
December 20, 2017

U.S. Sanctions Relating to Russia and Ukraine: Navigating the Current Landscape

U.S. economic sanctions relating to Russia and Ukraine have steadily evolved since their introduction in 2014 in response to Russia's occupation of the Crimea region of Ukraine. The Obama administration implemented three types of primary sanctions: (1) traditional blocking sanctions against specific individuals and entities, which have been listed on the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") Specially Designated and Blocked Persons list (the "SDN List"); (2) an embargo against Crimea; and (3) "sectoral" sanctions prohibiting certain types of transactions with specific entities operating in particular sectors of the Russian economy, listed on OFAC's Sectoral Sanctions Identification List (the "SSI List").

Following the election of President Trump, it was predicted that his administration might rollback these sanctions. Instead, in response to Russia's cyber activity and continued occupation of Crimea, President Trump signed new bipartisan legislation on August 2, 2017.¹ The "Countering America's Adversaries Through Sanctions Act" ("CAATSA") codified existing sanctions targeting Russia issued through Obama-era executive orders, strengthened and expanded sectoral sanctions, and threatened the imposition of secondary sanctions for various activities that lack any nexus with the United States.² Members of Congress continue to pressure the administration to accelerate its implementation of CAATSA.³

In light of the recent changes and increasing complexity in Russia/Ukraine-related sanctions, this memorandum provides an overview of the sanctions program as it exists today and outlines considerations for both U.S. and non-U.S. companies seeking to manage their sanctions risk.

Primary Sanctions

Primary sanctions prohibit certain activities with a U.S. nexus, *i.e.*, activities that involve U.S. persons or touch U.S. territory.⁴ U.S. citizens and green card holders residing or traveling overseas should be aware that primary sanctions continue to apply to them, wherever they are located.

Non-U.S. entities can conduct transactions that have a U.S. nexus. Examples include transactions involving U.S. person employees or business partners, U.S. dollar transactions that clear through the U.S. financial system, and export or reexport of U.S.-origin goods. Further, non-U.S. persons may expose themselves to U.S. sanctions liability by "causing" a violation of primary sanctions (*e.g.*, by causing a foreign financial institution to initiate a prohibited exportation of financial services from the United

States⁵). By contrast, when non-U.S. persons conduct business that does not involve a U.S. nexus, primary sanctions do not apply.

There are three types of Russia/Ukraine-related primary sanctions: blocking sanctions, the trade embargo against Crimea, and sectoral sanctions.

Russia and Ukraine-related Blocking Sanctions

The Obama administration instituted blocking sanctions in response to Russia's occupation of Crimea, designating a number of entities and individuals on OFAC's SDN List. Since March 2014, nearly 300 individuals and entities have been designated pursuant to OFAC's Russia/Ukraine-related program. Many of these individuals are "cronies" of President Putin and prominent Russian government officials and business persons, such as Igor Sechin, the head of Russian state oil firm Rosneft, and Gennady Timchenko, an oligarch with interests in the transportation and energy sectors. Under OFAC's "50 percent rule," any entity that is owned 50 percent or more by one or more blocked persons or entities is also blocked, even if the entity itself is not on the SDN List.

Unless otherwise authorized or exempt, transactions by U.S. persons or with a U.S. nexus are prohibited if they involve transferring, paying, exporting, withdrawing, or otherwise dealing in the property or interests in property of entities or individuals on OFAC's SDN List.

A recent OFAC enforcement action demonstrated the potentially far-reaching effects of the designation of individuals on the SDN List. On July 20, 2017, OFAC assessed a \$2 million civil penalty against ExxonMobil Corp. and two of its U.S. subsidiaries for violating OFAC's Russia/Ukraine-related sanctions by executing eight legal documents with Russian oil company Rosneft OAO.⁶ Importantly, the legal documents were countersigned by Rosneft's president, Igor Sechin, an SDN.⁷ OFAC took the position that by signing legal documents with Sechin, the companies dealt in the services of a blocked person. Rosneft itself is not an SDN and is not subject to blocking sanctions. ExxonMobil is challenging the penalty in federal court, arguing that U.S. sanctions applied to Sechin only in his "personal" capacity, and not in his "professional" capacity as president of Rosneft.⁸ OFAC maintains that there is no such "personal" versus "professional" distinction.⁹

The Embargo against Crimea

The U.S. maintains a comprehensive trade embargo against the Crimea region of Ukraine, broadly prohibiting:

- New investment in the Crimea region of Ukraine by a U.S. person, wherever located;

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- The importation into the United States, directly or indirectly, of any goods, services, or technology from the Crimea region of Ukraine;
 - The exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a U.S. person, wherever located, of any goods, services, or technology to the Crimea region of Ukraine; and
 - Any approval, financing, facilitation, or guarantee by a U.S. person, wherever located, of a transaction by a foreign person where the transaction by that foreign person would be prohibited if performed by a U.S. person or within the United States.

OFAC has authorized by general license certain transactions involving Crimea, including: (1) the exportation or reexportation of certain agricultural commodities, medicine, and medical supplies;¹⁰ (2) non-commercial, personal remittances;¹¹ (3) the operation of certain accounts in a U.S. financial institution for individuals ordinarily resident in Crimea;¹² (4) certain transactions related to the receipt and transmission of telecommunications and mail;¹³ and (5) the exportation or reexportation of certain services and software incident to internet-based communications.¹⁴

OFAC has issued an advisory highlighting several practices that have been used to evade or circumvent Crimea sanctions in both the financial services and international trade sectors.¹⁵ These practices include “the omission or obfuscation of references to Crimea and locations within Crimea in documentation underlying transactions involving U.S. persons or the United States.”¹⁶ With respect to financial transactions, OFAC cautioned that it was “aware that certain individuals and entities were engaged in a pattern or practice of repeatedly omitting originator or beneficiary address information from Society for Worldwide Interbank Financial Telecommunications (SWIFT) messages involving individuals ordinarily resident in, or entities located in, Crimea.”¹⁷ In the international trade context, references to Crimea have been obscured in trade transactions and associated agreements and documentation or replaced with references to “Russia.”¹⁸

OFAC recommended three measures to minimize risk in this area: (1) ensure that transaction monitoring captures geographic locations in Crimea rather than simply screening for “Crimea,” *e.g.*, screen major cities and ports; (2) request additional information from parties that have previously violated or attempted to violate Crimea sanctions (*e.g.*, routing transactions to or through U.S. financial institutions with inaccurate or incomplete address information for Crimean individuals or entities); and (3) clearly communicate U.S. sanctions obligations to international partners and discuss OFAC sanctions compliance expectations with correspondent banking and trade partners.¹⁹

Sectoral Sanctions

The most novel of the Russia/Ukraine-related sanctions are the “sectoral” sanctions.²⁰ The sectoral sanctions were designed to impose a “targeted” impact on the Russian economy, as compared to more traditional OFAC sanctions. These sanctions prohibit certain categories of dealings involving U.S. persons or U.S. territory with parties named on SSI List.²¹ Currently there are approximately 280 individuals and entities on the SSI List, including many prominent Russian companies and financial institutions. The transactions subject to sectoral sanctions are enumerated in four directives issued by OFAC (the “Directives”), with each directive targeting a different sector of the Russian economy.

We provide below an overview of the activities prohibited by each Directive. As a preliminary matter, in order for a transaction to be prohibited by sectoral sanctions, it must involve: (1) a U.S. nexus (*i.e.*, U.S. persons or the use of U.S. territory); (2) an activity prohibited by one of the Directives; and (3) an individual or entity on the SSI List subject to the applicable Directive. Also note that under OFAC’s “50 percent rule,” an entity that is owned 50% or more by one or more SSI parties must be treated as though it itself is on the SSI List.

Directive 1 (Targets Entities in Russia’s Financial Sector)

Directive 1 has been modified twice since originally established, most recently in September of this year as a result of the CAATSA legislation. The current iteration became effective on November 28, 2017 and prohibits: (1) all transactions in, provisions of financing for, and other dealings in new debt of a Directive 1 SSI longer than 14 days maturity or new equity issued by a Directive 1 SSI; (2) all activities related to debt or new equity, issued on or after September 12, 2014 and before November 28, 2017, that would have been prohibited by the second version of Directive 1 (which extended to activities involving debt of longer than 30 days maturity or equity if that debt or equity was issued on or after the date a person was determined to be subject to Directive 1); and (3) all activities related to debt or new equity issued before September 12, 2014 that would have been prohibited by the first version of Directive 1 (which extended to activities involving debt of longer than 90 days maturity or equity if that debt or equity was issued on or after the date a person was determined to be subject to Directive 1).

Directive 2 (Targets Entities in Russia’s Energy Sector)

Directive 2 has been modified twice since first established, most recently in September of this year pursuant to CAATSA. Amended Directive 2, effective as of November 28, 2017, prohibits: (1) transacting in, providing financing for, or otherwise dealing in new debt of longer than 60 days maturity of a Directive 2 SSI; and (2) all activities related to new debt, issued on or after July 16, 2014 and before November 28, 2017, that would have been prohibited by the prior version of Directive 2 (which extended to activities involving debt of longer than 90 days maturity if that debt was issued on or after the date a person was determined to be subject to Directive 2).

Directive 3 (Targets Entities in Russia's Defense Sector)

Directive 3, effective on September 12, 2014, prohibits transacting in, providing financing for, or otherwise dealing in new debt of longer than 30 days maturity of a Directive 3 SSI.

Directive 4 (Targets Certain Types of Oil Exploration and Production)

Directive 4 prohibits providing, exporting, or reexporting, directly or indirectly, goods, services (except for financial services), or technology in support of exploration or production for deep-water, Arctic offshore, or shale projects that have the potential to produce oil in the Russian Federation, or in the maritime area claimed by the Russian Federation and extending from its territory, and that involve any person subject to Directive 4, its property, or its interests in property. CAATSA provides that the Treasury Secretary is required to expand Directive 4 to prohibit the provision of goods or services by U.S. persons in support of exploration or production for new deepwater, Arctic offshore, or shale projects *anywhere in the world* that (1) have the potential to produce oil; and (2) involve any person subject to the directive that has a controlling interest or a substantial noncontrolling (33 percent or greater) ownership interest in the relevant project.

The expanded Directive 4, issued on October 31, 2017, applies to projects that are initiated after January 29, 2018. OFAC has provided guidance stating that a project is “initiated” when a “government or any of its political subdivisions, agencies, or instrumentalities (including any entity owned or controlled directly or indirectly by any of the foregoing) formally grants exploration, development, or production rights to any party.”²² The “33 percent or greater” threshold in Directive 4 refers to Directive 4 SSI entities’ aggregate ownership interest in a deepwater, Arctic offshore, or shale project. The amendments to Directive 4 do not change the applicability of OFAC’s 50 percent rule in the Directive 4 context (the 50% rule continues to apply when determining SSI ownership of entities, while the 33% rule applies to SSI ownership interest in projects). Nevertheless, the “33-percent rule” will pose additional compliance challenges for companies doing business with Russian entities in support of exploration or production for new deepwater, Arctic offshore, or shale projects worldwide.

Additional Sectoral Sanctions Authorized by CAATSA

CAATSA authorized, but did not require, the creation of new sectoral sanctions against state-owned entities “operating in the railway or metals and mining sector of the economy of [Russia].” OFAC has issued guidance stating that, “[w]hile sanctions may be imposed on potential targets in any sector of the economy of the Russian Federation in the future, maintaining unity with partners on sanctions . . . is important to the U.S. government” and noting that these additional sectoral sanctions are “not required” by CAATSA.²³ Absent a change in circumstances, additional sectoral sanctions are not expected to be implemented in the near term.

Secondary Sanctions

In addition to primary sanctions, the U.S. government utilizes “secondary sanctions” to discourage certain specified activities by non-U.S. individuals and entities relating to certain sanctioned countries. Secondary sanctions target conduct with no nexus to the United States. Under these authorities, non-U.S. persons engaging in certain activities are at risk of being designated on the SDN List or otherwise sanctioned.

CAATSA includes a series of new and expanded secondary sanctions that seek to discourage non-U.S. persons (including entities and individuals that are based outside of Russia) from engaging in certain Russia-related conduct. While a number of the secondary sanctions included in CAATSA are referred to as “mandatory,” it remains to be seen how certain provisions are implemented by the Trump administration. As an initial matter, these provisions require the president to impose sanctions against individuals and entities after he determines that they have engaged in certain activities, thus allowing the president to theoretically refrain from implementing these sanctions by withholding certain determinations. Additionally, many of the new secondary sanctions direct the president to select from a “menu” of sanctions that have a varying degree of severity.²⁴

Following the enactment of CAATSA, the president is required or authorized to impose secondary sanctions against non-U.S. persons for knowingly²⁵ engaging in a wide variety of activities involving Russia or Russia-related projects:

- *Russian Deepwater, Artic offshore or shale oil projects.*²⁶ The president is required to impose certain sanctions²⁷ against entities that knowingly make a significant investment in, or provide financial support for, a Russian deepwater, Arctic offshore or shale oil project.

In determining whether an investment is “significant,” the Department of State will consider “the totality of the facts and circumstances surrounding the investment and weigh various factors on a case-by-case basis. The factors considered in the determination may include, but are not limited to, the significance of the transactions to U.S. national security and foreign policy interests, in particular where the transaction has a significant adverse impact on such interest; the nature and magnitude of the investment, including the size of the investment relative to the project’s overall capitalization; and the relation and significance of the investment to the Russian energy sector.”²⁸

Notably, an investment is not considered significant if U.S. persons would not require specific licenses from OFAC to make or participate in it (*i.e.*, transactions that are either not prohibited by OFAC or that are generally authorized by OFAC).²⁹

- *Energy Export Pipelines.*³⁰ The president may impose certain sanctions³¹ against persons that make significant investments in, or sell, lease or provide significant goods, services, technology, information

or support (including financial support) that could directly and significantly facilitate the maintenance or expansion of the construction, modernization or repair of energy export pipelines by the Russian Federation. Although imposition of such sanctions will be implemented “in coordination with allies of the United States,” CAATSA also states that the United States will “continue to oppose” the NordStream 2 pipeline, which is planned to provide natural gas from Russia to a number of EU countries—“given its detrimental impact on the European Union’s energy security, gas market development in Central and Eastern Europe, and energy reforms in Ukraine.”

The State Department has issued guidance emphasizing that these sanctions are discretionary and that imposition of the sanctions would seek to avoid harming the energy security of U.S. partners or endangering public health or safety.³² The State Department further stated that implementation will focus on energy export pipelines that (1) originate in Russia and (2) transport hydrocarbons across a border for delivery to another country. Energy pipelines that originate outside of Russia will not be the focus of implementation.³³ For the purposes of these sanctions, “a project is considered to have been initiated when a contract for the project is signed.”³⁴ Investments and loan agreements made prior to August 2, 2017 are not subject to sanctions.³⁵ Moreover, sanctions will not target investments or activities related to the standard repair or maintenance of pipelines in existence on August 2, 2017 and capable of transmitting commercial quantities of hydrocarbons on that date.³⁶

- *Sanctions on Foreign Financial Institutions engaging in certain defense and energy-related transactions or facilitating certain transactions on behalf of SDNs.*³⁷ The president is required to impose prohibitions on opening – and a prohibition or the imposition of strict conditions on maintaining – in the United States of a correspondent account or a payable-through account by a foreign financial institution that the president determines to have knowingly facilitated a significant financial transaction: (i) on behalf of any Russia/Ukraine-related SDN; (ii) involving a Russian deepwater, Arctic offshore or shale oil project; or (iii) involving the manufacture, transfer, or brokering of defense articles into Syria.³⁸

OFAC has issued guidance clarifying that foreign financial institutions will not be subject to sanctions under this authority solely on the basis of knowingly facilitating significant transactions on behalf of persons listed on the SSI List.³⁹ Further, OFAC stated that it will consider the following seven factors in order to determine whether a transaction or transactions is “significant:” (1) the size, number, and frequency of the transaction(s); (2) the nature of the transaction(s); (3) the level of awareness of management and whether the transaction(s) are part of a pattern of conduct; (4) the nexus between the transaction(s) and a blocked person; (5) the impact of the transaction(s) on statutory objectives; (6) whether the transaction(s) involve deceptive practices; and (7) such other factors that the Secretary of the Treasury deems relevant on a case-by-case basis.⁴⁰

OFAC also stated that it will interpret the term “facilitated” broadly, to include “the provision of assistance for certain efforts, activities or transactions, including the provision of currency, financial

instruments, securities or any other transmission of value; purchasing; selling; transporting; swapping; brokering; financing; approving; guaranteeing; the provision of other services of any kind; the provision of personnel; or the provision of software, technology, or goods of any kind.”⁴¹

- *Privatization of state-owned assets.*⁴² The president is required to impose certain sanctions⁴³ against persons that, with actual knowledge, invest over 10 million dollars in, or facilitate such an investment, if the investment directly and significantly contributes to the privatization of Russia’s state-owned assets in a manner that unjustly benefits Russian officials or their close associates or family members. OFAC has issued guidance defining “investment,”⁴⁴ “facilitates,”⁴⁵ “unjustly benefits,”⁴⁶ “close associate,”⁴⁷ and “family member.”⁴⁸ Non-U.S. persons engaging in the privatization of state-owned assets in Russia will want to be mindful of these definitions and conduct due diligence to determine whether a transaction falls within the scope of this designation authority.
- *Intelligence and Defense Sectors.*⁴⁹ The president is required to impose at least five sanctions selected from a “menu” of 12 sanctions⁵⁰ against persons knowingly engaging in a significant transaction with a person that is part of, or operates for or on behalf of, the “intelligence or defense sectors” of the Government 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 Service of the Russian Federation on or after January 29, 2018.

The U.S. State Department has published a list of 39 companies and government entities identified to be part of, or operate on behalf of, the defense and intelligence sectors of Russia.⁵¹ Many of these entities are also listed on OFAC’s SDN List. The State Department has stated that in determining whether a transaction is “significant,” it will “consider the totality of the facts and circumstances surrounding the transaction and weigh various factors on a case-by-case basis. The factors considered in the determination may include, but are not limited to, the significance of the transaction to U.S. national security and foreign policy interests, in particular whether it has a significant adverse impact on such interests; the nature and magnitude of the transaction; and the relation and significance of the transaction to the defense or intelligence sector of the Russian government.”⁵² Importantly, “if a transaction for goods or services has purely civilian end-uses and/or civilian end-users, and does not involve entities in the intelligence sector, these factors will generally weigh heavily against a determination that such a transaction is significant.”⁵³

Based on the State Department’s guidance and past practice, we expect that the U.S. Government will likely engage with any company or person that is at risk of sanctions under Section 231 for conducting business with a party on the State Department’s list. The State Department has announced an intention to “work with” persons contemplating transactions with the identified parties: “once we have a good analysis, we’re going to start that robust engagement and talk to partners and allies about where we find transactions that may be problematic.”⁵⁴ The “deadline” for imposition of these sanctions is January 29, 2018 (180 days after the enactment of CAATSA), although this deadline is

subject to certain waiver authorities,⁵⁵ and it is impossible to predict with certainty how the Trump administration will implement Section 231.

- *Evasion or Facilitation.*⁵⁶ The president is required to impose blocking sanctions (*i.e.*, designation on OFAC's SDN List), against persons that knowingly: (1) materially violate, attempt to violate, conspire to violate, or cause a violation of any Russia/Ukraine-related sanctions, executive order or statute; or (2) knowingly facilitate significant transactions,⁵⁷ including deceptive⁵⁸ or structured transactions, for or on behalf of any persons on Russia-related sanctions lists (SDN List or SSI List⁵⁹) or his or her children, spouse, parents or siblings.

OFAC has issued guidance providing that the term "materially violate" will be interpreted to mean an "egregious" violation.⁶⁰ "Facilitation for or on behalf of" shall be interpreted by OFAC to mean "providing assistance for a transaction from which the person in question derives a particular benefit of any kind (as opposed to a generalized benefit conferred upon undifferentiated persons in aggregate). Assistance may include the provision or transmission of currency, financial instruments, securities or any other value; purchasing, selling, transporting, swapping, brokering, financing, approving or guaranteeing; the provision of other services of any kind; the provision of personnel; or the provision of software, technology or goods of any kind."⁶¹

- *Corruption.*⁶² The president is required to impose blocking sanctions (*i.e.*, designation on OFAC's SDN List) and U.S. exclusion sanctions against Russian officials determined to be responsible for or complicit in significant acts of corruption, whether in Russia or elsewhere. The U.S. Government has not issued guidance related to implementation of this sanctions authority.
- *Cybersecurity.*⁶³ The president is required to impose blocking sanctions (*i.e.*, designation on OFAC's SDN List) and U.S. exclusion sanctions against persons that knowingly engage in significant activities undermining the cybersecurity of any person on behalf of the Russian government. The statute provides examples of such "significant activities."⁶⁴
- *Human Rights Abuses.*⁶⁵ The president is required to impose blocking sanctions (*i.e.*, designation on OFAC's SDN List) and U.S. exclusion sanctions against persons that are knowingly responsible for or complicit in "serious human rights abuses" in Russia, or material assisting such a person. The U.S. Government has not issued detailed guidance related to implementation of this sanctions authority.

To date, the administration has not imposed any Russia/Ukraine-related secondary sanctions. As noted above, imposition of "mandatory" secondary sanctions is not automatic; rather, it requires the president to make a factual and legal determination that sanctionable activity has transpired. Additionally, each of the secondary sanctions is subject to certain waiver authorities.

Implications

In light of the strengthened and more complex state of Russia/Ukraine-related sanctions, companies may want to consider the following:

1. *For U.S. financial institutions and other U.S. entities doing business with Russia, careful review of activities for exposure to new sectoral sanctions restrictions.*

Amendments to the sectoral sanctions program present increased compliance challenges for U.S. companies providing financing or goods and services to designated Russian entities. As noted above, amended Directives 1 and 2 further limit the provision of goods and services on credit from U.S. suppliers to designated Russian entities. In addition, Directive 4 will soon prohibit deepwater, Arctic offshore, and shale projects *worldwide* in which a Russian SSI listed under Directive 4 holds a 33% or greater ownership interest. This represents a significant expansion of Directive 4—which now only applies to specified projects in Russia or Russian waters.

Given such compliance landmines, companies contemplating transactions implicated by the revised directives may want to consider increased precautions, including careful diligence on all stakeholders.

2. *For U.S. financial institutions and other U.S. entities doing business with Russia, anticipate the potential implementation of Russia-related secondary sanctions.*

U.S. companies may want to consider the commercial and reputational concerns associated with entering into business relationships with non-U.S. entities facing a significant risk of secondary sanctions. For example, defense companies may want to factor in the risk of secondary sanctions into a business decision whether to form new business relationships with (currently non-designated) entities that are potential targets of future sanctions, and financial institutions may want to screen for such transactions.

3. *For non-U.S. financial institutions and non-U.S. companies doing business with Russia, use caution concerning transactions involving U.S. dollars and enhanced diligence to avoid the threat of expanded Russia-related secondary sanctions.*

Because primary sanctions involving Russia/Ukraine apply to activities with a U.S. nexus, such as the use of U.S. dollars that clear through the U.S. financial system, non-U.S. entities must be mindful of transaction flows in order to avoid prohibited transactions.

In addition, the threat of secondary sanctions constitutes an added risk for non-U.S. entities. Enhanced due diligence related to business partners and transactions is particularly important for

non-U.S. entities that wish to participate in the privatization of Russia's state-owned assets; invest in or provide significant goods or services to Russian energy export pipeline projects (a potentially broad category that will likely be the subject of negotiations between the United States and EU countries); or engage in significant transactions with the Russian defense and intelligence sectors. Non-U.S. entities also face potential blocking sanctions for knowingly facilitating significant transactions, including deceptive or structured transactions, for or on behalf of any Russian related parties on the SDN list or SSI list.

While the conventional wisdom is that President Trump will likely not be energetic in implementing the secondary sanctions mandated or authorized by CAATSA, members of Congress continue to pressure the administration to take additional steps to implement the law. In addition, developments in geopolitics or domestic politics may lead the Trump administration to take tougher measures towards Russia. As a result, non-U.S. companies should meaningfully consider the risk of secondary sanctions in evaluating their ongoing and future business dealings in Russia.

We will continue to monitor sanctions developments that relate to Russia and Ukraine and look forward to providing you with further updates.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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- ¹ The full text of CAATSA is available here. For additional detail on CAATSA and its implications for U.S. Russia/Ukraine-related sanctions, see the August 3, 2017 Paul, Weiss [Client Memorandum](#).
- ² CAATSA also restricts President Trump’s ability to lift certain sanctions unilaterally by including a congressional review mechanism that will allow Congress to potentially block the president from relaxing measures targeting Russia.
- ³ See *The Economist*, “New sanctions are about to bite, and Russia’s elite are spooked,” Nov. 23, 2017, available [here](#).
- ⁴ OFAC has repeatedly stated that the use of U.S. dollars in itself does not create a U.S. nexus. Generally speaking, however, wire transfers in U.S. dollars transit the U.S. financial system, resulting in an exportation of services from the United States. A more detailed discussion of this complex issue is beyond the scope of this memorandum.
- ⁵ See U.S. Dep’t of the Treasury, Office of Foreign Assets Control, “Enforcement Information for July 27, 2017,” available [here](#), as well as our memorandum discussing this action, available [here](#).
- ⁶ See U.S. Dep’t of the Treasury, Office of Foreign Assets Control, “Enforcement Information for July 20, 2017,” available [here](#). Rosneft is on the SSI List as subject to Directives 2 and 4 under Executive Order 13662 of March 20, 2014, “Blocking Property of Additional Persons Contributing to the Situation in Ukraine,” but those authorities are not implicated in the enforcement action. Rosneft is not subject to blocking sanctions.
- ⁷ *Id.*
- ⁸ See *ExxonMobil Corp. v. Mnuchin*, Civ. No. 3:17-cv-1930 (N.D. Tex. Jul. 7, 2017).
- ⁹ See U.S. Dep’t of the Treasury, Office of Foreign Assets Control, “Enforcement Information for July 20, 2017,” available [here](#).
- ¹⁰ See Ukraine General License No. 4, available [here](#).
- ¹¹ See Ukraine General License No. 6, available [here](#).
- ¹² See Ukraine General License No. 7, available [here](#).
- ¹³ See Ukraine General License No. 8, available [here](#).
- ¹⁴ See Ukraine General License No. 9, available [here](#).
- ¹⁵ See U.S. Dep’t of the Treasury, Office of Foreign Assets Control “Crimea Sanctions Advisory, Obfuscation of Critical Information in Financial and Trade Transactions Involving the Crimea Region of Ukraine,” dated July 30, 2015, available [here](#).
- ¹⁶ *Id.*
- ¹⁷ *Id.*
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ For OFAC guidance on sectoral sanctions, see U.S. Dep’t of the Treasury, Office of Foreign Assets Control, Frequently Asked Questions 370-454, available [here](#).
- ²¹ The most recent version of the SSI List is available [here](#).
- ²² OFAC Frequently Asked Question No. 536, available [here](#).
- ²³ OFAC Frequently Asked Question No. 539, available [here](#).

- ²⁴ These sanctions, enumerated in Section 235 of CAATSA, include the following: (1) denial of export-import bank financing; (2) U.S. export sanctions; (3) restrictions on access to loans from U.S. financial institutions; (4) U.S. opposition to any loan from international financial institutions; (5) specific prohibitions on financial institutions, including prohibition on designation by the Board of Governors of the Federal Reserve System or the Federal Reserve Bank of New York as a primary dealer and prohibition on service as a repository of government funds; (6) U.S. procurement sanctions; (7) prohibitions on transactions in foreign exchange subject to U.S. jurisdiction; (8) prohibitions on banking transactions subject to U.S. jurisdiction; (9) prohibitions on dealings in property subject to the jurisdiction of the United States; (10) prohibitions on U.S. investment in debt or equity; (11) exclusion of corporate officers from entering the United States; and (12) imposition of any of the foregoing sanctions of principal executive officers of the sanctioned person.
- ²⁵ “Knowingly” with respect to conduct, a circumstance or a result is generally interpreted by OFAC to mean that a person has actual knowledge, or should have known, of the conduct, circumstance or result.
- ²⁶ See CAATSA § 225; Ukraine Freedom Support Act of 2014, § 4(b)(1).
- ²⁷ The sanctions authorized include: (1) denial of export-import bank financing; (2) U.S. procurement sanctions; (3) arms export prohibitions; (4) dual-use export sanctions, (5) prohibitions on dealings in property subject to the jurisdiction of the United States; (6) prohibitions on banking transactions subject to U.S. jurisdiction; (7) prohibitions on U.S. investment in debt or equity; (8) exclusion of individuals from entering the United States; and (9) exclusion of corporate officers from entering the United States.
- ²⁸ See U.S. Dept of State, Bureau of Energy Resources, “CAATSA/CRIEEA Section 225 Public Guidance,” available [here](#).
- ²⁹ *Id.*
- ³⁰ See CAATSA § 232.
- ³¹ The president may impose five or more of the sanctions enumerated in § 235 of CAATSA. See *infra* at endnote 24.
- ³² See U.S. Dept of State, Bureau of Energy Resources, “CAATSA/CRIEEA Section 232 Public Guidance, available [here](#).
- ³³ *Id.*
- ³⁴ *Id.*
- ³⁵ *Id.*
- ³⁶ *Id.*
- ³⁷ See CAATSA § 226; Ukraine Freedom Support Act of 2014 § 5.
- ³⁸ Any foreign financial institution sanctioned pursuant to these prohibitions will be added to a new (not yet established) list similar to OFAC’s List similar to the List of Foreign Financial Institutions Subject to Part 561 (the “Part 561 List”). See OFAC Frequently Asked Question No. 543, available [here](#).
- ³⁹ See OFAC Frequently Asked Question No. 541, available [here](#).
- ⁴⁰ See OFAC Frequently Asked Question No. 542, available [here](#). OFAC will generally interpret the term “financial transaction” to broadly encompass any transfer of value involving a financial institution (see a non-exhaustive list of examples [here](#)).
- ⁴¹ *Id.*

- ⁴² CAATSA §233.
- ⁴³ The president is directed to impose five or more of the sanctions enumerated in § 235 of CAATSA. *See infra* at endnote 16.
- ⁴⁴ OFAC has stated that it will interpret the term “investment” broadly as “a transaction that constitutes a commitment or contribution of funds or other assets or a loan or other extension of credit to an enterprise.” OFAC Frequently Asked Question No. 540, available [here](#).
- ⁴⁵ OFAC will interpret “facilitates” to mean the “provision of assistance for certain efforts, activities, or transactions, including the provision of currency, financial instruments, securities, or any other transmission of value; purchasing, selling, transporting, swapping, brokering, financing, approving, or guaranteeing; the provision of other services of any kind; the provision of personnel; or the provision of software, technology, or goods of any kind.” OFAC Frequently Asked Question No. 540, available [here](#).
- ⁴⁶ OFAC will interpret the term “unjustly benefits” broadly to refer to “activities such as public corruption that result in any direct or indirect advantage, value, or gain, whether the benefit is tangible or intangible, by officials of the Government of the Russian Federation, or their close associates or family members.” This could include, among other things, the misuse of Russian public assets or the misuse of public authority. OFAC Frequently Asked Question No. 540, available [here](#).
- ⁴⁷ OFAC will interpret the term “close associate” of an official of the Government of the Russian Federation as “a person who is widely or publicly known, or is actually known by the relevant person engaging in the conduct in question, to maintain a close relationship with that official.” OFAC Frequently Asked Question No. 540, available [here](#).
- ⁴⁸ OFAC will interpret the term “family member” of an official of the Government of the Russian Federation to “include parents, spouses (current and former), extramarital partners, children, siblings, uncles, aunts, grandparents, grandchildren, first cousins, stepchildren, stepsiblings, parents-in-law, and spouses of any of the foregoing.” OFAC Frequently Asked Question No. 540, available [here](#).
- ⁴⁹ *See* CAATSA § 231.
- ⁵⁰ The president is directed to impose five or more of the sanctions enumerated in § 235 of CAATSA. *See infra* at endnote 16.
- ⁵¹ CAATSA Section 231(d) Lists Regarding the Defense and Intelligence Sectors of the Government of the Russian Federation, available [here](#).
- ⁵² Public Guidance on Sanctions with Respect to Russia’s Defense and Intelligence Sectors Under Section 231 of the Countering America’s Adversaries Through Sanctions Act of 2017, available [here](#).
- ⁵³ *Id.*
- ⁵⁴ *Id.*
- ⁵⁵ The president has the authority to waive the initial application of sanctions upon a determination that such waiver is in the national security interests of the United States and will further the enforcement of CAATSA, supported by a certification to Congress that the Russian government has made significant efforts to reduce the number and intensity of its cyber intrusions. Further, the president can delay the imposition of sanctions against a specific person if the president certifies to Congress (every 180 days) that the person is substantially reducing the number of “significant transactions” in which that person engages.

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- ⁵⁶ See CAATSA § 228; *see also* The Support for the Sovereignty, Integrity, Democracy, and Economic Stability of Ukraine Act of 2014, §10.
- ⁵⁷ OFAC stated that it will consider the following seven factors in order to determine whether a transaction or transactions is “significant”: (1) the size, number, and frequency of the transaction(s); (2) the nature of the transaction(s); (3) the level of awareness of management and whether the transaction(s) are part of a pattern of conduct; (4) the nexus between the transaction(s) and a blocked person; (5) the impact of the transaction(s) on statutory objectives; (6) whether the transaction(s) involve deceptive practices; and (7) such other factors that the Secretary of the Treasury deems relevant on a case-by-case basis. See OFAC Frequently Asked Question No. 545, available [here](#).
- ⁵⁸ OFAC further stated that a “deceptive transaction” is one that involves deceptive practices. A structured transaction is a type of deceptive transaction that involves one or more persons conducting or attempting to conduct one or more transactions, at one or more financial institution, on one or more days, in any matter, for the purpose of evasion. See 31 C.F.R. § 1010.100(xx).
- ⁵⁹ See OFAC Frequently Asked Question No. 546, available [here](#).
- ⁶⁰ Pursuant to OFAC’s Enforcement Guidelines, in making the egregiousness determination, OFAC generally will give substantial weight to General Factors A (“willful or reckless violation of law”), B (“awareness of conduct at issue”), C (“harm to sanctions program objectives”), and D (“individual characteristics”), with particular emphasis on General Factors A and B. A case will be considered an “egregious case” where the analysis of the applicable General Factors, with a focus on those General Factors identified above, indicates that the case represents a particularly serious violation of the law calling for a strong enforcement response. Appendix A to Part 501, Economic Sanctions Enforcement Guidelines, available [here](#).
- ⁶¹ See OFAC Frequently Asked Question No. 545, available [here](#).
- ⁶² See CAATSA § 227; *see also* The Support for Sovereignty, Integrity, Democracy, and Economic Stability of Ukraine Act of 2014, §9.
- ⁶³ See CAATSA § 224.
- ⁶⁴ Such activities include significant efforts to: (1) deny access to or degrade, disrupt or destroy an information and communications technology system or network; or (2) to exfiltrate, degrade, corrupt, destroy or release information from such a system or network without authorization for the purposes of: (i) conducting influence operations or causing a significant misappropriation of funds, economic resources, trade secrets, personal identifications or financial information for commercial or competitive advantage or private financial gain; (ii) significant destructive malware attacks; or (iii) significant denial of service activities.
- ⁶⁵ See CAATSA § 228; *see also* The Support for the Sovereignty, Integrity, Democracy, and Economic Stability of Ukraine Act of 2014, § 11.