

September 25, 2018

U.S. AUTHORIZES SANCTIONS FOR ELECTION INTERFERENCE

To Our Clients and Friends:

In a recent client alert we foreshadowed the Trump administration taking an aggressive stance on its sanctions policy in the lead-up to the U.S. midterm elections in November. In a new development, on Wednesday, September 12, 2018, President Trump signed Executive Order 13848 on Imposing Certain Sanctions in the Event of Foreign Interference in a United States Election ("E.O. 13848"). E.O. 13848 declares the threat of foreign interference in U.S. elections a national emergency and authorizes sanctions on various non-U.S. actors to address the threat of future election meddling.

E.O. 13848 (i) introduces broad sanctions with respect to targeted foreign persons determined to have interfered with a U.S. election directly or indirectly; (ii) introduces a specific analysis and reporting process to identify foreign interference with U.S. elections as well as the foreign persons responsible for it; and (iii) requests recommendations for the President, including remedial measures and whether additional sanctions against targeted foreign persons may be appropriate.

The issuance of E.O. 13848 should be seen against the background of ongoing discussions on alleged Russian efforts to target the United States in the 2016 election and amid fears that similar interference and discussion will impact the November midterm elections. Specifically, E.O. 13848 references the 2017 Intelligence Community Assessment—a report from the Central Intelligence Agency, the Federal Bureau of Investigation and the National Security Agency—which assessed that Russian activities in the run-up to the 2016 presidential election represented a significant escalation in a long history of Russian attempts to interfere in U.S. domestic politics.

With E.O. 13848, President Trump acted both on the perceived threat to the U.S. electoral process and also, some might argue, in an effort to avoid proposed sanctions legislation in Congress, discussed below. The fact that President Obama had already issued an E.O.^[1] which provided for sanctions against any person found to be involved in election interference, means that, at very least, some of the provisions of this new E.O. are redundant and that President Trump wanted to emphasize that he, too, was concerned about election interference.

In the E.O., President Trump explains the reason for the E.O. as follows "*[a]lthough there has been no evidence of a foreign power altering the outcome or vote tabulation in any United States election, foreign powers have historically sought to exploit America's free and open political system. In recent years, the proliferation of digital devices and internet-based communications has created significant vulnerabilities and magnified the scope and intensity of the threat of foreign interference, as illustrated in the 2017 Intelligence Community Assessment.*"

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While the current public discussion and pending Congressional legislation focus on Russia, the new E.O. 13848 does not. Instead, its sanctions could target foreign persons anywhere in the world through the imposition of secondary sanctions, measures that have been developed to penalize non-U.S. persons for sanctions violations. Director of National Intelligence Dan Coats stated that, in addition to Russia, the U.S. intelligence community is focused on the activities of China, Iran, and North Korea.[2] So far, no foreign persons have yet been identified and targeted under the authority set forth in E.O. 13848.

Post-Election Review Process

Section 1 of E.O. 13848 provides for a detailed process in which the Director of National Intelligence, in consultation with other U.S. government agencies, will undertake an assessment not later than 45 days of the conclusion of the election, analyzing any information indicating that a foreign government, or any person acting as an agent of or on behalf of a foreign government, has acted with the intent or purpose of interfering in that election is to be prepared.[3]

This will then be followed by the preparation of a report by the Attorney General and the Secretary of Homeland Security. This report must evaluate, within 45 days of receiving the assessment, (i) the extent to which any foreign interference that targeted election infrastructure materially affected the security or integrity of that infrastructure, the tabulation of votes, or the timely transmission of election results; and (ii) if any foreign interference involved activities targeting the infrastructure of, or pertaining to, a political organization, campaign, or candidate, the extent to which such activities materially affected the security or integrity of that infrastructure, including by unauthorized access to, disclosure or threatened disclosure of, or alteration or falsification of, information or data.

The report also must include recommendations regarding remedial actions to be taken by the U.S. Government, other than sanctions against targeted foreign persons.

Determination of Targeted Foreign Persons

Following the transmission of the assessment and the report, the Secretary of the Treasury will review the assessment and the report and, in consultation with the Secretary of State, the Attorney General, and the Secretary of Homeland Security, shall impose all appropriate sanctions against targeted foreign persons.

Targeted foreign persons, according to section 2 (a) of E.O. 13848, are any foreign persons determined in the above described process:

- (i) to have directly or indirectly engaged in, sponsored, concealed, or otherwise been complicit in foreign interference in a United States election;
- (ii) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any activity described in subsection (a)(i) of section 2 E.O. 13848 or any person whose property and interests in property are blocked pursuant to this order; or

(iii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property or interests in property are blocked pursuant to this order.

Broad Sanctions against Targeted Foreign Persons

The sanctions authorized by E.O. 13848 would block the U.S. property of targeted foreign persons^[4], place targeted foreign persons on the Specially Designated National and Blocked Person List and broadly prohibits dealings with or facilitating dealings of targeted foreign persons.^[5] Finally, section 6 of E.O. 13848 suspends entry into the United States of such targeted foreign persons. Notably, E.O. 13848 does not purport to sanction the Russian banks that have been called out in almost every piece of sanctions legislation that is pending before Congress.

Additional Sanctions to be Determined on a Case-by-Case Basis

Also, in addition to the above sanctions, the Secretary of State and the Secretary of the Treasury, in consultation with the heads of other appropriate agencies, will jointly prepare a recommendation for the President as to whether further sanctions against foreign persons may be appropriate in response to the identified foreign interference. The list of the possible additional sanctions is broad and includes most types of sanctions that we have seen in the past.^[6]

Parallel Legislative Process

Several sanctions bills are currently pending in Congress, most notably the Defending Elections from Threats by Establishing Redlines ("**DETER**") Act (S. 2313, H.R. 4884) Act and the Defending American Security from Kremlin Aggression Act of 2018 (S. 3336).

DETER Act

The DETER Act suggests several new sanctions, yet leaves a level of executive discretion on the full scope of sanctions to implement. Furthermore, additional sanctions would only be triggered in case there is a finding that Russia interfered in a U.S. election. The DETER Act seeks to prevent and penalize Russia's interference in U.S. elections by, among other measures, blocking the assets of Russian oligarchs and major Russian companies if the U.S. Director of National Intelligence determines that the Russian government, or any person acting on its behalf, "*knowingly engaged in interference in a United States election.*"^[7] The DETER Act was introduced in the Senate in January 2018 by Senator Chris Van Hollen (D-MD), with Senator Marco Rubio (R-FL) as a co-sponsor, and was subsequently referred to the Committee on Banking, Housing, and Urban Affairs. Since then it has picked up a dozen additional co-sponsors, including Senators Lindsey Graham (R-SC) and Susan Collins (R-ME). In the House of Representatives, the bill was introduced in January 2018 by Rep. Ileana Ros-Lehtinen (R-FL) and presently has 25 co-sponsors from both parties.

Notably, the proposed legislation seeks to block the U.S. assets of Rosneft, Gazprom, and Lukoil, Russian companies in the Russian defense and intelligence sectors, Russian state-owned entities, and senior Russian political figures or oligarchs upon a finding of election interference by the U.S.

intelligence community. The DETER Act would block the assets of those political figures and oligarchs previously identified by OFAC. Section 241 of Countering America's Adversaries Through Sanctions Act ("CAATSA") required OFAC to publish a report on January 29, 2018 identifying "*the most significant senior foreign political figures and oligarchs in the Russian Federation*,"^[8] (the "**Section 241 List**"). The Treasury Department issued the report shortly before midnight on the due date, publicly naming 114 senior Russian political figures and 96 oligarchs.^[9] The report did not result in any sanctions or legal repercussions. At the time, most observers were highly critical of the Section 241 List, claiming that it demonstrated that the Trump administration was failing to adequately address Congressional intent to punish Moscow. Interestingly, almost all of the oligarchs designated by OFAC on April 6, 2018 originally appeared on the Section 241 List (but not all oligarchs on the Section 241 List were designated by OFAC on April 6).^[10] The bill would designate all persons on the Section 241 List. In addition, the bill seeks to block the U.S. assets of six Russian state-owned financial institutions: (1) Sberbank, (2) VTB Bank, (3) Gazprombank, (4) Vnesheconombank, (5) Bank of Moscow, and (6) Rosselkhozbank.

Defending American Security from Kremlin Aggression Act of 2018

Defending American Security from Kremlin Aggression Act of 2018 (S. 3336) was introduced on August 1, 2018 by a bipartisan group of senators including Senator Lindsey Graham (R-SC) and five bipartisan co-sponsors: Senators Robert Menendez (D-NJ), Cory Gardner (R-CO), Benjamin Cardin (D-MD), Jeanne Shaheen (D-NH) and the late John McCain (R-AZ). Senator Graham dubbed it the "*sanctions bill from hell*," and indeed it threatens to sanction wide swaths of the Russian economy.^[11]

Most notably, in a new Section 237 added to CAATSA, described in Section 601 of S. 3336, the President is directed to impose sanctions against any person that "*sells, leases, or provides to the Russian Federation goods, services, technology, financing, or support*" of a certain amount^[12] that "*could directly and significantly contribute to the Russian Federation's (1) ability to develop crude oil resources located in the Russian Federation; or (2) production of crude oil resources in the Russian Federation, including any direct and significant assistance with respect to the construction, modernization, or repair of infrastructure that would facilitate the development of crude oil resources located in the Russian Federation.*"

These bills propose a range of sanctions measures, including, depending on the bill, broad sanctions against seven Russian financial institutions, restrictions on Russian sovereign debt, energy sector sanctions, and other measures.

If passed, the sanctions could limit the president's discretion on sanctions policy, much as CAATSA sought to do, as we had highlighted in a last year's [client alert](#).

Effect of Executive Order on Pending Legislation

It is a possibility that the Executive Order could dissuade Congress from taking further action on Russian sanctions. With the Executive Order enacted, legislators might be of the opinion that less room and reason are left for the pending legislation. That seems unlikely, however, as several Senators have already criticized the Executive Order for being too weak. Senator Chris Van Hollen, who introduced

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the DETER Act, characterized the executive order as a version of the DETER Act but "*without teeth*".^[13] "*As I look at this, it seems aimed more at deterring congressional action on the Deter Act than deterring Putin's interference in our elections,*" Senator Van Hollen said.^[14] Likewise, Senator Lindsey Graham, who introduced the Defending American Security from Kremlin Aggression Act, said: "*Something is better than nothing, but I doubt it will be a substitute for legislation.*"^[15]

It therefore remains likely that Congress will push ahead with sanctions legislation that would, side by side with E.O. 13848, result in even broader and tougher sanctions, specifically targeting Russia.

Conclusion

The broad scope of sanctions announced in E.O. 13848 and the generic reference to foreign persons might lead to a substantial broadening of U.S. sanctions, in both substance and reach.

Considering the time frame allotted to the various steps of the assessment, review and finally potential listing of targeted foreign persons, it is possible this process might last well into 2019 before any listings actually take place.

However, if reports begin to surface regarding Russian- or other country interference in the upcoming, November midterm elections, businesses should closely assess whether any determinations under the new E.O., could impact their business relationships with companies with ties to countries where the interference originates.

[1] Executive Order 13694 of April 1, 2015, as amended by Executive Order 13757 of December 28, 2016, is executive order that targets, *inter alia*, attacks on the IT systems with the purpose or effect of interfering with or undermining election processes and institutions. This executive order remains in effect and President Trump could opt to use it to issue sanctions alongside those described in E.O. 13848.

[2] Chris Riotta, *Trump signs executive order imposing sanctions on foreign election meddlers*, Independent, (Sept. 12, 2018), available at <https://www.independent.co.uk/news/world/americas/us-politics/trump-us-election-meddling-russia-executive-order-conspiracy-dan-coats-john-bolton-a8535051.html> and <http://www.foxnews.com/politics/2018/09/12/trump-signs-executive-order-to-impose-sanctions-against-any-election-interference.html>.

[3] Section 1 (f) E.O. 13848 notes that not later than 30 days following the date of this order, the Secretary of State, the Secretary of the Treasury, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence shall develop a framework for the process that will be used to carry out their respective responsibilities pursuant to this order. The framework, which may be classified in whole or in part, shall focus on ensuring that agencies fulfill their responsibilities pursuant to this order in a manner that maintains methodological consistency; protects law enforcement or other sensitive information and intelligence sources and methods; maintains an appropriate separation between intelligence functions and policy and legal judgments; ensures that efforts to protect electoral

processes and institutions are insulated from political bias; and respects the principles of free speech and open debate.

[4] Section 5 explains that to the blocking of targeted persons' U.S. property also prohibits (i) the making of any contribution or provision of funds, good, or services by, to, or for the benefit of such foreign targeted person; and (ii) the receiving of any contribution or provision of funds, goods, or services from any such targeted foreign person.

[5] Furthermore, according to section 4 of E.O. 13848, U.S. persons are also prohibited from making donations of certain humanitarian articles such as food, clothing, and medicine to such targeted foreign persons.

[6] It includes

(i) blocking and prohibiting all transactions in a person's property and interests in property subject to United States jurisdiction;

(ii) export license restrictions under any statute or regulation that requires the prior review and approval of the United States Government as a condition for the export or re-export of goods or services;

(iii) prohibitions on United States financial institutions making loans or providing credit to a person;

(iv) restrictions on transactions in foreign exchange in which a person has any interest;

(v) prohibitions on transfers of credit or payments between financial institutions, or by, any financial institution, for the benefit of a person;

(vi) prohibitions on United States persons investing in or purchasing equity or debt of a person;

(vii) exclusion of a person's alien corporate officers from the United States;

(viii) imposition on a person's alien principal executive officers of any of the sanctions described in this section; or

(ix) any other measures authorized by law.

[7] H.R. 4884, Section 201 (a).

[8] CAATSA, Title II, § 241.

[9] See U.S. Dep't of the Treasury, *Report to Congress Pursuant to Section 241 of the Countering America's Adversaries Through Sanctions Act of 2017 Regarding Senior Foreign Political Figures and Oligarchs in the Russian Federation and Russian Parastatal Entities (Unclassified)* (Jan. 29, 2018), available at <https://www.scribd.com/document/370313106/2018-01-29-Treasury-Caatsa-241-Final>.

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[10] The one exception is Igor Rotenberg. Although Igor Rotenberg did not appear on the Section 241 List, his father and uncle were included. According to the April 6 OFAC announcement, Igor Rotenberg acquired significant assets from his father, Arkady Rotenberg, after OFAC designated the latter in March 2014. Specifically Arkady Rotenberg sold Igor Rotenberg 79 percent of the Russian oil and gas drilling company Gazprom Burenie. Igor Rotenberg's uncle, Boris Rotenberg, owns 16 percent of the company. Like his brother Arkady Rotenberg, Boris Rotenberg was designated in March 2014.

[11] Patricia Zengerle, *U.S. senators introduce Russia sanctions 'bill from hell,'* Reuters (Aug. 2, 2018), available at <https://www.reuters.com/article/us-usa-russia-sanctions/us-senators-introduce-russia-sanctions-bill-from-hell-idUSKBN1KN22Q>.

[12] \$1,000,000 per transaction or \$5,000,000 over a 12-month period.

[13] Julian E. Barnes and Nicholas Fandos, *Lawmakers Dismiss White House Push to Fight Election Interference as Too Weak*, N.Y. Times, Sept. 12, 2018, available at <https://www.nytimes.com/2018/09/12/us/politics/trump-executive-order-election-interference-senate.html>.

[14] *Id.*

[15] *Id.*



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