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New Senate Bill Significantly Expands U.S. Sanctions Against Russia

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The bill, if passed, would impose severe sanctions on “foreign persons” that make significant investments in Russian crude oil projects.

On December 2, U.S. Senator Bob Corker, the ranking Republican on the Senate Committee on Foreign Relations, introduced into the current Congress’s lame duck session Senate Floor Amendment No. 3966 (SA 3966) to S. 2828 Ukraine Freedom Support Act of 2014. SA 3966 is a major revision of the original S. 2828 introduced in September 2014, and if passed in the current Congress or in the new incoming Republican-controlled houses of Congress, SA 3966 will extensively widen the breadth of U.S.-Russian sanctions.

Sections 4(b) of SA 3966 will impose against “foreign persons” the risk of exposure to severe U.S. sanctions if the President of the United States of America “determines that the foreign person knowingly makes a significant investment in a special Russian crude oil project.”

“. . . on and after the date that is 45 days after the date of the enactment of this Act, the President <u>shall</u> impose 3 or more of the sanctions described [see below] with respect to a foreign person if the President determines that the foreign person knowingly makes a significant investment in a special Russian crude oil project.” (Emphasis added.)

This type of sanction against “foreign persons” is similar to the secondary sanctions now imposed only against non-U.S. companies and financial institutions for various activities in, or transactions concerning, Iran.

Section 1(6) of SA 3966 defines “foreign person” to mean “any individual or entity that is not a United States citizen, a permanent resident alien, or an entity organized under the laws of the United States or any jurisdiction within the United States.” Current Office of Foreign Assets Control (OFAC) Ukraine-related/Russia sanctions imposed under the authority of the International Emergency Economic Powers Act only enforce prohibitions and sanctions against “U.S. Persons” and do not extend prescriptive jurisdiction over “foreign persons.”

SA 3966 does not define “significant” or “investment.” Section 1(9) of SA 3966 provides that a “special Russian crude oil project” means a project intended to extract crude oil from (a) the exclusive economic zone of the Russian Federation in waters more than 500 feet deep, (b) Russian Arctic offshore locations, or (c) shale formations located in the Russian Federation.

The sanctions that the President “shall” impose on such a foreign person found to have made such a “significant investment” in a “special Russian crude oil project” are at least three of the following:

- **Export-Import Bank Assistance**—The President may direct the Export-Import Bank of the United States to not approve the issuance of any guarantee, insurance, extension of credit, or participation in the extension of credit in connection with the export of any goods or services to the foreign person.

- **Procurement Sanction**—The President may prohibit the head of any executive agency (as defined in section 133 of title 41, United States Code) from entering into any contract for the procurement of any goods or services from the foreign person.

- **Arms Export Prohibition**—The President may prohibit the exportation or provision by sale, lease or loan, grant, or other means, directly or indirectly, of any defense article or defense service to the foreign person and the issuance of any license or other approval to the foreign person under section 38 of the Arms Export Control Act (22 U.S.C. 2778).

- **Dual-Use Export Prohibition**—The President may prohibit the issuance of any license and suspend any license for the transfer to the foreign person of any item the export of which is controlled under the Export Administration Act of 1979[1] (as in effect pursuant to the International Emergency Economic Powers Act[2]) or the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations.

- **Property Transactions**—The President may, pursuant to such regulations as the President may prescribe, prohibit any person from

    - acquiring, holding, withholding, using, transferring, withdrawing, transporting, or exporting any property that is subject to the jurisdiction of the United States and with respect to which the foreign person has any interest;

    - dealing in or exercising any right, power, or privilege with respect to such property; or

    - conducting any transaction involving such property.

- **Banking Transactions**—The President may, pursuant to such regulations as the President may prescribe, prohibit any transfers of credit or payments between financial institutions or by, through, or to any financial institution, to the extent that such transfers or payments are subject to the jurisdiction of the United States and involve any interest of the foreign person.

- **Prohibition on Investment in Equity or Debt of a Sanctioned Person**—The President may, pursuant to such regulations as the President may prescribe, prohibit any U.S. person from transacting in, providing financing for, or otherwise dealing in

    - debt

        - of longer than 30 days' maturity of a foreign person, with respect to which sanctions are imposed under subsection (a) or of longer than 90 days' maturity of a foreign person, with respect to which sanctions are imposed under subsection (b); and
        - issued on or after the date on which such sanctions are imposed with respect to the foreign person.
    - equity of the foreign person issued on or after that date.
- **Exclusion from the United States and Revocation of Visa or Other Documentation**—In the case of a foreign person who is an individual, the President may direct the Secretary of State to deny a visa to, and the Secretary of Homeland Security to exclude from the United States, the foreign person, subject to regulatory exceptions to permit the United States to comply with the agreement regarding the headquarters of the United Nations, signed at Lake Success on June 26, 1947 and entered into force on November 21, 1947, between the United Nations and the United States, or other applicable international obligations.
- **Sanctions on Principal Executive Officers**—In the case of a foreign person that is an entity, the President may impose on the principal executive officer or officers of the foreign person, or on individuals performing similar functions and with similar authorities as such officer or officers, any of the sanctions described in this subsection applicable to individuals.

Therefore, a company incorporated in a country in Asia or the Middle East that has no U.S.-based nexus and uses no commodities or technology that are subject to U.S. export control jurisdiction that "significantly invests" (in the eyes of the U.S. government) in a "special Russian crude oil project" is thereby exposed to the risk of presidential action to completely exclude such "foreign person" from access to the U.S. economy.

SA 3966 is clearly meant to strongly discourage all non-U.S. companies from backfilling investments related to a "special Russian crude oil project," even when no amount of U.S.-origin items and technology are used, given that U.S. companies cannot engage in such activities because of U.S. sanctions imposed against U.S. persons.

In addition, section 5(a) of SA 3966 specifically also targets foreign financial institutions that facilitate foreign persons' "significant investment" in a "special Russian crude oil project."

"The President may impose the sanction described [below] with respect to a foreign financial institution that the President determines knowingly engages, on or after the date of the enactment of this Act, in significant transactions involving activities described in section 4(b) for persons with respect to which sanctions are imposed under section 4."

Interestingly, the SA 3966 section 1(5) definition of "foreign financial institutional" is expressly tied to the OFAC Iranian Financial Sanctions Regulations: The term "foreign financial institution" has the meaning given that term in section 561.308 of title 31, Code of Federal Regulations (or any corresponding similar regulation or ruling).

The sanction on a foreign financial institution is a prohibition on the opening, and a prohibition or the imposition of strict conditions on the maintaining, in the United States of a correspondent account or a payable-through account by the foreign financial institution.

SA 3966 bears close monitoring because of its extraterritorial extension of sanctions jurisdiction over foreign persons' activities in Russia.

The 2014 lame duck session of Congress will likely end in a week or so. There is no scheduled date for voting on the proposed legislation at this time, but it is possible that the proposed legislation will be bundled for House and Senate votes with other proposed bills. If the proposed legislation is not voted on by the House and the Senate before the lame duck session ends, it is likely to be reintroduced in the new Congress, which begins in early January 2015. If the proposed legislation passes the House and the Senate, it may be vetoed by the President, whose veto may be overridden by a two-third vote of each house of Congress before becoming law. Or, the President may opt to sign the legislation, given that it, if enacted as proposed, gives the President consideration discretion in execution.

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[1] 50 U.S.C. App. 2401 *et seq*.

[2] et seq.

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