

The Countering America's Adversaries Through Sanctions Act Becomes Law

August 4, 2017

EXECUTIVE SUMMARY

On August 2, 2017, President Trump signed into law the **Countering America's Adversaries Through Sanctions Act of 2017** (the "**Act**"). The measure, which was passed by substantial bipartisan majorities in the House and in the Senate, codifies certain sanctions previously imposed by Executive Order ("**E.O.**"), provides for new sanctions with respect to Iran, Russia, and North Korea, and establishes new congressional review procedures for terminating or waiving sanctions against Russia.

As described in more detail below, the Act is divided into three titles covering Iran, Russia, and North Korea respectively. Title II is the most sweeping and significant: in addition to codifying existing Russia-related sanctions, it targets new transactions with the Russian defense, intelligence, financial and energy sectors and responds to Russian efforts to undermine cybersecurity and destabilize Ukraine and Syria.

President Trump issued two signing statements¹ that criticize the Act as "significantly flawed" and "seriously flawed" and raise concerns with a number of its provisions. In particular, the first statement notes that the Administration will implement certain provisions in a manner consistent with the President's constitutional authority to conduct foreign relations. The first statement also asserts that the elements of the Congressional review process for Title II constitute an unconstitutional legislative veto, although it also notes that, despite the infirmities, the Administration expects to honor the process established by the Act. In both statements, the President indicated significant policy concerns with the Act, including its limits on Executive flexibility in negotiations, which may have unintended consequences for U.S. business and allied countries.

KEY PROVISIONS OF THE ACT

Russia

Title II of the Act codifies existing sanctions with respect to Russia and makes any termination, waiver, or significant modification of the sanctions through licensing subject to Congressional review. It also provides for new sanctions targeting a wide range of Russian activity. The relevant provisions are as follows:

- **Codification of Sanctions:** Section 222 of the Act codifies the Ukraine-related sanctions in effect as of August 1, 2017 (E.O.s 13660, 13661, 13662, and 13685)² as well as the current

¹ See The White House, Statement by President Donald J. Trump on the Signing of H.R. 3364 (Aug. 2, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/02/statement-president-donald-j-trump-signing-hr-3364>, which was shortly followed by The White House, Statement by President Donald J. Trump on Signing the "Countering America's Adversaries Through Sanctions Act" (Aug. 2, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/02/statement-president-donald-j-trump-signing-countering-americas>.

² See E.O. 13660, "Blocking Property of Certain Persons Contributing to the Situation in Ukraine" (Mar. 6, 2014); E.O. 13661 "Blocking Property of Additional Persons Contributing to the Situation in Ukraine" (Mar. 16, 2014); E.O. 13662 "Blocking Property of (cont.)"

sanctions targeting significant malicious cyber-enabled activity (E.O.s 13694 and 13757).³ The President may terminate the application of sanctions with respect to a particular sanctioned person upon submission of a notice to the appropriate Congressional committees, subject to the review process described below.

- **Congressional Review:** Section 216 of the Act provides for Congressional review of actions by the President to terminate or weaken the application of specified Russia-related sanctions – which include the sanctions imposed pursuant to the Act (or any of the E.O.s codified by the Act), the Support for the Sovereignty, Integrity, Democracy, and Economic Stability of Ukraine Act of 2014 (“**SIDES Act**”)⁴ or the Ukraine Freedom Support Act of 2014 (“**UFSA**”)⁵ – and the prohibition on Russian access to certain of its diplomatic properties in the United States, originally ordered by President Obama. The review process established by Section 216 applies to actions to terminate or waive the specified sanctions (including the delisting of particular sanctioned persons), as well as to any licensing action related to such sanctions that significantly alters U.S. foreign policy with regard to Russia (“**covered actions**”).

Should the President propose to take a covered action, he must submit a report to the appropriate Congressional committees describing the action, which is then subject to review for a period of 30 days (60 days if the report is submitted between July 10 and September 7). During the review period, the President may not take the covered action unless Congress passes a joint resolution of approval with respect to the action.

Congress may prevent the covered action by enacting a joint resolution of disapproval with respect to the action. Such resolutions are subject to Presidential veto; following such a veto, the President is precluded from taking the covered action for an additional 10 day period to permit Congressional reconsideration of the resolution and potential override of the veto. The review process established by Section 216 is structured to ensure timely consideration of a joint resolution of disapproval, and to protect the ability of the minority party in each house of Congress to introduce such a resolution and have it considered.⁶

- **Modifications to Directives:** Section 223 of the Act requires the Secretary of the Treasury to make the following modifications to the sectoral sanctions Directives issued pursuant to E.O. 13662:
 - Amend Directive 1 to prohibit the conduct by United States persons or persons within the United States of all transactions in, provision of financing for, and other dealings in new debt of longer than 14 days maturity (as compared to 30 days under the current Directive 1) or new equity of persons operating in Russia’s financial services sector determined to be subject to the Directive, their property, or their interests in property.

(cont.)

Additional Persons Contributing to the Situation in Ukraine” (Mar. 24, 2014); E.O. 13685 “Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to the Crimea Region of Ukraine” (Dec. 19, 2014).

³ See E.O. 13694 “Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities” (Apr. 1, 2015); E.O. 13757 “Taking Additional Steps to Address the National Emergency With Respect to Significant Malicious Cyber-Enabled Activities” (Dec. 28, 2016).

⁴ 22 U.S.C. §§ 8901-8908.

⁵ 22 U.S.C. §§ 8921-8930.

⁶ In the second signing statement released by the White House, the President noted his concerns about the bill’s encroachment on the Executive’s foreign affair powers, specifically, the authority to negotiate. See The White House, Statement by President Donald J. Trump on Signing the “Countering America’s Adversaries Through Sanctions Act” (Aug. 2, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/02/statement-president-donald-j-trump-signing-countering-america>.

- Amend Directive 2 to prohibit the conduct by United States persons or persons within the United States of all transactions in, provision of financing for, and other dealings in new debt of longer than 60 days maturity (as compared to 90 days under the current Directive 2) of persons operating in Russia's energy sector determined to be subject to the Directive, their property, or their interests in property.
- Amend Directive 4 to prohibit the provision, exportation, or reexportation, directly or indirectly, by United States persons or persons within the United States, of goods, services (except for financial services), or technology in support of exploration or production for new deepwater, Arctic offshore, or shale projects (1) that have the potential to produce oil; and (2) that involve any person determined to be subject to the Directive or the property or interests in property of such a person who has a controlling interest or a substantial non-controlling ownership interest in such a project defined as not less than a 33 percent interest. These changes expand the scope of current Directive 4 to cover projects with the potential to produce oil outside of Russia in addition to inside Russia, but narrow it by excluding projects where the person subject to the Directive has less than a 33 percent ownership interest.

The modifications to Directives 1 and 2 are to take effect 60 days after they are announced by Treasury, and the modification to Directive 4, 90 days after it is announced.

- **Additional Designation Authorities:** Several sections of Title II provide for sanctions against persons determined to meet specified criteria, including:
 - **Railways, Metal and Mining Sectors:** Section 223 of the Act authorizes the Secretary of the Treasury to impose sanctions pursuant to Section 1(a) of E.O. 13662 with respect to state-owned entities operating in the railway or metals and mining sector of the Russian economy. This would add to existing sectoral sanctions pursuant to this E.O. that target the financial services, defense, and energy sectors.
 - **Cybersecurity:** Section 224 of the Act requires the President to:
 - block the assets of, and exclude from the United States, any person the President determines knowingly engages directly or indirectly on behalf of the Government of the Russian Federation (“GOR”) in significant activities undermining cybersecurity against any person (including a democratic institution or a government).
 - impose five or more limited sanctions measures⁷ on 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 such activities; and
 - impose three or more limited sanctions measures with respect to any person that the President determines knowingly provides financial services in support of such activities.
 - **Energy Sector:** Section 225 of the Act amends UFSA to require the President to impose, unless he determines that doing so is not in the national interest, three or more

⁷ Such measures include prohibitions on debt, equity, and/or foreign exchange transactions involving U.S. financial institutions or other U.S. persons.

limited sanctions measures⁸ with respect to foreign persons determined to knowingly make a significant investment in a special Russian crude oil project (i.e., deepwater, Arctic offshore, or shale projects). Section 232 provides discretionary authority to impose similar sanctions with respect to persons who knowingly make a significant investment that directly and significantly contributes to the enhancement of the GOR's ability to construct energy export pipelines; or sell, lease or provide goods, services, technology, information, or support to the GOR for the construction of Russian energy export pipelines.

- **Activities of Foreign Financial Institutions:** Section 226 of the Act amends UFSA to require the President to impose correspondent account sanctions with respect to foreign financial institutions the President determines to knowingly engage in significant transactions involving certain defense- or energy related activities of persons sanctioned pursuant to UFSA (of which there are currently none) or involving Russian persons identified on the list of Specially Designated Nationals and Blocked Persons (the “**SDN List**”) maintained by the Treasury Department’s Office of Foreign Assets Control (“**OFAC**”).
- **Corruption:** Section 227 of the Act amends the SIDES Act to require the President to block transactions of, and exclude from entry into the United States, any official of the GOR, or a close associate or family member of such an official, that the President determines is responsible for, complicit in, or responsible for ordering, controlling, or otherwise directing, acts of significant corruption in the Russian Federation, as well as any individual who has materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, such acts of corruption.
- **Sanctions Evasion:** Section 228 of the Act uses unusually broad language to require the President to block the assets of foreign persons the President determines to have engaged in certain activities that facilitate the evasion of Russia-related sanctions.
- **Human Rights Abuses:** Section 228 of the Act requires the President to block the assets of, and exclude from entry into the United States, foreign persons determined by the President to be responsible for or complicit in serious human rights abuses in any territory forcibly occupied by or otherwise controlled by the GOR.
- **Transactions with Russian Defense and Intelligence Sectors:** Section 231 of the Act requires the President to impose five or more limited sanctions measures with respect to a 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 GOR, 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.
- **Privatization of State Assets:** Section 233 of the Act requires the President to impose five or more limited sanctions measures with respect to a person the President determines, with actual knowledge, makes or facilitates an investment of \$10,000,000 or more that directly and significantly contributes to Russia's ability to privatize state-owned assets in a manner that unjustly benefits GOR officials or their close associates or family members.

⁸ Such measures include prohibiting Export-Import Bank assistance and imposing U.S. government procurement sanctions.

- **Arms Sales to Syria:** Section 234 of the Act requires the President to block the assets, and exclude from entry into the United States, any foreign person the President determines to have knowingly exported, transferred, or otherwise provided to Syria significant financial, material, or technological support that contributes materially to the ability of the Government of Syria to acquire or develop weapons of mass destruction (“WMD”), missile capabilities, advanced conventional weapons, significant defense articles, services, or information, or items on the U.S. Munitions List.

A number of the Act’s new sanctions – both with respect to Russia and in general – are styled as “mandatory,” but apply only to the extent that the President determines that persons meet the specified criteria, so the President retains considerable discretion with respect to their implementation. Subject to the Congressional review provisions described above, sanctions imposed pursuant to Title II of the Act may also be waived if the President determines that such a waiver is in the national security interest of the United States, and the application of sanctions to a particular person may be terminated if the President provides a notice of and justification for the termination to Congress.

North Korea

Title III of the Act includes a number of new secondary sanctions provisions and other measures targeting sources of economic support for the North Korean Government, as follows:

- **Expanded Designation Criteria:** Section 311 of the Act amends the North Korea Sanctions and Policy Enhancement Act of 2016 (“**NKSPEA**”)⁹ to provide for additional sanctions designation criteria with respect to North Korea and block the assets of any person the President determines to knowingly, directly or indirectly:
 - purchase or acquire from North Korea significant amounts of gold, titanium ore, vanadium ore, copper, silver, nickel, zinc, or rare earth minerals;
 - sell or transfer to North Korea any significant amounts of rocket aviation or jet fuel;
 - provide significant amounts of fuel or supplies, provide bunkering services, or facilitate a significant transaction or transactions to operate or maintain a vessel or aircraft that is identified as sanctioned or that is owned or controlled by a sanctioned person;
 - insure, register, facilitate registration of, or maintain insurance or a registration for, a vessel owned or controlled by the Government of North Korea (unless specifically approved by the United Nations Security Council (“**UNSC**”)); or
 - maintain a correspondent account with any North Korean financial institution (unless specifically approved by the UNSC).
- **Discretionary Authority:** Section 311(b) authorizes the President to block the assets of persons determined to knowingly, directly or indirectly:
 - purchase or acquire from the Government of North Korea fishing rights, significant types or amounts of textiles, food, or agriculture products, or significant quantities of coal, iron, or iron ore in excess of UNSC restrictions;
 - facilitate a significant transfer of funds or property of the North Korean Government that materially contributes to a violation of an applicable UNSC resolution, or facilitate significant

⁹ 22 U.S.C. § 9214.

transfers of bulk cash, and certain precious metals, gemstones, or other stores of value to the North Korean Government;

- engage in, facilitate, or be responsible for online commercial activities of the North Korean Government or the exportation of workers from North Korea in a way that generates significant revenue for use by the North Korean Government or the Workers' Party of Korea;
 - sell, transfer or otherwise provide significant amounts of crude oil, condensates, refined petroleum, other types of petroleum or petroleum byproducts, liquefied natural gas, or other natural gas resources to the North Korean Government (with some exceptions, such as humanitarian purposes);
 - conduct a significant transaction in North Korea's transportation, mining, energy, or financial services industries; or
 - facilitate the operation of any branch, subsidiary, or office of a North Korean financial institution.
- **Correspondent Account Prohibition:** Section 312 of the Act amends NKSPEA to require U.S. financial institutions to prevent the indirect use of correspondent accounts maintained for a foreign financial institution to provide significant financial services to any person, foreign government, or financial institution sanctioned pursuant to NKSPEA, as amended by the Act.
 - **Shipping and Vessel Sanctions:** Section 314 of the Act prohibits the entry or operation in the navigable waters of the United States, or the transfer of cargo in any port or place under United States jurisdiction, by vessels owned or operated by the Government of North Korea or a North Korean person, vessels owned or operated by or on behalf of any country that is identified by the President as not in compliance with applicable UNSC Resolutions related to North Korea, or in which is located a sea port identified by the President as not sufficiently enforcing applicable UNSC Resolutions. The Secretary of Homeland Security, with the concurrence of the Secretary of State, is required to publish a list of vessels subject to this prohibition in the Federal Register within 180 days after the date of enactment of the Act, and to periodically update the list. The Secretary of State may waive the prohibition as to a vessel owned or operated by a country whose government is determined to be cooperating with the implementation of applicable UNSC resolutions or where the waiver is in the national security interest, and may also be waived by the Secretary of Homeland Security where necessary for the safety of the vessel or persons aboard.
 - **Human Rights Sanctions:** Section 321 of the Act amends NKSPEA to establish a rebuttable presumption that goods produced wholly or partly by North Korean labor may not enter any U.S. port. The prohibition can be overcome upon a demonstration by clear and convincing evidence that the goods, wares, articles, or merchandise were not produced with convict labor, forced labor, or indentured labor under penal sanctions.

Section 321 additionally expands existing requirements for periodic human rights reports by the Secretary of State to include the identification of foreign persons knowingly employing North Korean laborers. The President is required to block the assets of persons identified in such reports.

- **State Sponsor of Terrorism:** Section 324 of the Act requires the Secretary of State to submit to Congress within 90 days a determination of whether North Korea meets the criteria for designation as a state sponsor of terrorism. Such a determination would not impose additional restrictions on transactions or dealings involving North Korea, given the comprehensive U.S. sanctions already in place.

The authorities provided by Title III of the Act add to already sweeping authorities under existing E.O.s to target for sanctions persons providing support to the Government of North Korea and its illicit and malign activities.

Iran

Title I of the Act provides for additional sanctions targeting Iran's ballistic missile programs and support for terrorism that are largely duplicative of existing authorities. The inclusion of these measures in the Act is mostly notable as an indicator of overwhelming Congressional support for robust enforcement of Iran sanctions. The sanctions provisions include:

- **Ballistic Missile Sanctions:** Section 104 of the Act requires the President to impose blocking sanctions against and exclude from entry into the United States any person determined by the President to knowingly engage in any activity that materially contributes to the Iranian Government's activities regarding its ballistic missile program, or any other program in Iran for developing, deploying, or maintaining systems capable of delivering WMD; as well as successor entities of such persons, persons who own or control or are owned or controlled by such persons, persons that form an entity to evade sanctions against the foregoing, and persons that act for or on behalf of, or knowingly provide support, goods, or services to or in support of, sanctioned persons. This provision largely duplicates authorities already available under E.O. 13382¹⁰, which targets WMD proliferators and their support networks, though it may permit broader upstream designations of persons that own or control sanctioned entities.
- **Additional Sanctions Targeting the IRGC:** Section 105 of the Act requires the President to impose sanctions pursuant to E.O. 13224¹¹ against the Iranian Islamic Revolutionary Guard Corps ("IRGC") and foreign persons that are officials, agents, or affiliates of the IRGC within 90 days of enactment. The IRGC is already subject to primary sanctions, and secondary sanctions may be imposed against foreign persons that knowingly engage in transactions involving the IRGC and its agents and affiliates, so these additional sanctions will likely have minimal practical impact.
- **Arms Embargo Enforcement:** Section 107 of the Act requires the President to impose blocking sanctions against and exclude from entry into the United States any person that the President determines knowingly engages in any activity that materially contributes to the supply, sale, or transfer directly or indirectly to or from Iran, or for Iran's use or benefit, of prohibited arms and related material, including spare parts; or knowingly 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 such arms and related materiel.
- **Human Rights Sanctions:** Section 106 of the Act requires the Secretary of State to submit to Congress, at regular intervals, a list of persons responsible for gross human rights violations against any individuals supporting internationally recognized human rights and freedoms or any persons exposing illegal activities of the Iranian Government, and authorizes the President to block the assets of listed persons.
- **Review of SDN List:** Section 108 of the Act directs the President to, within five years, conduct a review of all persons on the SDN List for activities relating to Iran's ballistic missile program or

¹⁰ See E.O. 13382, "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters" (June 28, 2005).

¹¹ See E.O. 13224, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism" (Sep. 23, 2001).

support for terrorism and determine whether sanctions pursuant to E.O. 13382 or 13224 apply to such persons.

CONCLUSION

The Act gives the Executive branch sweeping authorities that could lead to a significant expansion of sanctions with respect to Russia and North Korea. However, despite some limitations on the President's authority to terminate or waive sanctions on Russia, the President retains wide discretion in implementing these new authorities, suggesting that actual impact will be determined by executive branch agencies' implementation and enforcement. We will monitor developments closely as the Act is implemented, and provide updates as appropriate.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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The lawyers listed above gratefully acknowledge the assistance of law clerk Brooklynn Moore and summer associate Ilana Rice in preparing this memorandum.

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