SIGNIFICANT NEW RUSSIA, IRAN AND NORTH KOREA SANCTIONS LEGISLATION SIGNED INTO LAW

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International Trade Alert

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On August 2, 2017, President Trump signed into law the Countering America's Adversaries Through Sanctions Act (the "Act"). Passed by overwhelming bipartisan majorities in both Houses of Congress, the Act combines several different pieces of legislation and expands current sanctions on Russia, Iran, and North Korea. The Act, in particular, enhances current sanctions against Russia, requiring the president to impose certain additional measures in the Russia defense, financial, and energy sectors, while codifying into law the Russia sanctions measures already in place (which had been implemented pursuant to executive action), and imposing a complex legislative mechanism to allow Congress to review and disapprove significant changes to the Russia sanctions regime. The Act also imposes additional nonnuclear related sanctions against Iran, including requiring the designation of the Islamic Revolutionary Guard Corps ("IRGC") under terrorism-related sanctions, and steps up sanctions against North Korea with new measures that target the shipping, aviation, and metals sectors. U.S. persons are already broadly prohibited from engaging in transactions with Iran and North Korea, directly or indirectly, so the main impact of the Act with respect to these countries will be from new "secondary" sanctions, which allow for the imposition of sanction measures on non-U.S. persons for activities outside of U.S. jurisdiction.

On the same day as signing, President Trump issued two statements on the Act (here and here). While supporting the Iran and North Korea measures in the Act, the president expressed criticism of some of the Russia-related provisions, arguing that Congress has interfered with his ability to negotiate any future agreements with the Russian government related to sanctions and that the congressional review mechanism may be unconstitutional. Given this viewpoint, it remains uncertain to what extent the president will exercise his new discretionary authority or vigorously enforce the congressional requirements to impose or tighten sanctions, under the Act. However, even if the president elects not to implement or vigorously enforce certain of the provisions, the overall effect of the Act may be to discourage parties (especially non-U.S. persons) from exploring opportunities in sectors of the Russian economy that could be impacted by these sanctions in the future.

The following is a brief summary of the key provisions of the Act. Attached is a more detailed discussion of those key provisions.

RUSSIA SANCTIONS

- Expansion of prohibitions under Directives 1 and 2 of Executive Order 13662 on U.S. persons transacting in new debt of Russian entities in the financial and energy sectors designated under specific sectoral sanctions;

- Expansion of the prohibition (from Russia to worldwide) under Directive 4 of Executive Order 13662 on certain U.S. person transactions with designated Russian entities in the energy sector with respect to deepwater, Arctic offshore, and shale projects that have the potential to produce oil;
- Authorization of secondary sanctions on any persons in connection with the development of energy export pipelines in Russia, the corrupt privatization of state-owned assets in Russia, or transactions with the intelligence and defense sectors of the Russian government;
- Mandating the imposition of sanctions that previously were discretionary in connection with: investments in Russian crude oil projects, opening or maintaining correspondent accounts of certain Russian restricted parties, and involvement in significant acts of corruption or serious human rights abuses in Russia; and
- Codification of current Russian sanctions (including current designations of persons) and imposition of a process for congressional review of significant changes to Russian sanctions regime.

IRAN SANCTIONS

- Authorization of additional sanctions on any persons materially contributing to Iran's ballistic missile program or supplying military equipment to Iran;
- Imposition of terrorist sanctions on the IRGC as well as IRGC officials, agents, and affiliates; and
- Imposition of sanctions on persons responsible for human rights abuses in Iran.

NORTH KOREA SANCTIONS

- Expansion of mandatory sanctions to cover certain North Korea-related transactions by any person with respect to: precious metals, ores, and rare earth minerals; rocket, aviation, and jet fuel; insuring or registering vessels; and maintenance of correspondent accounts;
- Expansion of discretionary sanctions to cover certain North Korea-related transactions involving coal, iron, iron ore, textiles, crude oil and refined petroleum products, fund and property transfers, online commercial activity, food and agricultural products, fishing rights, exportation of workers, and the transportation, extractive, and financial services industries; and
- Expansion of the prohibition on U.S. assistance to foreign governments that provide military-related assistance to the North Korean government.

Of course, given the limited trade activities involving North Korea, the most consequential provisions of the Act relate to Russia and Iran. Although a substantial part of the Russian sanctions provisions is directed to a codification of existing sanctions, as noted above, new categories of Russian companies subject to blocking sanctions are added; existing restrictions on certain transactions by U.S. persons with designated Russian companies in the financial, defense, and energy sectors are tightened; and the potential categories of transactions that can give rise to secondary sanctions are expanded. The provisions of the Act relating to Iran, given the continuation of the U.S. primary embargo restricting U.S. persons' dealings with Iran, principally directly affect non-U.S. persons by adding categories of Iranian persons subject to blocking sanctions and of activities by non-U.S. persons involving Iran that can lead to blocking or secondary sanctions. However, because of the potential reverberating effect of blocking and secondary sanctions, the expanded Iran sanctions may also have at least an indirect impact on U.S. persons. As such, provisions of the Act can impact U.S. as well as non-U.S. companies and bear further evaluation by any person doing business with Russia or Iran or with persons doing business with those countries.

For example, in the case of Russia, because of the shortening of the debt term restrictions applicable to persons designated under Directives 1 and 2, even permissible commercial transactions with those persons may become problematic. Office of Foreign Assets Control ("OFAC") has interpreted "debt" to include deferred payment terms, so the Act will significantly impact U.S. persons engaged in the sale of goods, technology, software, and services, directly or indirectly, to an entity designated under those Directives.

Also, in the case of Russia, the restrictions on U.S. persons engaging in activities (including as a supplier) in support of projects that have the potential to produce oil and that involve companies in Russia designated under Directive 4 will no longer be limited to projects only in Russia and will now apply to new oil projects involving those companies anywhere in the world, including any project in which they have an ownership interest of at least 33 percent. It is not yet clear what OFAC will consider to be a "new" project.

In the case of the new or expanded blocking provisions, in certain instances the Act also provides for the blocking of persons that provide supplies or financial support to the blocked entities and the expanded secondary sanctions may result in penalties imposed against non-U.S. persons in connection with additional types of transactions with Russia and Iran. Both of these categories of expanded sanctions can create risks and due diligence considerations for any company, including a U.S. company, dealing with persons that, in turn, engage in the types of transactions with Russia or Iran that could lead to blocking and secondary sanctions.

Finally, non-U.S. companies engaged in transactions in North Korea should be mindful of the North Korea-related provisions under the Act, which expand secondary sanctions for various categories of transactions that have no nexus to the United States.

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We expect to issue further alerts as significant developments occur in connection with the implementation of the Act. Please contact any of the authors listed on this alert if you have additional questions concerning the Act or international trade laws generally.

Discussion of Key Provisions of the Act

RUSSIA

Modification of Directives Issued Pursuant to Executive Order 13662

Under current U.S. sanctions, U.S. persons are prohibited from conducting certain transactions in the financial, defense, and energy sectors with entities that have been designated under one or more of four Directives issued by the OFAC pursuant to Executive Order 13662 ("Blocking Property of Additional Persons Contributing to the Situation in Ukraine"). [1] The Act requires OFAC to materially enhance the prohibitions under three of these Directives as follows.

Narrowing Permissible Debt Transactions Under Directives 1 and 2
Directives 1 and 2 of Executive Order 13662 target certain Russian entities in the finance and energy sectors, respectively. The Directives currently prohibit U.S. persons from conducting transactions in, providing financing for, and other dealings in new debt with maturity of longer than 30 days (for Directive 1) and 90 days (for Directive 2) with respect to persons designated under those Directives. [2] The Act requires OFAC to issue revised Directives shortening the applicable new debt maturity periods for Directives 1 and 2 to 14 days and 60 days, respectively. OFAC has interpreted "debt" to include deferred payment terms, so the Act will significantly impact U.S. persons engaged in the sale of goods, technology, software, and services, directly or indirectly, to an entity designated under those Directives.

OFAC is required to issue revised Directives 1 and 2 within 60 days after the date of the Act's enactment. However, because this is a restriction on "new" debt (and consistent with prior changes to Directives to shorten the applicable debt maturity period), any contracts and other arrangements subject to the current (30 or 90 day) debt restriction should be grandfathered and not affected by the Act.

Expanding Prohibitions Under Directive 4
Directive 4 of Executive Order 13662 currently prohibits U.S. persons from exporting, reexporting, or providing, directly or indirectly, goods, services (except for financial services), or technology in support of deepwater (greater than 500 foot depth), Arctic offshore, or shale projects in the Russian Federation that have the potential to produce oil and involve persons designated under Directive 4 (including their property or interests in property). The Act requires OFAC to expand this prohibition to "new" deepwater, Arctic offshore, or shale projects located anywhere in the world involving designated persons, no longer requiring a nexus to Russian territory. Moreover, the prohibition extends to any such projects in which a Directive 4 designee has an ownership interest of at least 33 percent.

The Act provides a 90-day grace period before this provision becomes effective. However, because the expanded prohibition covers "new" projects, current projects located outside the Russian Federation presumably will be grandfathered and not affected. The Act does not define "new," which may lead to some uncertainty in the law's application. For example, it is not certain if a "new" project would include a deepwater oilfield under preliminary analysis and exploration, or whether the oilfield has to be in actual production to qualify for grandfathering.

Potential Sanctioning of State-Owned Entities in Russia's Railway, Metals, and Mining Sectors
The Act also provides that state-owned entities operating in the railway or metals and mining sectors of the Russian economy may also be sanctioned under Executive Order 13662. This opens the possibility of future designations of such entities under blocking sanctions or future Directives similar to the above targeting those sectors.

Imposition of "Secondary" Sanctions

The Act authorizes and in some cases requires the president to impose "secondary" sanctions on persons (including non-U.S. persons) that are determined to be involved in certain types of conduct in or involving Russia. Secondary sanctions are noteworthy in that they can be imposed on persons outside U.S. jurisdiction for actions that have no nexus to the United States or to U.S. persons. If secondary sanctions are imposed, the Act requires the president to select from a menu of sanctions that ranges from relatively light measures (e.g., denial of Export-Import Bank assistance, prohibition on granting of U.S. export licenses, and exclusion of corporate officers from

U.S. territory), to measures that would block the property of a sanctioned person coming into U.S. jurisdiction, effectively imposing the same type of prohibition applicable to Specially Designated Nationals.

It remains to be seen whether these new secondary sanctions will have an immediate, material impact, given that even the mandatory sanctions apparently leave discretion to the president to decide whether a person meets the conditions for designation. Nonetheless, the mere possibility of sanctions in the future may steer some non-U.S. companies away from engaging in or supporting the types of activities falling within the scope of sanctionable conduct.

Specific secondary sanctions measures provided for under the Act are the following:

Sanctions with Respect to the Development of Pipelines
The Act authorizes the president to impose sanctions on any person who knowingly, on or after the date of the Act's enactment, (1) makes an investment that "directly and significantly contributes to the enhancement of the Russian Federation's ability to construct energy export pipelines," or (2) sells, leases, or provides goods, services, technology, or information for the construction of Russian energy export pipelines, and the fair market value of such transaction is $1,000,000 or more (or, for multiple transactions, the aggregate fair market value is $5,000,000 or more during a 12-month period). Although the pipeline sanctions provision is a potentially substantial new area of sanctions and highly controversial given the interest of European allies in obtaining energy supplies from Russia, this sanction provision is discretionary and it is uncertain whether there is a significant prospect it will be implemented at least in the near term.

Sanctions with Respect to Privatization of State-Owned Assets in Russia
The Act requires the president to impose sanctions on any person the president determines knowingly makes, on or after the date of the Act's enactment, an investment of $10,000,000 or more (or any combination of investments of not less than $1,000,000 each, which in the aggregate equals or exceeds $10,000,000 in any 12-month period), or facilitates such an investment, if the investment directly and significantly contributes to the ability of the Russian government to privatize state-owned assets in a manner that unjustly benefits (1) officials of the Russian government or (2) close associates or family members of those officials.

Imposition of Sanctions with Respect to Persons Engaging in Transactions with the Intelligence or Defense Sectors of the Russian Government
The Act also requires the president to impose sanctions on any person the president determines knowingly engages in a significant transaction with a person that is part of, or operates for or on behalf of, the defense or intelligence sectors of the Russian government, including the Main Intelligence Agency of the General Staff of the Armed Forces of the Russian Federation or the Federal Security Service of the Russian Federation. This provision becomes effective for any sanctionable activities on or after a date that is 180 days from the Act's enactment.

IMPOSITION OF SANCTIONS WITH RESPECT TO ACTIVITIES OF THE RUSSIAN GOVERNMENT UNDERMINING CYBERSECURITY

The president is required, on and after the date that is 60 days after the date of the enactment of this Act, to block the assets of and deny or revoke visas to any person that the president determines (1) "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 (2) is an owned or controlled subsidiary, or acts directly or indirectly on behalf of a person described in (1). In addition, the president is required to impose five or more sanctions from a prescribed list of "secondary sanctions" against any person that the president determines "knowingly materially assists, sponsors, or provides financial, material, or technological support for, or goods or services (except financial services) in support of, an activity" covered by the cybersecurity provision, and three or more "secondary sanctions" against any person that the president determines "knowingly provides financial services in support of" such an activity.

New Mandatory Sanctions Measures

The Act also amends several laws previously passed by Congress to address the Russian incursion into Ukraine to mandate the imposition of sanctions measures that previously were discretionary, as follows:

- Secondary sanctions on any foreign person the president determines knowingly makes a "significant" investment in a special Russian crude oil project (unless the president determines the sanctions are not in the national interest);
- Prohibiting the opening, and prohibiting or restricting the maintenance, in the United States of correspondent accounts by foreign financial institutions that are determined to knowingly facilitate certain defense and energy-related transactions, or financial transactions on behalf of Russian SDNs;
- Blocking of property and (for individuals) denial or revocation of U.S. visas of Russian government officials, their family members, and close associates who are determined to be responsible for or complicit in "significant" acts of corruption in Russia or elsewhere;
- Blocking of property of foreign persons determined (1) to knowingly violate, conspire to violate, or cause a violation of any Russia-related license, order, regulation, or prohibition, or (2) to facilitate significant transactions (including deceptive or structured transactions) with respect to persons designated under Russia-related sanctions including their family members; and
- Blocking of property and (for individuals) denial or revocation of U.S. visas of foreign persons determined to be responsible for or complicit in serious human rights abuses in any territory occupied by the Russian government (including their owned or controlled entities), and any person who provides financial, material, or technological to such persons.

While these provisions are stated as mandatory, the president does retain discretion to determine whether a person meets the criteria for designation.

Sanctions with Respect to the Transfer of Arms and Related Materiel to Syria

The Act also requires the president to impose sanctions on foreign persons who are determined, on or after the date of the Act's enactment, to have knowingly exported, transferred, or otherwise provided to Syria significant financial, material, or technological support that contributes materially to the Syrian government's ability to acquire or develop chemical, biological, or nuclear weapons or related technologies; ballistic or cruise missile capabilities; advanced conventional weapons of a type and number deemed to be "destabilizing;" or defense-related articles, services, or information including items described on the U.S. Munitions List of the International Traffic in Arms

Regulations. The sanctions triggered by this provision are blocking of property and (for individuals) denial or revocation of U.S. visas.

Codification of Russia Sanctions and Limitation of Presidential Waiver and Termination Authority

In an effort to assert congressional authority over the president with respect to Russia sanctions policy, the Act codifies the following Executive Orders issued since 2014 as well as the sanctions on persons designated under those Orders:

- Executive Orders 13660, 13661, and 13662, which relate to blocking property of certain persons contributing to the situation in Ukraine;
- Executive Order 13685, which relates to the blocking of property of certain persons and prohibiting certain transactions with respect to the Crimea region of Ukraine; and
- Executive Orders 13694 and13757, which relate to taking steps to address significant malicious cyber-enabled activities.

Codification of these provisions means that a superseding act of Congress will be necessary to terminate these sanctions measures.

The Act furthermore imposes a complex legal mechanism that allows Congress to review and disapprove of any actions by the president to terminate or waive application of the Russia sanctions that would significantly alter U.S. sanctions and foreign policy toward Russia.

IRAN

The Iran component of the Act imposes additional sanctions on Iran and creates authority for the president to impose secondary sanctions on any persons, including non-U.S. persons, engaged in certain Iranian related transactions. To avoid conflict with the recent Iran nuclear deal (the Joint Comprehensive Plan of Action, or JCPOA), these sanctions are crafted to target Iranian conduct outside the nuclear sphere. Because U.S. persons are still broadly prohibited from engaging in transactions with Iran, these measures primarily impact dealings by non-U.S. persons involving Iran.

Imposition of Additional Sanctions in Response to Iran's Ballistic Missile Program and Enforcement of Arms Embargo

The Act requires the president to impose sanctions on persons determined to have knowingly engaged in any activity that materially contributes to:

- The government of Iran's ballistic missile program, or any other program in Iran capable of delivering weapons of mass destruction; or
- The supply, sale, or transfer of any battle tanks, armored combat vehicles, large caliber artillery systems, combat aircraft, attack helicopters, warships, missiles or missile systems, or related material, including

spare parts for the use or benefit of Iran, or provides to Iran any technical training, financial resources or services, advice, other services or assistance related to the supply, sale, transfer, manufacture, maintenance, or use of arms and related material.

Specific sanctions that must be imposed on such persons are blocking of property and (for individuals) denial or revocation of U.S. visas.

Imposition of Terrorism-Related Sanctions with Respect to the IRGC

The Act specifically requires that the president designate the IRGC, as well as officials, agents, and affiliates of the IRGC, under Executive Order 13224, which relates to the blocking of property of persons who commit, threaten to commit, or support terrorism. The IRGC is already designated under Executive Order 13382, which relates to the blocking of property of weapons of mass destruction proliferators. As the IRGC is a branch of the Iranian military, the Act marks the first time an entire foreign military force has been designated under terrorism sanctions. The designation will cover all forces operated by the IRGC, including ground, air, and naval forces, as well as the Basij paramilitary force.

IRGC is also claimed to have significant ownership interests in the Iranian economy and control over numerous foundations. Businesses and foundations owned or controlled by the IRGC will be subject to designation.

Imposition of Additional Sanctions with Respect to Persons Responsible for Human Rights Abuses

The Act also requires the State Department to prepare a list of persons the Secretary of State determines are (1) responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals in Iran and (2) acting as an agent of or on behalf of such foreign persons. Such persons will be subject to a blocking of property that are within the United States or within the possession or control of a U.S. person.

NORTH KOREA

In addition to the measures placed on Iran and Russia, the Act takes further action against North Korea by amending the North Korea Sanctions and Policy Enhancement Act of 2016 (22 U.S.C. § 9221 *et seq.*). The following measures are of note:

Expansion of Mandatory and Discretionary Designations under the North Korea Sanctions and Policy Enhancement Act of 2016

The Act amends the North Korea Sanctions and Policy Enhancement Act of 2016 ("NKSPEA") by adding a number of new categories of North Korea-related transactions that can result in designation and blocking of property. In particular, designation is mandatory for any person who knowingly engages, directly or indirectly, in the following:

- Purchasing or acquiring "significant amounts" of gold, titanium ore, vanadium ore, copper, silver, nickel, zinc, or rare earth minerals from North Korea;

- Selling or transferring to North Korea "significant amounts" of rocket, aviation, or jet fuel (use for civilian passenger aircraft outside North Korea exempted);
- Providing "significant amounts" of fuel or supplies, providing bunkering services, or facilitating "a significant transaction or transactions" to operate or maintain a designated vessel or aircraft;
- Insuring or registering (including facilitation) a vessel owned or controlled by the North Korean government, except as approved by the U.N. Security Council; and
- Maintaining a correspondent account with any North Korean financial institution, except as approved by the U.N. Security Council.

A number of discretionary designation authorities have also been added to NKSPEA, including certain transactions with the North Korean government involving the purchase or acquisition of coal, iron, iron ore, textiles, crude oil, and refined petroleum products; the transfers of funds, property, bulk cash, precious metals, and gemstones; online commercial activity including online gambling; food and agricultural products; and fishing rights. Certain transactions involving the exportation of workers from North Korea; the transportation, extractive, and financial services industries in North Korea; and the operation of a branch, subsidiary, or office of a North Korean financial institution are also subject to discretionary designation.

Correspondent Accounts

The Act prohibits knowingly, directly or indirectly, maintaining a correspondent account with any North Korean financial institution, with very limited exceptions. In addition, if a U.S. financial institution has or obtains knowledge that one of its correspondent accounts is being used to provide significant financial services indirectly to any restricted party, the financial institution must take steps to ensure that account is no longer used to provide such services.

Expanded Limitations on Foreign Assistance

The Act also expands NKSPEA's prohibition on the provision of foreign assistance to third-country governments that provide certain military-related assistance to the government of North Korea. Previously, NKSPEA prohibited the provision of assistance under the Foreign Assistance Act of 1961 to third-country governments that provide "lethal military equipment" to the North Korean government. The Act amends NKSPEA to prohibit foreign assistance to any third-country government that "provides to or receives from" the North Korean government any defense article or defense service as defined under the Arms Export Control Act if the president verifies that such defense article or defense service has been so provided or received. The Act furthermore extends this prohibition from one to two years.

Notes:

[1] Entities designated under these Directives are found on the OFAC Sectoral Sanctions Identifications List.

[2] Directive 1 also prohibits U.S. persons from engaging in transactions related to new equity of designated persons. The Act does not change this equity prohibition.

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