

Deconstructing Those Russia Sanctions

Now that the shouting is over, what did that bill actually deliver?

Zlatko Hadzismajlovic, special counsel at **McCarter & English**, watched with great interest this past summer as the U.S. Senate, the U.S. House of Representatives and the president verbally volleyed an economic sanctions bill back and forth as if they were participating in a particularly competitive tennis match (albeit Canadian doubles). In the end it was point, set, match to Congress. Now, we ask Hadzismajlovic to explain what it is that we've won. The interview has been edited for style and length.

On August 2, President Trump signed into law the Countering America's Adversaries Through Sanctions Act (CAATS). What is the significance of the law?

Zlatko Hadzismajlovic: Many things stand out, but here are three that are foremost. First is the sheer number of members of Congress, on both sides of the aisle, who supported the legislation. It passed the House by a staggering margin and the Senate by a vote of 98-2. Second, the support in both houses, coupled with the Trump administration's Russia predicament, made it obvious that the president wouldn't have done himself any favors with a veto, as Congress had more than the requisite two-thirds to override. Third, this is really a wonderful example of the interplay of foreign policy authority accorded to Congress and the president via Articles I and II of the Constitution, respectively.

How so?

Hadzismajlovic: We know that Article I provides Congress with enumerated foreign affairs powers, such as regulating commerce with foreign nations, declaring war and requiring Senate approval over the power to make treaties and appoint diplomats. Article II provides for the president's authority over foreign affairs, which (as most observers will acknowledge)



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has been steadily tilting toward the president. This has been particularly evident since the International Emergency Economic Powers Act (1977), in which Congress authorized the president to impose economic sanctions on foreign entities. CAATS, on the other hand, squarely limits the president's ability to significantly alter U.S. foreign policy with regard to the Russian Federation.

What are the effects of that?

Hadzismajlovic: Previously, U.S. sanctions on Russia relied mainly on a framework of executive orders signed by then-President Obama. A president may swiftly undo a predecessor's executive orders, as we've seen this administration do with many of Obama's. Perhaps with that in mind, Title II of the law, the Countering Russian Influence in Europe and Eurasia Act (CRIEEA), codifies the sanctions provided for in a number of executive orders.

Which orders are affected? What do those orders contemplate?

Hadzismajlovic: Executive Orders Nos. 13660 to 13662, 13665, 13694 and 13757.

These involve blocking sanctions – freezing property owned by sanctioned individuals. All but the last two penalize individuals who contributed to the situation in Ukraine. The last two sanction those involved in “significant malicious cyber-enabled activities.”

CRIEEA also requires that the president submit a report to Congress justifying any alteration of sanctions. Congress then has 30 days to review the report. The president may not proceed with the alteration during that 30-day review period unless Congress passes a joint resolution of approval. The president may proceed after 30 days unless both houses pass a resolution of disapproval. CRIEEA significantly expands the scope of the U.S. sanctions in other ways and extends into the scope of secondary sanctions in ways that ought to concern both domestic and foreign entities. We've not previously implemented mandatory secondary sanctions targeting Russia, which is a very large market for many of our European allies.

What does that mean?

Hadzismajlovic: For example, CRIEEA provides for mandatory secondary sanctions on non-U.S. persons who knowingly invest significantly in Russian crude oil projects, including deep water, Arctic offshore or shale. While the president retains the ability to determine which investments are significant, this provision ought to stop non-U.S. oil companies from investing additional resources in that sector, lest they expose themselves to various penalties. The toolbox includes prohibiting U.S. financial institutions from extending loans or credit to the sanctioned persons and opposing any loans from international financial institutions; prohibiting the Office of Foreign Assets Controls (OFAC), the Bureau of Industry and Security and the Directorate of Defense Trade Controls or other

Zlatko Hadzismajlovic is special counsel in the New York office of **McCarter & English**, where he focuses on international trade, export controls and customs matters, as well as immigration and global mobility counseling. He can be reached at zb@mccarter.com.

agencies from issuing licensing authority to the sanctioned person for the export of any goods or technology subject to U.S. export controls; debaring U.S. government procurement for the sanctioned person; and imposing additional property-based and financial sanctions. CRIEEA also requires the imposition of many of the foregoing penalties on those who knowingly invest or facilitate the investment of \$10 million or more (or any investment of not less than \$1 million aggregating to \$10 million during any 12-month period) that significantly contributes to Russia's ability to privatize state-owned assets in a manner that unjustly benefits Russian Federation government officials or their close associates or family members.

The banking sector ought to be aware that CRIEEA mandates restrictions on U.S. correspondent and payable-through accounts for foreign banks that knowingly engage in significant transactions in that sector or on behalf of Russian nationals deemed to be specially designated nationals (SDNs) by OFAC. CRIEEA requires the president to designate as an SDN any foreign person who "knowingly" facilitates a significant transaction, including deceptive or structured transactions, for any Russian SDN or their immediate family members; or materially violates, attempts to violate, conspires to violate or causes a violation of any Russia sanctions executive order or statute.

Besides mandating the imposition of blocking sanctions on Russian Federation government officials and their close associates or family members complicit in or responsible for ordering, controlling or otherwise directing acts of corruption in the Russian Federation or elsewhere, CRIEEA would also impose these sanctions on anyone materially assisting, sponsoring or providing financial, material or technological support for, or goods or services in support of, said corruption. Presumably with an eye toward additional sanctions, CRIEEA also mandates reporting to Congress information on Russian officials and their families, including net worth, sources of income and indices of corruption, as well as their non-Russian business affiliations.

CRIEEA requires the imposition of blocking sanctions on those who knowingly engage in significant activities undermining cybersecurity against any person, including a democratic institution or government, on behalf of the Russian government, and freezing property that is owned or controlled by such a person or by someone who acts on behalf of such a person. Those penalties are mandatorily imposed on anyone who knowingly assists, sponsors or provides financial, material or technological support for, or provides goods or

services (except financial services) in support of such activity.

In addition, CRIEEA requires the imposition of the above-enumerated penalties on any person who knowingly engages in a significant transaction with a person who is part of or operates on behalf of the defense or intelligence sectors of Russia. Presumably linked to the foregoing is the requirement to impose blocking sanctions on those responsible for or complicit in ordering, controlling, or otherwise directing the commission of serious human rights abuses in any territory forcibly occupied or otherwise controlled by Russia, as well as those who materially assist, sponsor or provide financial, material or technological support for or goods or services to said persons. Also included are those who knowingly exported, transferred or otherwise provided to Syria significant financial, material or technological support that contributes materially to Syria's ability to acquire or develop chemical, biological or nuclear weapons or related technologies, ballistic or cruise missile capabilities, destabilizing numbers and types of advanced conventional weapons, or significant defense articles, services or information, as defined under U.S. export control law, or to acquire items controlled under the International Traffic in Arms Regulations.

In addition to the secondary sanctions, does CRIEEA also expand the existing sanctions on U.S. persons?

Hadzismajlovic: CRIEEA prohibits U.S. persons from providing goods, services – except for financial services – or technology in support of exploration or production for new deepwater, Arctic offshore or shale oil projects involving a sanctioned Russian entity or individual with a controlling interest or a 33 percent or more non-controlling ownership interest therein. This is a significant expansion of the current sanctions and could be interpreted to include any expansions of existing projects. Presumably, this will significantly hinder any future involvement of a U.S. entity in Russia's oil and gas industry, including exploration and production, as well as the construction, modernization or repair of Russian energy export pipelines.

CRIEEA also expands prohibitions on U.S. persons transacting in new debt of sanctioned Russian energy companies, permitting only dealings in their new debt of 60 days' maturity or less. Likewise, CRIEEA expands prohibitions on U.S. persons transacting in new debt of sanctioned Russian financial institutions, permitting only dealings in their new debt of 14 days' maturity or less. Both are significant hits on

the liquidity of the Russian financial sector as well as the ability of Russia's energy sector to obtain short-term financing in international markets.

Most important from the practitioner's standpoint, CRIEEA also requires congressional review of any decision by the president to take any licensing action that significantly alters U.S. foreign policy on Russia. Seemingly, it will be difficult to obtain an approval of most Russia-related license applications.

The law also imposes sanctions on Iran and North Korea. Are they as significant in breadth?

Hadzismajlovic: They are not, but they are important nonetheless. Title I of the act, Countering Iran's Destabilizing Activities Act (CIDA), provides for additional sanctions targeting primarily Iran's ballistic missile program, the Iranian Revolutionary Guard Corps and affiliated parties and the supply of arms and armaments – and related technical and other support – to Iran. Under CIDA, the president must submit a report to Congress twice a year regarding coordination between the United States and the European Union on sanctions against Iran, identifying discrepancies between the lists of sanctions targets between the EU and the United States. It is important to note that these new sanctions do not undo or violate the Joint Comprehensive Plan of Action, the July 14, 2015, international agreement on Iran's nuclear program reached between Iran and the five permanent members of the United Nations Security Council.

Finally, Title III of the bill, Korean Interdiction and Modernization of Sanctions Act, authorizes the president to impose sanctions on parties that violate UN Security Council resolutions concerning North Korea; prohibits the importation into the United States of goods produced by North Korean convict or forced labor; places restrictions on North Korean cargo and shipping; imposes sanctions on foreign persons that employ North Korean laborers; and prohibits U.S. financial institution activities related to the use of correspondent accounts of foreign financial institutions to provide indirect financial services to North Korea. It also requires that the president report to relevant Congressional committees about whether the following parties should be subject to sanctions: Korea Shipowners' Protection and Indemnity Association, Chinpo Shipping Company (Private) Limited, the Central Bank of the Democratic People's Republic of Korea, Kumgang Economic Development Corporation, Sam Pa and any entities owned or controlled by this individual, and the Chamber of Commerce of the Democratic People's Republic of Korea.