

Client Alert

International Trade & Litigation Practice Group

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ANTICIPATED CHANGES TO RUSSIAN SANCTIONS

On August 2, 2017, President Trump signed “H.R. 3364 – Countering America’s Adversaries Through Sanctions Act” (the “Act”) into law. The law, which introduces several important changes to the Russia, Iran, and North Korea sanctions programs, passed both houses of Congress with overwhelming bipartisan support. This client alert discusses the key changes which will impact the Russia sanctions program.

SUMMARY

From a review of the Act, it is clear that Congress had two primary objectives: First, Congress intended to limit the President’s ability to change the Russia sanctions program without its input. Second, Congress intended to mandate changes strengthening certain of the existing sanctions against Russia.

Below we discuss several key elements of the Act.

KEY ELEMENTS OF THE ACT

Congressional Oversight

The Act requires that the President submit a report to Congress if he wishes to take any of the following actions: (i) terminate any of the Russia sanctions; (ii) terminate any of the Russia sanctions with respect to its application to a particular person; or (iii) take a licensing action that “significantly alters” the United States’ foreign policy with respect to the Russian Federation.

Upon receipt of such a report, Congress has up to 30 days to issue either a Joint Resolution of Approval or a Joint Resolution of Disapproval. If, however, the President issues such a report to Congress near August recess (specific dates are provided in the Act), Congress has up to 60 days to issue a Joint Resolution. The President is not allowed to take the proposed action before the waiting period expires, unless Congress issues a Joint Resolution of Approval. If Congress enacts a Joint Resolution of Disapproval, the President may not take the proposed action.

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Sanctions Codification

All existing U.S. sanctions on Russia related to Russia's activities in the Ukraine, cyber intrusions, and interference in U.S. elections were implemented by a series of Executive Orders during the Obama Administration. The Act codifies those sanctions measures, meaning they can no longer be suspended or terminated by Executive action alone. Instead, any changes to the Russia sanctions must be made with Congressional involvement, in accordance with the process described above.

New & Amended Sanctions

In addition to making it more difficult for the President to make changes to the Russia sanctions program, the Act also strengthens the existing sanctions program as follows.

- **Sectoral Sanctions:** Executive Order 13662 ("EO 13662") imposed sanctions on specified entities operating in the Russian economy in the financial services sector, defense sector, and energy sector, including deep-water, Arctic offshore, or shale projects that have the potential to produce oil in the Russian Federation, or in maritime area claimed by the Russian Federation and extending from its territory.
 - The Act strengthens the Directives that implement EO 13662 by adding the railway sector to the metals, mining, and energy sectors. This means that persons and entities in the railway sector may also be listed on the Sectoral Sanctions Identifications List and, thus, subject to certain sanctions, if the Department of Treasury determines they meet the necessary criteria to be listed.
 - The Act directs the Secretary of Treasury to tighten the restrictions related to certain debt transactions within 60 days after enactment of the Act, *i.e.*, by October 1, 2017:
 - Directive 1 of the existing sectoral sanctions prohibits all transactions in, provision of financing for, and dealings in new debt of longer than 30 days maturity of persons (including entities) listed by the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") as subject to Directive 1, their property, or their interests in property. Under the Act, the maturity date for new debt is changed from 30 to 14 days.
 - Directive 2 of the existing sectoral sanctions prohibits all transactions in, provision of financing for, and other dealings in new debt of longer than 90 days maturity of persons (including entities) listed by OFAC as subject to Directive 2, their property, or their interests in property. Under the Act, the maturity date for new debt is changed from 90 to 60 days.
 - The Act expands energy sector sanctions under Directive 4 of the current sectoral sanctions by prohibiting the provision, exportation, or reexportation, directly or indirectly, of goods, services (except for financial services), or technology in support of exploration or production for deepwater, Arctic offshore, or shale projects that (i) have the potential to produce oil and (ii) involve any person determined to be subject to the Directive, their property, or their interests in property, who has a controlling interest or substantial non-controlling ownership interest in such a project defined as not less than a 33% interest. This modification must be made by the Secretary of Treasury no later than 90 days after enactment of the Act, *i.e.*, by October 31, 2017.
 - The current Directive 4 proscribed similar prohibitions but limited them to "projects that have the potential to produce oil *in the Russian Federation, or in maritime area claimed by the*

Russian Federation and extending from its territory, and that involve any person determined to be subject to this Directive, its property, or its interests in property” (emphasis added). The Act extends the prohibitions to support for exploration or production for deepwater, Arctic offshore, or shale projects involving persons subject to Directive 4 which have the potential to produce oil *anywhere* in the world.

- In addition, in a departure from OFAC practice, which requires that if a person is listed as subject to sanctions, that person’s designation extends to any entity in which the designated person owns a 50% or greater interest, the Act imposes sanctions on entities or projects where such entities or projects have sanctioned owners with a substantial non-controlling ownership interest. Note that under this formulation, the ownership interest would be less than a 50% interest and could be as low as a 33% interest.
- **Development of Pipelines in Russia:** The Act provides the President with discretion to impose sanctions on any person who knowingly facilitates the development of energy export pipelines in the Russian Federation. Such sanctions include the inability to access any services from the Export-Import Bank, prohibition on certain exports, prohibition on receipt of loans from United States financial institutions, prohibition on loans from international financial institutions, as well as other financial sanctions.

The Act amended the language of an earlier Senate bill passed in June 2017 by specifying that the U.S. shall coordinate with U.S. allies prior to imposing these discretionary sanctions. This amendment reportedly was in response to lobbying by European governments and others who vigorously opposed this provision. Although the term ‘coordination’ is not defined, its inclusion could be used as an indication of congressional intent, i.e., that discretionary sanctions should not be imposed under this section absent some degree of consensus with our allies. Those advocating for this change have concluded that it makes it less likely that discretionary sanctions under this provision will be imposed.

- **Cybersecurity:** The President is required to impose certain sanctions, such as asset blocking and visa refusal or revocation, on any person which he determines “knowingly engages in significant activities undermining cybersecurity against any person, including a democratic institution, or government on behalf of the Government of the Russian Federation” or “is owned or controlled by, or acts or purports to act on behalf of” such a person. The President is required to impose certain additional sanctions on financial institutions which materially assist such activities.
- **Crude Oil Projects & Defense-Related Transactions:** The Ukraine Freedom Support Act of 2014 specifies that the President “*may* impose” certain sanctions on a person who knowingly makes a significant investment in certain Russian crude oil projects. The Act specifies instead that the President is *required* to impose such sanctions, “unless the President determines that it is not in the national interest of the United States to do so.”

Similarly, the Ukraine Freedom Support Act of 2014 specifies that the President “*may* impose” certain sanctions on foreign financial institutions engaged in transactions involving the defense and energy sectors. The Act specifies the President is *required* to impose such sanctions, “unless the President determines that it is not in the national interest of the United States to do so.”

- **Corrupt Russian Actors:** Section 9 of the Support for the Sovereignty, Integrity, Democracy, and Economic Stability of Ukraine Act of 2014 authorizes the President to sanction Russian officials and other individuals responsible for “acts of significant corruption.” The Act specifies that the President is *required* to impose certain sanctions, such as asset blocking and visa refusal or revocation, on such individuals.

- **Foreign Sanctions Evaders & Human Rights Abusers:** The Act mandates that the President impose certain sanctions on those persons who evade or facilitate a violation of the Russia sanctions program. It also mandates that the President implement sanctions on those foreign persons who engage in serious human rights abuses.
- **Intelligence & Defense Sectors:** The Act mandates that the President impose sanctions with respect to any person that the President determines knowingly engages in a significant transaction with a person that is a part of the defense or intelligence sectors of the Russian Federation, including the Main Intelligence Agency of the General Staff of the Armed Forces of the Russian Federation or the Federal Security Services of the Russian Federation. What remains unclear from the text of the Act is whether this potentially subjects to sanctions Russian state controlled enterprises that engage in both commercial and military activities, such as many of the large Russian aerospace companies.
- **Privatization of State-Owned Assets:** The Act mandates that the President impose sanctions on any person who he determines invests in the privatization of state-owned assets in a manner that unjustly benefits an official of the Russian Federation or their family members or close associates.
- **Weapons & Syria:** The Act mandates that the President impose sanctions on a foreign person if the President determines that such foreign person knowingly exported, transferred, or otherwise provided to Syria significant financial, material or technological support that contributes materially to the ability of Syria to acquire or develop chemical, biological, or nuclear weapons, ballistic or cruise missiles, and other destabilizing weapons.

Strengthening Allies

The Act also includes an authorization of appropriation for \$250 million for fiscal years 2018 and 2019 to strengthen allies in Central and Eastern Europe. The funds can be used for a variety of items, including to protect critical infrastructure and electoral mechanisms from cyber-attacks, combat corruption, respond to certain humanitarian crises, and build the capacity of civil society, media and other NGOs.

Other Elements

Numerous requirements throughout the Act mandate periodic reports to Congress. Importantly, the Act also contains customary national security waiver authorizations which permit the President to waive application of sanctions under certain specified conditions.

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