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Regulatory Alert:

U.S. Imposes New Sanctions on Russia, Iran, and North Korea

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On August 2, 2017, President Trump signed the Countering America's Adversaries Through Sanctions Act ("CAATSA"), imposing new sanctions against Russia, Iran and North Korea. The Administration had initially urged Congress not to act on the proposed legislation, as the president and Secretary of State Rex Tillerson sought to make inroads on the relationship with Russia and considered the bill, as it related to Russia sanctions, to amount to congressional overreach into presidential powers to conduct foreign policy. Not surprisingly, the president issued two presidential signing statements, describing numerous perceived constitutional and practical flaws in the legislation. Still, the bill had near unanimous bipartisan support and passed both houses of Congress overwhelmingly, making any veto futile in the face of almost certain override. To the extent within the discretion of the Executive Branch, the precise scope and reach of additional sanctions under CAATSA, as implemented, remains to be seen.

1. New Sanctions on Russia

As described below in greater detail, the new sanctions imposed on Russia pursuant to Title II of CAATSA are far-reaching, strengthening certain existing sanctions and authorizing or requiring the president to impose new secondary or blocking sanctions on U.S., Russian or even third country entities or individuals engaged in certain business or nefarious activities in or relating to Russia. CAATSA also expressly scales back the president's discretionary authority in implementing or revising U.S. sanctions on Russia.

1.1. Codification of Existing Sanctions & Requiring Congressional Approval of Future Changes

Perhaps the most controversial aspect of CAATSA is the codification in Section 222 of the previously imposed cyber-related sanctions as well as sanctions imposed on Russia and Crimea pursuant to several Executive Orders issued by President Obama. A sitting president has the authority to reverse actions taken by a predecessor via Executive Order. However, codification into law of the provisions of Executive Orders issued by President Obama makes it impossible for the Trump Administration to relax those sanctions without Congressional approval. While there are mechanisms in the new law for waivers of certain sanctions on Russia, as described below, such waivers are only permitted after the president submits written determinations and certifications of facts to Congress.

Section 216 of CAATSA requires the president to submit to Congress a report of any proposed executive action to: i) terminate or waive the Russia sanctions, including SDN or Sectoral Sanctions Identification List designations; or ii) issue a regulatory license that significantly alters U.S. foreign policy vis-à-vis Russia. The report has to detail whether or not the proposed action is intended to significantly alter U.S. foreign policy vis-à-vis Russia, and if so, provide a justification for the change and an indication of the effect on U.S. national security. Once a report is submitted, Congress will have 30 days to review the report (60 days if the report is submitted between July 10 and September 7), and the president cannot take the proposed action during the review period unless Congress passes a

joint resolution authorizing the action. If instead Congress passes a joint resolution of disapproval of the proposed action, the president cannot take the action for 12 days after the passage of the joint resolution, or if the president vetoes the joint resolution, 10 days after the veto. If the joint resolution passes over a veto, the president may not take the action. This is a new check on presidential authority over licensing and designation of individuals or entities subject to sanctions vis-à-vis Russia, subjects heretofore within the discretion of OFAC, as directed by the president.

1.2. Further Restrictions Under OFAC's Directives 1, 2 and 4

OFAC's Directive 1 has prohibited U.S. persons from involvement in any transactions or dealings related to new debt of longer than 30 days maturity or new equity of Directive 1 designated Russian financial institutions. Directive 2 has imposed the same prohibitions with respect to new debt of longer than 90 days maturity of Directive 2 designated Russian energy firms. The new sanctions under CAATSA reduce those time periods to 14 days in the case of Directive 1 and 60 days in the case of Directive 2. Because OFAC has adopted a broad interpretation of the meaning of "new debt," even payment terms that allow for over 14 or 60 days' time, as the case may be, to pay for goods sold will be considered to be prohibited transactions. As a practical matter, businesses making sales to designated entities should strongly consider requiring pre-payment.

Directive 4 has prohibited U.S. persons from any involvement in or support of (except for provision of financial services) deepwater, Arctic offshore, or shale projects with the potential to produce oil in Russia if the project involves any Directive 4 designated entities (the five major Russian oil and gas companies – Gazprom, Gazprom Neft, Lukoil, Surgutneftegas, and Rosneft – and any of their 50% or more owned subsidiaries). As such, Directive 4 has operated to effectively prohibit U.S. companies from involvement in unconventional oil exploration projects in Russia, since virtually any such project is almost certain to involve a Directive 4 designated entity.

The new sanctions under CAATSA drastically expand the scope of Directive 4 by prohibiting U.S. person involvement with or support of (except for provision of financial services) new deepwater, Arctic offshore or shale projects with the potential to produce oil *anywhere in the world* – not just Russia – if a Directive 4 designated entity has a 33% or more ownership stake in the project. Directive 4 has to date only restricted the specified projects in Russia and, as a practical matter, did not require much investigation into the parties involved because the restricted projects were almost certain to involve a designated entity. Now, to ensure compliance, U.S. persons will need to conduct extensive due diligence on energy operations and projects anywhere in the world to determine whether the project qualifies as deepwater, Arctic offshore, or shale, and to ascertain the various ownership interests in the project. Such due diligence could be especially tricky for subcontractors who would not in the ordinary course of business necessarily be privy to information about the identity of counterparties on projects and the nature of the exploration.

OFAC will have 60 days to implement the changes to Directives 1 and 2, and 90 days for Directive 4. Directive 3 targets the Russian defense sector, prohibiting the provision of new debt of more than 30 days maturity to certain designated entities, and is not addressed or revised by CAATSA.

1.3. Secondary Sanctions for Certain Activities Involving Russian Export Pipelines

Section 232 of CAATSA authorizes the president to impose discretionary sanctions on any U.S. or non-U.S. person that knowingly (i) makes an investment that "directly and significantly" (this term remains to be defined, presumably as part of implementing regulations) contributes to the enhancement of Russia's ability to construct energy export pipelines, or (ii) furnishes goods, services, technology or information valued at \$1 million or more, or \$5 million or more in the aggregate during a 12-month period, to support the construction of Russian energy export pipelines. The president can choose to impose five or more sanctions from a menu of options, including restrictions on access to U.S. Export-Import Bank financing, U.S. export licenses, U.S. government contracts, U.S. visas, certain loans from U.S. banks, and even certain loans from international financial institutions, among other things.

In response to strong negative reactions from a number of European countries about the imposition of secondary sanctions, CAATSA was revised to require the president to "coordinate with allies of the United States" in imposing these secondary sanctions. Nevertheless, certain European allies who have to date closely coordinated with the U.S. on a united response to

Russia's activities in Ukraine and its annexation of Crimea, have continued to express strong reservations about Section 232, which they believe to be extraterritorial application of U.S. law that threatens their energy security. To what extent the president imposes such secondary sanctions remains to be seen.

1.4. New Authorization for Asset Blocking and Secondary Sanctions

Finally, subject to the president's waiver authority under certain circumstances, CAATSA authorizes or requires the president to impose sanctions on designated persons/entities in certain additional circumstances, as described below:

- Authorize asset blocking of Russian state-owned entities operating in the Russian railway or metals and mining sectors (§223);
- Require asset blocking if a person knowingly engages in significant activities undermining cybersecurity against any person (§224);
- Require secondary sanctions if a person knowingly and materially assists or supports someone undermining cybersecurity (§224);
- Require asset blocking if a Russian government official or close associate or family member engages in significant acts of corruption (§227);
- Require asset blocking if a foreign person knowingly evades the Russia sanctions or engages in serious human rights abuses in Russia (§228);
- Require secondary sanctions if a person knowingly engages in a "significant" (undefined) transaction with specified persons that are part of the Russian defense or intelligence sectors (§231);
- Require asset blocking if a foreign person knowingly provides specified material support to the Syrian Government (§234); and
- Require secondary sanctions if a person knowingly makes specified investments in or facilitates the privatization of Russian state-owned assets unjustly benefitting Russian government officials or their close associates or family (§233).

2. New Sanctions on Iran

Under Title I of CAATSA, subject to certain waiver authorities, the president is required or authorized to impose blocking sanctions on persons or entities determined to knowingly engage in (i) activities that materially contribute to or support Iran's ballistic missile program or systems capable of delivering weapons of mass destruction, (ii) certain extrajudicial killings, torture, or other gross violations of internationally recognized human rights against individuals in Iran, and (iii) activities materially contributing to or supporting the sale or supply of certain military equipment to or from or for the benefit of Iran. The legislation also requires the president to impose additional sanctions on the Islamic Republican Guard Corps (IRGC) and its foreign officials, agents and affiliates. As such, subject to the ordinary course due diligence required to be undertaken by persons involved in or interested in business dealings in or relating to Iran to identify SDN entities and otherwise, additional sanctions imposed pursuant to CAATSA will have limited practical impact on the private sector and requirements under primary and secondary U.S. sanctions vis-a-vis Iran relating to civilian commercial activities.

That said, the Iranian government has strongly objected to the imposition of these additional sanctions, contending that they constitute a clear violation of U.S. obligations under the JCPOA. As such, the implementation of Title I of CAATSA and, perhaps more importantly, whether in October the president again waives U.S. sanctions imposed on Iran until January 2016 when the JCPOA came into effect, could have far reaching consequences for the continued viability and enforcement of the JCPOA.

3. New Sanctions on North Korea

Title III of CAATSA significantly tightens sanctions against North Korea by, among other things, requiring or authorizing the president, subject to certain waiver authorities, to impose blocking sanctions on persons or entities determined to knowingly engage in a wide array of dealings with or relating to North Korea and authorizing secondary sanctions on non-U.S. entities that engage in certain business activities with North Korea.