanket purchase order.

22. Can a certification from a vendor with whom we regularly do business be valid for a certain period of time to avoid having to obtain a separate certification each time we do business with this vendor?

The Act requires certification *when the contract is entered into*. Since an individual purchase is a form of contract, a strict interpretation of the Act would require a local government to obtain certification each time it makes a purchase from that vendor. Such an interpretation, however, would place a significant administrative burden on local governments and their vendors. Local governments may address this problem by issuing blanket purchase orders or master contracts as discussed in Question 21. Local governments may also choose to include certification language in the standard terms and conditions of their purchase orders and other similar documents.

23. What about buying off State contract? If the State has already obtained a certification from the vendor, is the local government still required to do so?

Yes. The Act places an affirmative obligation on the local government to obtain certification from the vendor or contractor *when it enters into the contract*. The Act has no language providing that (or even suggesting that) a certification obtained by one unit of government on one contract could be considered valid for another unit of government on another contract.

24. What about contracts entered into under the piggyback exception to competitive bidding requirements? If the governmental unit that entered into the original contract already obtained a certification from the vendor, is the local government piggybacking off that contract still required to do so?

Yes. As discussed in Question 23, the Act has no language providing that (or even suggesting that) a certification obtained by one unit of government on one contract could be considered valid for another unit of government on another contract.

25. What about buying off federal contract (GSA contracts)? If the federal government already obtained a certification from the vendor, is the local government still required to do so?

Yes. As discussed in Question 23, the Act has no language providing that (or even suggesting that) a certification obtained by one unit of government on one contract could be considered valid for another unit of government on another contract.

26. What about buying off a group purchasing program (co-op) contract? If the group purchasing program already obtained a certification from the vendor, is the local government still required to do so?

Yes. As discussed in Question 23, the Act has no language providing that (or even suggesting that) a certification obtained by one unit of government on one contract could be considered valid for another unit of government on another contract.

27. Are contracts with other units of government covered under the Act?

No. The only governmental entities included in the definition of “person” under the Act are a small group of foreign financial institutions specifically identified in federal law, and does not include any units of federal, state, or local government in the United States.²² Thus, a local government entering into a contract, interlocal agreement, memorandum of understanding, etc. with another unit of government is not required to obtain a certification from that unit.

28. Are grant agreements for grants we receive covered under the Act?

Yes, unless the grant is awarded by a unit of government, such as the State or a federal agency (See Question 27). Grants are a form of contract, so if the grant is awarded by a nongovernmental entity (such as a foundation), the grant agreement is subject to the Act and the local government must obtain a certification from the granting entity.²³

29. What about grants we award – are they covered under the Act?

Yes. Just like grants *received* by the local government (See Question 28), grants *awarded* by the local government are subject to the Act. Grants are a form of contract, so if the grant is awarded to a nongovernmental entity (such as a nonprofit), the grant is subject to the Act and the local government must obtain a certification from the entity receiving the grant.

30. Are contracts with non-profits covered under the Act?

Yes. Because the definition of “person” under the Act specifically includes any “nongovernmental entity or group,”²⁴ contracts with non-profits, including grant awards (See Questions 28 and 29), are covered under the Act and the local government must obtain a certification from the non-profit.

31. Are audit contracts covered under the Act?

Yes. The Act applies to all local government contracts unless an exception applies (see Question 9 for discussion of exemptions). The State Treasurer’s office is in the process of updating its template audit contract to include certification language.

32. Can the State Treasurer make any modifications to the Act’s requirements and prohibitions?

No. The State Treasurer does not have the authority to modify a statutory requirement, such as increasing the \$1,000 exemption threshold, granting exemptions beyond those

²² G.S. 143C-6A-3(6)b. The institutions identified in federal law are the International Bank for Reconstruction and Development, European Bank for Reconstruction and Development, International Development Association, International Finance Corporation, Multilateral Investment Guarantee Agency, African Development Bank, African Development Fund, Asian Development Bank, Inter-American Development Bank, Bank for Economic Cooperation and Development in the Middle East and North Africa, and Inter-American Investment Corporation (22 U.S.C. § 262r(c)(2)).

²³ The definition of “person” specifically includes any “nongovernmental entity or group.” G.S. 143C-6A-3(6)a.

²⁴ *Id.*

included in the Act, or allowing self-certification by checking the Iran List in lieu of obtaining certifications from vendors or contractors. Only the General Assembly can modify the Act.

III. Violations

33. What are the consequences if we contract with a person on the Iran List?

Under the Act, a contract entered into with a person on the Iran List is rendered void by operation of statute.²⁵ This means that the contract is *automatically* void; litigation and a court decision are not necessary for this result.

34. What are the consequences if a vendor or contractor who is NOT on the Iran List engages a subcontractor who IS on the list?

The Act does not address this question. While the Act specifically prohibits vendors and contractors from engaging subcontractors who are on the Iran List, the Act does not impose any specific penalties if the vendor or contractor does so. Nor does the Act render the local government's contract with the vendor or contractor void in this situation.

35. What if a vendor or contractor with whom we have an existing contract is placed on the Iran List while the contract is still in effect?

The Act specifically provides that existing contracts in this situation remain valid and are allowed to expire in accordance with the terms and conditions of the contract.²⁶ If a local government chooses to include a provision in the contract that makes being placed on the Iran List a violation of the contract's terms and conditions, the local government could terminate the contract if this situation occurs.

Although contracts in this situation remain valid until the end of the contract's initial term, the local government cannot renew the contract if the vendor or contractor is on the Iran List at the time of renewal. If the local government renews a contract with a vendor or contractor who is included on the list, that contract would be void.

36. What are the consequences if we don't get a certification?

The Act does not address this question. While the Act renders void a contract entered into with a person on the Iran List, it does not provide any penalty or consequence for failing to obtain a certification. This does not mean that local governments should ignore the certification requirement. It is imposed by state law, and local governments are obligated to comply with state law. It is conceivable that a court may rule the contract void for failure to comply with a statutory requirement, but such a result could only occur if the local government is sued for failing to obtain a certification. Such a suit is highly unlikely to succeed because the Act specifically provides that it does not create or authorize a private right of action to enforce its provisions.

²⁵ G.S. 143C-6A-6(b).

²⁶ G.S. 143C-6A-6(c).

IV. Sample Certification Statements

City of Raleigh:

IRAN DIVESTMENT ACT CERTIFICATION

Contractor certifies that, as of the date listed below, it is not on the Final Divestment List as created by the State Treasurer pursuant to N.C.G.S. § 143-6A-4. In compliance with the requirements of the Iran Divestment Act and N.C.G.S. § 143C-6A-5(b), Contractor shall not utilize in the performance of the contract any subcontractor that is identified on the Final Divestment List.

Town of Cary:

Iran Divestment Act Certification. Contractor hereby certifies that Contractor, and all subcontractors, are not on the Iran Final Divestment List (“List”) created by the North Carolina State Treasurer pursuant to N.C.G.S. 143-6A-4. Contractor shall not utilize any subcontractor that is identified on the List.

Town of Zebulon:

By acceptance of this purchase order, vendors, contractors, and/or subcontractors affirm they are not listed on the Final Divestment List created by the State Treasurer pursuant to N.C.G.S. 143-6A-4, Iran Divestment Act Certification.

Union County:

Seller certifies that: (i) Seller is not listed on the Final Divestment List created by the State Treasurer pursuant to N.C.G.S. § 143C-6A-4 (the “Final Divestment List”), and (ii) Seller will not utilize any subcontractor performing work under this Purchase Order which is listed on the Final Divestment List. The Final Divestment List can be found on the State Treasurer’s website at the address www.nctreasurer.com/iran and should be updated every 180 days.

State of South Carolina University System:

IRAN DIVESTMENT ACT -CERTIFICATION AND ONGOING OBLIGATIONS: The Iran Divestment Act is contained in Section 11-57 of the South Carolina Code of Laws. The Iran Divestment Act List is a list published by the South Carolina Budget and Control Board pursuant to the requirements of this Act that identifies persons engaged in investment activities in Iran. Currently, the list is available at the following URL: <http://procurement.sc.gov/PS/PS-iran-divestment.ptm>.

By accepting an order from the University, the Contractor certifies that, as of the date of acceptance, it is not on the then-current version of the Iran Divestment Act List. Contractor agrees to not contract with any person to perform a part of the contractual work, if, at the time the Contractor enters into a subcontract, that person is on the then-current version of the Iran Divestment Act List. Contractor further agrees to notify the Procurement Officer if, at any time during the contract term, including any renewal terms, it is added to the Iran Divestment Act List.