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U.S. INTERNATIONAL TRADE AND INVESTMENT SECURITY REVIEWS: THE LATEST DEVELOPMENTS

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OVERVIEW

- Oversight of Foreign Investment & Tech Transfer
- CFIUS Reforms – FIRRMA
- Investment Strategies

Oversight of Foreign Investment & Tech Transfer

FOREIGN INVESTMENT & TECH OVERSIGHT

- The Committee on Foreign Investment in the United States **(CFIUS) is a U.S. government interagency committee that reviews foreign investment in the United States for national security risks**.

- The **U.S. Congress and the Trump Administration have been very focused on Chinese investments** -- especially by SOEs or government-backed entities (at all levels of government) -- that appear to target industries and technologies that the Chinese government has identified as critical to China's future economic development.

- On **August 13, 2018, the President signed into law the FY2019 National Defense Authorization Act** ("NDAA"), **which incorporates CFIUS reform legislation** known as the Foreign Investment Risk Review Modernization Act ("**FIRRMA**"). Certain FIRRMA provisions are effective immediately; other provisions take effect in 18 months.

- **Export control legislation** (the Export Control Reform Act of 2018 ("**ECRA**")), also included in the NDAA, **establishes a process to identify and control "emerging and foundational technologies" – technology "essential" to U.S. national security that is not currently subject to export controls**.

- Technologies/sectors **likely to receive enhanced investment scrutiny include artificial intelligence, advanced IT, robotics, new energy vehicles, medical devices and pharmaceuticals, cybersecurity, power generation and transmission, and financial technology**.

CFIUS REVIEW and RISK ASSESSMENT

- In assessing the risk posed to national security by a foreign investment transaction, **CFIUS looks at the facts of the transaction under review**.

- Specifically, CFIUS will consider:

1. The **threat posed by the foreign investment in terms of intent and capabilities of the acquirer**;

2. Whether **aspects of the business activity pose vulnerabilities to national security**; and

3. The **potential national security consequences if the vulnerabilities were to be exploited**.

EXPORT CONTROLS FOR EMERGING TECHNOLOGIES - ECRA

- U.S. **export laws and regulations operate to restrict the use of and access to controlled information, goods, and technology for reasons of national security** or protection of trade.

- The **new export control law, ECRA, is intended to strengthen enforcement of export controls and address concerns about the transfer of technology** in conjunction with the expanded jurisdiction of CFIUS.

- **ECRA expands the ways in which items subject to export controls are identified**, including –
  - Establishes an **interagency process, including the intelligence community, to identify emerging and foundational technologies essential to the national security of the United States** and not otherwise already subject to export controls. Technologies likely to receive enhanced scrutiny include artificial intelligence, robotics, cybersecurity, and financial technology.

  - Authorizes the Commerce Secretary to **establish controls on the newly identified emerging and foundational technologies** to address concerns posed by transfers through such investment vehicles as joint ventures. The levels of control require an **enhanced license application** to export, re-export, or transfer in-country to a country subject to United States embargo (including an arms embargo).

  - **Enhances collaboration and coordination with U.S. allies and partners**.

- On November 19, 2018, Commerce requested public comment on the criteria to identify "emerging" technologies essential to U.S. national security.

CFIUS Reforms – FIRRMA

EXPANSION OF CFIUS JURISDICTION

- **FIRRMA expands the jurisdiction of CFIUS** to address growing national security concerns over foreign exploitation of certain investment structures which traditionally have fallen outside of CFIUS jurisdiction, such as –
  - **investments in critical technology or critical infrastructure that fall short of "control,"** but that allow the foreign investor access to material nonpublic information, membership or observer rights on the board, or other decision-making rights (other than through voting shares);
  - **any change in a foreign investor's rights resulting in foreign control** of a U.S. business or providing access to information or governance regarding critical technology, critical infrastructure, or sensitive personal information that could result in foreign control of the business;
  - **transactions resulting in foreign access to sensitive personal information**, including non-controlling foreign investments in firms that maintain or collect personal data of U.S. citizens; and
  - **real estate purchases, leases and concessions** that are in or part of an airport or seaport, or in "close proximity" to a U.S. government or military facility and could pose a national security risk even if they do not involve the acquisition of a U.S. business.
- Under certain circumstances, **FIRRMA limits the jurisdiction of CFIUS for investments through U.S.-managed investment funds**. In particular, a foreign indirect investment may not be within CFIUS jurisdiction over non-controlling investments even if foreign limited partners sit on a fund advisory board if, *e.g.*, the advisory committee cannot control the fund, the foreign persons cannot otherwise control the fund, and the foreign investors do not have access to material nonpublic information through their participation on the advisory board.

FIRRMA ESTABLISHES NEW CFIUS PROCESSES

- **Mandatory Declarations** – Transactions in which a foreign government would hold a "substantial interest" in critical technology, critical infrastructure, or personal data maintenance/collection firms will be required to file declarations. (Rulemaking required.) Mandatory declarations must be submitted at least 45 days prior to closing.

- **Non-notified Transactions** – CFIUS must establish a process to identify covered transactions that were not notified to the Committee. (Rulemaking required.)

- **Information Sharing** – Information "important to the national security analysis or actions" of CFIUS may be shared with any domestic governmental entity or with allied foreign governments "to the extent necessary for national security purposes." (Effective immediately.)

- **Mitigation** – FIRRMA strengthens the requirements for use of mitigation agreements, including the addition of compliance plans to inform the use of such agreements. (Rulemaking required.)

- **Judicial Review** – Civil actions challenging an action or finding by CFIUS may be brought before the U.S. Court of Appeals - D.C. Circuit. (Effective immediately.) Previously, presidential findings and actions resulting from CFIUS proceedings were not subject to judicial review.

- **Filing Fees** – CFIUS is authorized to assess and collect filing fees "not to exceed" 1% of the value of the transaction or $300,000 (adjusted annually for inflation), whichever is less. (Rulemaking required.)

FIRRMA IMPLEMENTATION – TREASURY REGS

Treasury will need to do rulemakings before FIRRMA is fully implemented. During the rulemaking process (to be completed no later than March 2020), **there will be an opportunity for interested stakeholders to provide input**.

NEW Pilot Program – CFIUS must review foreign investments in "pilot program industries"

- On **October 10, 2018, Treasury issued interim CFIUS/FIRRMA regulations** "to protect critical American technology and intellectual property from potentially harmful foreign acquisitions" **including a pilot program to implement provisions in the legislation that did not become effective immediately upon enactment**.

- The pilot program **implements authorities that expand the scope of transactions subject to CFIUS review to include certain non-controlling investments in U.S. businesses involved in critical technologies related to specific industries**. The **pilot program also makes effective FIRRMA's mandatory declarations provision for transactions that fall within the scope of the pilot program**.

- The **pilot program applies to several types of investment transactions** including investments that could result in foreign control of a US business that produces, designs, tests, manufactures, fabricates, or develops a critical technology that is used or designed specifically **for use in a "pilot program industry."** Treasury's **interim regulations identify 27 "pilot program" industries**, including aircraft, chemical, power transformer, battery, communication equipment, and turbine manufacturing, as well as nanotech and biotech research and development.

- **Parties must file the more streamlined declaration with CFIUS at least 45 days prior to completing the transaction**. CFIUS will have 30 days to respond to a declaration and may request that parties file a full notice or "clear" the transaction.

- **Investment by a foreign person in a pilot program business through a US-managed investment fund may, under certain circumstances, be exempt from mandatory review**.

CFIUS LATEST DEVELOPMENTS/NEXT STEPS

Updates on Pilot Program:

- Notwithstanding "short" declaration form, CFIUS is asking multiple and detailed follow-up questions including:
  - Questions on operations in or related to China;
  - Organizational charts; and
  - Significant information on government contracts.
- In some cases, CFIUS does not clear transactions, but rather merely acknowledges that the Pilot Program requirements have been met (meaning the transaction could still be reviewed under normal CFIUS procedures).
- For that reason, many parties are filing a joint voluntary notification and requesting review via CFIUS's normal procedures, rather than the Pilot Program declaration.

Next steps:

- May 10, 2019 -- CFIUS to complete study on establishment of filing fees, study to be submitted to the Senate Banking and House Financial Services Committees.
- August 13, 2019 – Department of Homeland Security to submit a report to Congress assessing the national security risks related to state-owned or state-controlled entities in the manufacture or assembly of rolling stock or other assets used in freight rail, public transportation rail systems, or intercity passenger rail systems in the United States.
- March 5, 2020 -- The critical technologies Pilot Program must end before this date.

Critical Technologies/"Foundational" and "Emerging" Technologies

CRITICAL TECHNOLOGIES

- CFIUS Pilot Program specifically focused on "critical technologies," which includes:
  - Nearly all items controlled on the Commerce Control List of the Export Administration Regulations (i.e., technologies controlled for reasons relating to national security (NS), chemical and biological weapons proliferation (CB), nuclear nonproliferation (NP), missile technology (MT), regional stability (RS), or surreptitious listening (SL));
  - Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations (ITAR)
  - Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by 10 CFR part 810 (relating to assistance to foreign atomic energy activities);
  - Nuclear facilities, equipment, and material covered by 10 CFR part 110 (relating to export and import of nuclear equipment and material);
  - Select agents and toxins covered by 7 CFR part 331, 9 CFR part 121, or 42 CFR part 73; and
  - Emerging and foundational technologies controlled pursuant to section 1758 of the ECRA (not yet identified)

EMERGING & FOUNDATIONAL TECH.

- FIRRMA and ECRA instruct the Department of Commerce in conjunction with other relevant agencies to initiate a process to identify technologies as "emerging" and "foundational" that are "essential to the national security of the United States" and are critical technologies (i.e., are not currently subject to export controls).
  - November 2018 – Commerce published a notice with potential categories of technologies for designation as "emerging" technologies.
  - Separate notice with proposed categories of "foundational" technologies is forthcoming.
- Emerging and foundational technologies, once identified, will become part of CFIUS critical technologies review (currently under the Pilot Program).
- Commerce also instructed to consult with multilateral export control regimes on adding identified emerging and foundational technologies to control lists.
- Commerce also to consider unilateral (U.S. only) controls:
  - Level of control may vary among countries, however technologies must be controlled for any country subject to an embargo, including an arms embargo, imposed by the United States (China subject to a military embargo, and therefore would be impacted).
  - Non-embargoed countries could be impacted through reexport controls.

EMERGING & FOUNDATIONAL TECH.

- "Emerging" technologies – Potential types of emerging technologies included in Department of Commerce Notice of Proposed Rulemaking in the Federal Register (November 19, 2018)

Biotechnology
-- Nanobiology
-- Synthetic biology
-- Genomic/genetic engineering
-- Neurotech

Artificial intelligence/machine learning technology
-- Neural networks/deep learning
-- Evolution/genetic computation
-- Reinforcement learning
-- Computer vision
-- Expert systems
-- Speech/audio processing
-- Natural language processing
-- Planning
-- Audio and video manipulation
-- AI cloud technologies
-- AI chipsets

Position, Navigation, and Timing (PNT) technology

Advanced computing technology
-- Memory-centric logic

Microprocessor technology
-- Systems-on-Chip (SoC)
-- Stacked Memory on Chip

Data analytics technology
-- Visualization
-- Automated analysis algorithms
-- Context-aware computing

Quantum information and sensing technology
-- Quantum computing
-- Quantum encryption
-- Quantum sensing

Logistics technology
-- Mobile electric power
-- Modeling and simulation
-- Total asset visibility
-- Distribution-based Logistics Systems (DBLS)

Additive manufacturing/3D printing

Advanced surveillance technologies
-- Faceprint/voiceprint technologies

Robotics
-- Micro-drone/micro-robotic systems
-- Swarming technology
-- Self-assembling robots
-- Molecular robotics
-- Robot compliers
-- Smart Dust

Brain-computer interfaces
-- Neural-controlled interfaces
-- Mind-machine interfaces
-- Direct neural interfaces
-- Brain-machine interfaces

Hypersonics
-- Flight control algorithms
-- Propulsion technologies
-- Thermal protection systems
-- Specialized materials (for structures, sensors, etc.)

Advanced Materials
-- Adaptive camouflage
-- Functional textiles
-- Biomaterials


Investment Strategies

INVESTMENT STRATEGIES, MANAGING RISK

PREPARATION BEFORE CFIUS REVIEW

- Pre-acquisition diligence is critical – what is the investment target and what does it do?
  - Contracts with the U.S. government or military?
  - Key supplier to the U.S. government or critical industrial sectors?
  - Does the target possess critical technologies, or has control over or access to large pools of personal data?
  - Is the target part of or has control over critical infrastructure assets?
- Consider transactions that are arguably outside scope of CFIUS jurisdiction or that reduce the transaction's profile/risk:
  - E.g., technology licensing and sharing arrangements that are allowable under export control laws (although note that FIRRMA creates a mechanism to consider these types of arrangements, and CFIUS may try to review them under a creative jurisdictional interpretation);
  - Minority and passive investments; and
  - Proactively divest of potentially problematic operations/assets of U.S. targets.

INVESTMENT STRATEGIES, MANAGING RISK

PREPARATION BEFORE CFIUS REVIEW

- Diligence on foreign acquirer/investor is also critical:
  - Ownership or control by any governmental or state-owned entity?
  - Ownership or control by any countries of strategic concern for the United States?
  - China-related relationships important:
    - Relationships with Chinese government/military officials or entities?
    - Services provided to Chinese government?
    - Joint ventures, R&D partnerships, etc. with Chinese government/military?
  - Any transactions with countries subject to U.S. embargo (e.g., Cuba or Iran) or with persons designated under U.S. economic sanctions and export control laws?

INVESTMENT STRATEGIES, NO SURPRISES

DEVELOP AND IMPLEMENT ADVOCACY and EDUCATION PLAN

- Important to develop story on benefits of transaction (e.g., investment in the energy sector will boost U.S. energy exports; investments critical to keep production/employment in the U.S.).
- The process of informing and educating elected officials and executive branch officials should begin before the deal closes to ensure officials are not blindsided by press coverage or opposition campaigns.
- Other entities/stakeholders may have an incentive to derail the deal or at least make life difficult for investees and investors:
  - Politicians;
  - Competing investors / losing bidders that did not get the deal;
  - Competitors in the same industry or sector who do not want to compete with a company flush with new capital or other resources; and
  - Other stakeholders focused on substantive issues indirectly related to the deal – e.g., environment or labor organizations.
- Think broadly about the list of people to educate. For example, consider not just elected officials that represent the state/district where the investee is located, but also elected officials from states/districts where the investee's major suppliers (manufacturers) or customers reside.

INVESTMENT STRATEGIES, NO SURPRISES

WHETHER TO OFFER MITIGATION PROACTIVELY AS PART OF CFIUS STRATEGY?

Parties may agree to implement up-front certain mitigation measures, rather than wait for CFIUS to raise concerns. Examples of mitigation may include:

- Establishment of business governance mechanisms (e.g., proxy or security agreements, board resolutions, etc.) to give U.S. citizens sole authority over critical decisions of the U.S. business;
- Limiting access to facilities and databases to U.S. citizens;
- Retaining trusted third parties to review and audit products and services (e.g., software specialist to review critical software source code); and
- Agreements to to allow U.S. government veto over certain business decisions, such as termination or modification of critical government contracts, or requiring occasional meetings with/oversight of U.S. government officials to provide status update.

CFIUS REVIEW - KEY TAKEAWAYS

- Consider how to manage and mitigate possible risks associated with foreign investment, and whether a CFIUS filing is warranted *before* completing any transaction.

- Transactions involving Chinese investors likely will be subject to heightened scrutiny by U.S. officials, particularly where the investors are affiliated with the Chinese government.

- Preparation and planning when considering deals with international investors will be critical to the successful completion of such deals.

- Preparation and planning should include:

  - Consideration of the political climate in Washington in relation to the investor and the sector or industry;
  - Advance meetings with relevant elected officials and executive branch officials to familiarize officials with the project or deal and get out in front of possible opposition; and
  - Mitigation proposals up front.

Trump Trade/Tariff Update

PRES. TRUMP TRADE POLICY OBJECTIVES

- Guiding principle -- Expand trade in a way that is freer and fairer for U.S.
- Every action with respect to trade will be designed to –
  - Increase U.S. economic growth
  - Promote job creation in the United States
  - Promote reciprocity with our trading partners
  - Strengthen the U.S. manufacturing base and our ability to defend ourselves
  - Expand U.S. agricultural and services industry exports
- Focus on bilateral rather than multilateral negotiations
- Renegotiate and revising trade agreements when U.S. goals are not being met
- Workers, farmers and businesses in US will be served – stop turning blind eye to unfair trade practices

TARIFFS – STEEL/ALUMINUM (SEC. 232)

Background

- On March 8, 2018, the President announced the imposition of a 25% tariff on steel imports and a 10% tariff on aluminum imports after finding that foreign imports of steel and aluminum are a threat to U.S. national security.
- The tariffs went into effect on March 23, 2018, and are on top of customs or other (eg, AD/CVD) duties.
- With the exception of a few temporary country exemptions, the tariffs were applicable to steel and aluminum imports from all countries.
- In August 2018, the President raised the tariff rate on steel imports from Turkey to 50%.

Country Exemptions

- April 2018, South Korea - permanent exemption from steel tariffs by agreeing to a 70% quota on steel exports to the U.S..
- May 2018, Argentina (steel/aluminum), Australia (steel/aluminum), and Brazil (steel) successfully negotiated permanent exemptions.

Exclusion Requests

- Companies may file exclusion requests, or objections to exclusion requests.
- Commerce will consider exclusion requests on a rolling basis.
- There is no time limit for exclusion requests.
- If an exclusion request is granted, duties paid are refunded retroactive to the date the exclusion request was filed.
- Commerce typically will deny an exclusion request if a domestic producer objects to the request.
- Commerce recently established a rebuttal and surrebuttal process.

Exclusion Procedures for Countries with Quotas

- Currently Argentina, Brazil and South Korea are subject to quotas.
- Commerce has updated its regulations to allow companies to file for exclusions for products from countries that agreed to a quota.
- Exclusion requests for products coming from countries with quota arrangements will be valid only through March, 31, 2019.

TARIFFS – CHINA (SEC. 301)

Background

- In August 2017, USTR initiated a "301 investigation" with respect to China's intellectual property practices.
- Conclusion: China's practices were unfair and caused billions in damages to the U.S. each year.
- March 2018, the President proposed several trade sanctions on China, including tariffs.
- To date, the U.S. has imposed a 25% tariff on approximately $50bn of Chinese imports (Lists 1 & 2).
- A 10% tariff on approximately $200bn of Chinese imports goes into effect on September 24 (List 3). The tariff rate on the List 3 products increases to 25% on January 1, 2019.
- If a planned fourth round of cuts (on $257bn of Chinese imports) is fully implemented, the U.S. will have imposed new tariffs on virtually all imports of goods from China (which totaled $505bn in 2017).
- The President also has threatened to impose additional tariffs on $257bn of Chinese imports (List 4), and is expected to follow through on that threat.

Exclusion Requests

- Each tariff list provides two opportunities to request product exclusions.

TARIFFS – AUTOS, AUTO PARTS (SEC. 232)

Background

- On May 23, 2018, the Commerce Secretary initiated a section 232 investigation into whether imports of automobiles, light trucks, and automotive parts pose a risk to U.S. national security.
- Reaction mostly negative. However, certain unions have expressed support for the 232 investigation.

Products/Countries Subject to Investigation.

- All categories of automobiles are under review.
- The investigations — initiated by the U.S. Department of Commerce ("Commerce") — could result in the imposition of sweeping import restrictions with the potential for significant disruption of the autos/parts supply markets.

Status

- Commerce provided the autos/parts 232 report to the White House on February 17 – not yet made public.
- Rumor that the report recommends a "carve out" for specific facilities, such as US-brand manufacturing facilities in Mexico and Canada.
- Under Section 232, President must take action within 90 days (by May 18, 2019) – may continue using the threat of tariffs to keep the EU and Japan at the negotiating table and to obtain concessions.

TARIFFS – RETALIATION and LITIGATION

Retaliatory Tariffs/Litigation in Response to U.S. Steel/Aluminum Tariffs

- The following countries filed WTO cases against the U.S., and have imposed retaliatory tariffs, ranging from 10-100%, on U.S. exports: Canada, the EU, Mexico, China, India, Russia, and Turkey. Japan has proposed retaliatory tariffs but not yet imposed.
- The retaliatory tariffs cover a broad range of U.S. exports, targeted at specific sectors (eg, agriculture), districts and/or states to have maximum political impact.
- In June 2018, the American Institute for International Steel (AIIS) and two of its member companies filed suit in the United States Court of International Trade challenging the constitutionality of the statute under which the President imposed a 25% tariff on imported steel.

Retaliatory Tariffs/Litigation in Response to U.S. Tariffs on Imports from China

- China filed a WTO case against the U.S. and has imposed a retaliatory 25% tariff on a broad range of U.S. exports, targeted at specific sectors (eg, agriculture), districts and/or states to have maximum political impact.
- China will impose another round of retaliatory tariffs on $60bn in U.S. exports, in response to U.S. imposition of tariffs on List 3 imports ($200bn list). The retaliatory tariffs go into effect on 24 September 2018.
- Tech industry groups have threatened to challenge the Administration's proposed tariffs on $200bn of Chinese imports because the industry believes the tariffs are *not* based on a legal finding of unfair business practices by China.

OTHER TRADE NEGOTIATIONS – STATUS

- **U.S.-Japan Bilateral Agreement**. President Trump wants a bilateral deal with Japan. Japan will continue to slow walk talks on a bilateral deal and, at the same time, try to entice the President with the notion of the U.S. rejoining the TPP.
- **KORUS**. In negotiating exemption from steel tariffs, Korea also reached a deal on amendments to KORUS, including permitting increased U.S. auto imports and allowing the U.S. to keep a 25% tariff on truck imports for an additional 20 years. Korea also believes it will be exempted from any new tariffs on autos.
- **Trans-Pacific Partnership (TPP)**. In January 2017, President Trump withdrew the United States from the TPP. The 11 remaining countries signed an updated agreement on March 8, 2018, which will slash tariffs among the 11 member countries by 2019. Japan and Vietnam are urging the U.S. to rejoin the TPP. Farm-state senators also have asked the Administration to consider rejoining TPP.
- **India**. The U.S. and India are in discussions to resolve long-standing issues, including Indian price controls for medical devices, data localization requirements for electronic payment companies, and intellectual property issues. The U.S. also wants to improve market access for agricultural products, including dairy and poultry. Some of these issues could be resolved by the end of 2018.
- **Kenya**. In August, the U.S. and Kenya announced a new trade and investment working group, a potential early step toward a bilateral trade agreement.
- **WTO**. The Administration is working on legislation that would empower the President to walk away from U.S. commitments and obligations under the WTO. The President would have unilateral power to negotiate with other countries and raise tariffs at will. Congress is unlikely to support such legislation.

Select Trade Sanctions Program Updates

IRAN UPDATE

- Effective November 2018, US sanctions reverted to pre-JCPOA situation
- Primary impact:
  - Secondary sanctions no longer waived
  - General License H revoked
  - Redesignation of 100s of persons/entities as SDNs
- "Primary" sanctions on "US persons" were not lifted with JCPOA and therefore not affected
  - US persons broadly restricted from transactions with Iran, Iranian government, and Iranian SDNs

IRAN UPDATE (2)

- Foreign entities owned/controlled by US persons once again subject to primary sanctions
  - Essentially must comply with primary sanctions as if a US Person
- Secondary sanctions have been reimposed for many Iran energy sector-related transactions
  - Trump Administration has provided temporary waivers of secondary sanctions to several countries to continue purchasing and importing Iranian oil

CUBA UPDATE

- Limited easing of comprehensive embargo under President Obama
- US energy sector largely left out of policy change benefits
  - Cannot export petroleum products/LNG
  - Cannot participate in Cuban oil/gas exploration and production operations unless specifically authorized
- Limited claw-back of easing of embargo by President Trump
- No indication of future policy change

RUSSIA & UKRAINE

- Targeted sanctions first imposed in 2014, and have been expanded through a calibrated process (although still targeted, not comprehensive)
  - "Sectoral" sanctions targeting entities in specific segments in the Russian energy, banking and defense sectors
  - Targeted restrictions on export, reexport and transfer of EAR Items to restricted parties and sectors
  - Multilateral sanctions (EU, Switzerland, Canada, etc.)
  - Comprehensive military restrictions
- Sanctions expanded to include a comprehensive embargo on the Crimea region of Ukraine
  - Covers that portion of Ukraine including adjoining maritime areas claimed by Russia

RUSSIA & UKRAINE (2)

- "Sectoral" sanctions – apply to persons designated pursuant to specific Directives on OFAC's Sectoral Sanctions Identifications List ("SSIL")
  - Directive 1 – Financial Services
    - Currently prohibits U.S. Persons dealing/transacting in or financing new debt of greater than 14 days maturity or new equity for these persons, their property, or their interests in property
  - Directive 2 – Energy
    - Currently prohibits U.S. Persons dealing/transacting in or financing new debt of greater than 60 days maturity
  - Directive 3 – Defense
    - Currently prohibits U.S. Persons dealing/transacting in or financing new debt of greater than 30 days maturity

RUSSIA & UKRAINE (3)

- "Sectoral" sanctions (cont.)
  - Directive 4 – Restricted Oil & Gas Sectors
    - Prohibition on U.S. Person export or reexport directly or indirectly of goods, services (except for financial services) or technology in support of "deepwater" (greater than 500 foot depth), Arctic offshore or shale exploration or production projects – **this has been expanded by CAATSA as explained further**
  - "Debt" is a very broad term that includes bonds, loans, extensions of credit, loan guarantees, letters of credit, etc.
    - Delayed/deferred payment terms constitute "debt"
  - "Equity" includes stocks, share issuances, depositary receipts, or any other evidence of title or ownership
  - Sectoral sanctions not blocking requirement (unlike SDNs)
  - 50% ownership rule for SDNs applies to SSIL entities (but no aggregation across different Directives)

RUSSIA & UKRAINE (4)

- Crimea embargo (December 2014) – restrictions on U.S. Persons
  - New investment in Crimea
  - U.S. importation of Crimean goods, services, or technology
  - Export and reexport of goods, services, and technology to Crimea
  - Facilitation of such transactions by non-U.S. Persons
  - SDN and Entity List designation of a number of entities in Crimea including port facilities
  - Limited exceptions (humanitarian, medical and pharma)
- Analogous EU prohibitions on Crimea also

RUSSIA & UKRAINE (5)

- Countering America's Adversaries Through Sanctions Act ("CAATSA")
  - Required identification and designation of oligarchs (and, relatedly, their owned/controlled companies)
  - Expanded scope of Russian "sectoral" and secondary sanctions
    - OFAC Directive 4 – expanded to cover US provision of goods, services (except financial services) and technology for Arctic offshore, deepwater or shale projects wherever located globally in which any person persons designated under the Directive (or their property) has a 33% or greater voting interest

VENEZUELA UPDATE

- No comprehensive embargo, but increasing measures imposed since 2014 in response to deteriorating situation in Venezuela and actions of the government
  - 2015 – SDN blocking sanctions against certain individuals and entities implicated in human rights abuses and anti-democratic activities
  - 2017 – Sectoral sanctions against Venezuelan government and PdVSA, the national oil company (restrictions on debt and equity transactions)

VENEZUELA UPDATE (2)

- 2019 – PdVSA designated as SDN
  - Unless authorized, all transactions with PdVSA or any entities owned 50% or more directly or indirectly by PdVSA is prohibited
  - Temporary authorization for continuation of certain in-country activities of certain US majors and services providers (Chevron, Halliburton, Schlumberger, Baker Hughes, and Weatherford)
  - CITGO and certain other subsidiaries also exempt under temporary authorizations
- Venezuela also subject to heightened EAR export and reexport controls and military ban

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FOR ADDITIONAL INFORMATION

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