

Developments in Export Controls Enforcement, CFIUS Reviews, and Executive Orders/Sanctions

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Export Controls Recent Developments

Export Control Enforcement

ZTE Corporation

- In 2017, ZTE agreed to enter a guilty plea and pay approximately \$430M to the United States for conspiring to violate the International Emergency Economic Powers Act (IEEPA) by illegally shipping U.S.-origin items to Iran, obstructing justice, and making a material false statement
- ZTE simultaneously reached settlement agreements with the U.S. Dept. of Commerce's Bureau of Industry and Security (BIS) and the U.S. Dept. of the Treasury's Office of Foreign Assets Control (OFAC)
- In total ZTE has agreed to pay the U.S. government \$892,360,064; the BIS has suspended an additional \$300M

Export Control Enforcement

ZTE Corporation (cont.)

- BIS found that ZTE continued to mislead the government even after agreeing to the settlement by claiming it had disciplined employees, when, in fact, it gave them bonuses
- On Apr.15, 2018, BIS issued a seven-year denial order providing that ZTE "may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology . . . exported or to be exported from the United States that is subject to" the EAR

Export Control Reform

Pending Legislation

- In Feb., Rep. Royce introduced HR 5040, the Export Control Reform Act of 2018, with bipartisan support; on April 17, it advanced in committee
- ECRA will permanently fix the lapsed Export Administration Act, the basis of the Export Administration Regulations, which has been continued in force by emergency Presidential authority
- Notable provisions include
 - Review process for emerging technologies and items
 - Expands "technology" controls
 - Greater oversight of compliance and use of exceptions
 - Additional end-use controls

CFIUS Overview and Updates

CFIUS

Background

- Committee on Foreign Investment in the United States (CFIUS)
- Originated in 1975 under President Ford
- Managed by the Executive Branch without Congressional input until 1988
- In 1988, Congress passed the Exon-Florio Amendments to the Defense Production Act that identified CFIUS as an Executive Branch authority focused on defense, military, and national security issues

CFIUS

Background (cont.)

- In 1993, Congress passed the Byrd Amendment which mandated investigations of any transactions that involved foreign governments and/or foreign government representatives
- In 2007, based on the Dubai Ports acquisition, Congress passed the Foreign Investment and National Security Act of 2007 (FINSA); expanded CFIUS's jurisdiction to cover critical infrastructure such as telecommunications, finance, banking, law enforcement and safety, public welfare, and R&D

CFIUS

Legal Process

- Unlike other U.S. laws (i.e., export and government contracts laws), CFIUS does not publish any guidance regarding how it treats investments from different foreign countries
- Voluntary filing: voluntary in that the parties decide whether to submit a notice or not; CFIUS may also "request" a filing if the parties do not submit a notice
- CFIUS has 30 calendar days to review the formal filing, but may take an additional 45 days

CFIUS

Legal Process (cont.)

- Once CFIUS completes the 30 and/or 30 plus 45-day review, the transaction is either cleared of national security concerns or the Committee forwards its recommendations for mitigation and/or rejection to the President
- The President has 15 calendar days to accept, modify or reject CFIUS's recommendations

CFIUS

Elements for Notice Submission

- Key CFIUS factors to determine whether and when to file a notice
 - "U.S. business"
 - "Covered transaction"
 - "Foreign ownership" or "foreign control;" at times "foreign influence" when dealing with a target that is involved in the classified world
 - Certain industries: telecommunications, software tied to critical infrastructure (whether defense or commercial), finance, energy, defense, military, classified, health and safety, and law enforcement

CFIUS

Recent Developments

- Broadcom - Qualcomm
 - Singapore-based Broadcom proposed hostile takeover of Qualcomm; Qualcomm filed a unilateral notice at CFIUS
 - Mar. 5
 - CFIUS found that Qualcomm plays a leadership role in important communications technologies as a result of its R&D spending
 - CFIUS found this would be threatened by Broadcom's plan to focus on short term profits
 - As a result, the acquisition would weaken U.S. leadership and increase China's competitive position

CFIUS

Recent Developments (cont.)

- Broadcom - Qualcomm (cont.)
 - Mar. 12: President Trump issued an EO prohibiting the acquisition

The Purchaser and Qualcomm shall immediately and permanently abandon the proposed takeover. Immediately upon completion of all steps necessary to terminate the proposed takeover of Qualcomm, the Purchaser and Qualcomm shall certify in writing to the Committee on Foreign Investment in the United States (CFIUS) that such termination has been effected in accordance with this order and that all steps necessary to fully and permanently abandon the proposed takeover of Qualcomm have been completed.
- Reportedly the first use of CFIUS review as a defense to hostile takeover

CFIUS

Recent Developments (cont.)

- Lattice Semiconductor Corp. - Canyon Bridge Capital Partners
 - Canyon proposed Chinese-backed acquisition of Lattice, a maker of computer chips used in various cutting-edge technologies
 - Sept. 2017
 - Lattice announced it could not resolve CFIUS concerns regarding national security implications of the sale
 - CFIUS sent the matter to President Trump to review its findings
 - Sept. 13, 2017
 - President Trump issued an EO prohibiting the acquisition
 - Press release from the White House

The national-security risk posed by the transaction relates to, among other things, the potential transfer of intellectual property to the foreign acquirer, the Chinese government's role in supporting this transaction, the importance of semiconductor supply chain integrity to the United States Government, and the use of Lattice products by the United States Government.

CFIUS

Recent Developments (cont.)

- With the blocking of the Qualcomm acquisition, President Trump has now blocked two transactions for national security reasons
- President Obama blocked one transaction over two terms
- Only five have been blocked by the President in the past 30 years

CFIUS

Pending Legislation

- Foreign Investment Risk Review Modernization Act (FIRRMA)
- Introduced in Nov. 2017 with bipartisan support
 - Expands definition of "covered transaction" to include certain joint ventures and real estate transactions
 - Expands and further defines national security considerations
 - Creates different tiers of countries: "special concern" vs. favored allies
 - Further defines "passive investment"
 - Formalizes pre-filing process with an option of a more basic "declaration" vs. a "notice"
 - Requires a declaration for certain transactions involving foreign government ownership
 - Expands timeline for reviews
 - Authorizes assessment of filing fees

OFAC Sanctions Updates

Significant Recent Sanctions Developments

Apr. announcement of new Russia sanctions

CAATSA: Iran, Russia, North Korea

JCPOA in the balance

EOs: North Korea, Venezuela

Sudan program terminated

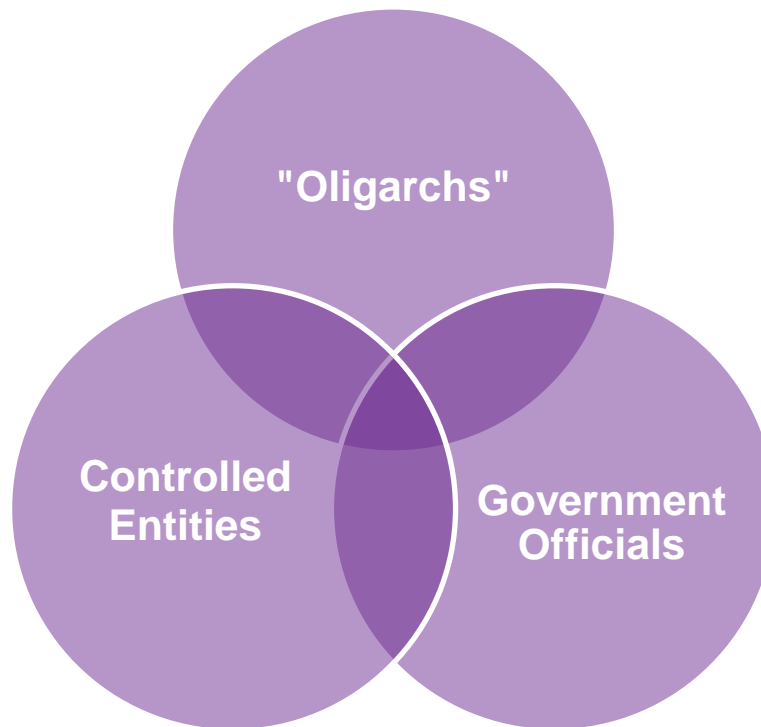
New Russia Sanctions



- New designations announced: on April 6, 2018, OFAC added 24 individuals and 14 entities to the List of Specially Designated Nationals (SDN List) and one entity to the Sectoral Sanctions Identifications List (SSI List) in connection with Russian activities in Ukraine and Syria
- Impact: April 6 designations are intended to have a significant commercial impact, as they target individuals and companies with global profiles across a range of key sectors

New Russia Sanctions

New Designations



New Russia Sanctions

General Licenses



- OFAC issued two new general licenses alongside the April 6 designations, followed by an amendment of one and an issuance of a third on April 23
- These authorizations can be used without seeking further permission from OFAC for any conduct that fits within their parameters, though certain reporting and/or notice requirements may be applicable

New Russia Sanctions

General Licenses (cont.)



- GL 12/12A
 - Authorizes ordinary transactions to facilitate a wind-down of operations or agreements in effect prior to April 6, 2018, involving the following entities or those in which they own a 50% or greater interest: AgroHolding Kuban; Basic Element Limited; B-Finance Ltd.; EN+ Group PLC; JSC EuroSibEnergo; GAZGroup; Gazprom Burenie, OOO; Ladoga Menedzhment, OOO; NPV Engineering Open Joint Stock Company; Renova Group; Russian Machines; United Company RUSAL PLC
 - Does not allow exportation from the United States and requires payment to a U.S. blocked account, except as authorized under GL 14, issued April 23

New Russia Sanctions

General Licenses (cont.)



- GL 13
 - Authorizes U.S. Persons to engage in activities necessary to divest from EN+ Group PLC, GAZGroup and United Company RUSAL PLC through 12:01 a.m. ET on May 7, 2018
 - To divest or transfer to a non-U.S. Person, or
 - To facilitate the transfer by a non-U.S. Person to another non-U.S. Person, debt, equity or other holdings in these companies; this authorization includes facilitating, clearing and settling transactions to divest to a non-U.S. Person debt, equity or other holdings of these three companies, including on behalf of U.S. Persons

New Russia Sanctions

General Licenses (cont.)



- GL 14
 - Authorizes ordinary transactions to facilitate a wind-down of operations or agreements in effect prior to Apr. 6, 2018 involving United Company RUSAL and entities in which it owns a 50% or greater interest
 - Allows exportation from the United States and does not require payment to a blocked account

Countering America's Adversaries Through Sanctions Act (CAATSA)

- Signed into law by President Donald Trump on Aug. 2, 2017: one of the most wide-ranging sanctions measures of the last five years
- Expands and enhances three separate sanctions programs targeting Iran, Russia and North Korea
- Sanctions impact not only U.S. businesses (and U.S. citizens and permanent residents employed by foreign companies), but also impose enhanced "secondary" sanctions that target foreign businesses directly; particularly with respect to the sanctions against Russia and North Korea

CAATSA

Iran



- Title I of CAATSA provides for several new and enhanced sanctions on Iran, and mandates that the Executive Branch produce several new reports regarding U.S. government strategy to address Iran
- Some of the key Iran-related measures include the following
 - Ballistic missiles
 - Another basis for IRGC sanctions
 - Human rights abuses
 - Arms embargo
- Review of mandatory sanctions designations
 - CAATSA directs the president to review, every five years, all persons designated on the SDN List in connection with Iran

CAATSA

Iran (cont.)



- Report on discrepancies between United States and European Union sanctions
 - CAATSA creates a new obligation for the president to submit periodic reports to Congress describing and explaining any discrepancies between United States and European Union sanctions against persons for activity related to weapons proliferation in Iran, support for acts of international terrorism by Iran or human rights abuses in Iran
 - IRGC, which was already designated as an SDN and with which dealings are already broadly prohibited, has now also been designated as a "Specially Designated Global Terrorist," pursuant to CAATSA

CAATSA

Russia



- Title II of CAATSA greatly expands the scope of the Russia/Ukraine sanctions program to target integral sectors of the Russian economy; also reduces the discretion of the Executive Branch in choosing whether to implement certain sanctions, and curtails the power of the president to terminate, waive, or amend certain sanctions unilaterally
 - Codification of Obama administration EOs
 - Creation of new sanctions authorities
 - Modification of sectoral sanctions
 - Secondary sanctions for foreign sanctions evaders and human rights abuses
 - Prohibited conduct related to the transfer of arms to Syria
 - Sanctions on dealings with Russia's defense or intelligence sectors
 - Modification of optional sanctions to mandatory sanctions
 - New discretionary sanctions authority on pipeline development

CAATSA

North Korea



- Title III of CAATSA expands the North Korea sanctions to target activities involving several sectors of the North Korean economy, and align U.S. sanctions with those imposed by the United Nations
 - Mandatory sanctions targeting the North Korean precious metals, aviation and finance industries: CAATSA provides the President the authority to designate persons who the President determines knowingly trade in precious or rare earth metals from North Korea
 - Discretionary sanctions: authorizes the President to impose discretionary sanctions against persons determined to have engaged in the certain types of activities related to North Korea and the government of North Korea

Iran Program Non-Certification

- The Iran Nuclear Agreement Review Act of 2015 (INARA) requires the President to issue certification to Congress every 90 days on Iran's compliance with the Joint Comprehensive Plan of Action (JCPOA); since assuming office in January 2017, President Trump certified that Iran was in compliance in April and July 2017
- For the Oct. 15, 2017 deadline, President Trump declined to certify Iran's compliance, citing the Government of Iran's involvement in the Middle East (but not material noncompliance with Iran's nuclear commitments)
- This was not a withdrawal or termination, but triggered a review period by Congress; Congress has not yet acted
- There is a May 12 deadline to renew waivers, and President Trump has issued an ultimatum to Congress to "fix" the JCPOA
-watch this space....

New Executive Orders

North Korea and Venezuela



- EO 13810 (Imposing Additional Sanctions With Respect to North Korea (Sept. 20, 2017))
 - Authority to block the property of and impose travel restrictions on certain persons and impose
 - Authority to impose blocking or other restrictive measures on foreign financial institutions that have knowingly conducted or facilitated certain "significant" transactions
 - Aviation and shipping sanctions
 - General licenses issued to
 - Allow vessels in distress to call at a port and aircraft to make emergency landings
 - Allow U.S. financial institutions to debit accounts that are blocked with "normal service charges"

New Executive Orders

North Korea and Venezuela (cont.)



- EO 13808 (Imposing Additional Sanctions with Respect to the Situation in Venezuela (August 24, 2017))
 - Prohibits U.S. persons from
 - Dealing in new debt of Petroleos de Venezuela SA (PdVSA) in excess of 90 days maturity
 - Dealing in new debt of the Government of Venezuela in excess of 30 days maturity
 - Dealing in securities of the Government of Venezuela (which would include PdVSA), apart from debt not exceeding the prescribed tenors above
 - Dealing in bonds issued by the Government of Venezuela prior to August 24, 2017
 - Dividend payments or other profits to the Government of Venezuela from any entity owned or controlled by the Government of Venezuela

New Executive Orders

North Korea and Venezuela (cont.)



- EO 13808 (cont.)
 - General Licenses issued to
 - Wind down certain activities prohibited by the new sanctions
 - Allow transactions in debt, equity, and other securities of CITGO, independent of the tenor restrictions
 - Allow transactions involving certain Venezuelan bonds specifically identified in the general license
 - Allow new debt transactions relating to specific underlying transactions, including humanitarian exports and replacement parts and components

Sudan Program Terminated



- Sudan Sanctions Regulations (SSR) terminated on October 12, 2017, effectively ending the U.S. embargo; dozens of persons and entities designated under the SSR were removed from the SDN list
- South Sudan and Darfur programs remain
- There remain SDNs located in Sudan
- Sudan remains designated as a State Sponsor of Terrorism
- General License A covers agricultural commodities, medicine, and medical devices for which a license to Sudan is statutorily required under TSRA
- BIS still requires a license or exception for exports of controlled items to Sudan

Questions?