

# Morgan Lewis

## US AND EU RUSSIA SANCTIONS UPDATE – OVERVIEW AND ENERGY SECTOR FOCUS



*as of 26 April 2018*

Jon Hines, Partner – Moscow  
Bruce Johnston, Partner – London  
Brian Zimble, Partner – Moscow/DC  
Carl Valenstein, Partner – Boston  
Louis Rothberg, Of Counsel – DC  
Andrei Ignatenko, Associate – Moscow

# CONTENTS

- Newest US Sanctions (6 April 2018)..... 3
- Basic Framework (US and EU) ..... 8
- US Sectoral Sanctions – OFAC..... 11
- US Sectoral Sanctions – BIS..... 18
- US Direct Sanctions – SDNs..... 23
- US Crimea Sanctions..... 28
- CAATSA / Guidances / Lists..... 29
- EU Sectoral Sanctions..... 42
- EU Crimea Sanctions ..... 53
- EU Direct Sanctions (SDN-like)..... 54

# Newest US Sanctions (OFAC - 6 and 23 April)

- See the [link](#) to OFAC's 6 April new SDNs List, and two related General Licenses and FAQs
- New SDN individuals
  - Including some prominent state company CEOs and other "oligarchs", such as
    - *Alexey Miller (Gazprom CEO)*
    - *Andrey Kostin (VTB CEO)*
    - *Vladimir Bogdanov (Surgutneftegaz CEO)*
    - *Viktor Vekselberg (Renova etc.)*
    - *Oleg Deripaska (Basic Element, EN+, Rusal, GAZ, etc.)*
    - *Suleiman Kerimov*
  - The new designations follow the US Treasury Dept. CAATSA sec. 241 Report to Congress listing many of Russia's senior political figures, oligarchs, and "parastatal entities" (see slides 38-39)
- New SDN companies, including
  - Rusal, Basic Element, EN+, GAZ, EuroSibenergo, Russian Machines, others (linked to Deripaska)
  - Renova (linked to Vekselberg)
- Hard to determine why these particular individuals and companies were singled out now, whether/when more will follow (depends on ongoing course of US-Russia events)
  - And others named (owned/controlled by newly-named SDN individuals Rotenberg and Shamalov)
  - As well as any other companies ultimately owned  $\geq 50$  by any of the SDN individuals (some real questions here with murky ownership structures / arrangements ...)
  - See the OFAC 6 April [Press Release](#) ... which gives a reason for each designation (but many of them seem lacking – is there some unspoken supporting intelligence?)
  - No doubt, these designations hit hard / cause real pain and chaos – for the first time in the heart of Russia's private-sector economy
- Newest OFAC [Press Release, GLs and FAQs](#) of 23 April 2018 re Rusal: extending time for US persons' contracting with Rusal to 23 Oct. 2018, and indicating (see new FAQ 576) that Rusal could be delisted if Mr. Deripaska divests / relinquishes control – *see slide 5 for details*

# Newest US Sanctions (cont'd)

- And new defense-related SDN state entities
  - Rosoboronexport (ROE), Russia's monopoly arms exporter (a subsidiary of Rostec – an SSI entity)
  - Russian Financial Corp. (RFK Bank) – a Rosoboronexport subsidiary
  - Some further defense related SDN designations (in connection with Syria) were expected on 16 April, but evidently have been put off for now
- SDN designation direct-effect essence – blocking of assets, prohibition on all business activity with them by US persons, etc. (see slides 23-27)
- Plus risk of application of CAATSA-based secondary sanctions
  - Against non-US companies/people who continue dealings with these newly designated SDNs – i.e., per the OFAC 6 April press release, “for knowingly facilitating significant transactions for or on behalf of” them
  - See also new OFAC FAQs 574, 579 and 580 and see generally slides 29-41 below
- General Licenses – for winding down business relations with these SDNs
  - GL 12, gives until 5 June 2018 for US persons to conduct transactions/activities “ordinarily incident and necessary to the maintenance or wind down of operations, contracts, or other agreements, including the importation of goods, services or technology” into the US
    - with most of the newly designated SDN companies (and with any other company held  $\geq 50\%$  by them)
    - but doesn't authorize (without specific license): divestiture or transfer of debt, equity or other holdings in, to or for benefit of any of these SDN companies; or any other unblocking of such companies' property; or any export of goods from the US involving such companies
    - and US persons engaging in transactions per this GL must file comprehensive report, by 15 June 2018, of each transaction so conducted

# Newest US Sanctions (cont'd)

- GL 13, gives until 7 May 2018 for US persons to conduct transactions/activities “ordinarily incident and necessary to divest or transfer debt, equity, or other holdings”
  - in newly-designated SDN companies EN+, GAZ and Rusal to a non-US person
  - or to facilitate such transfer by a non-US person to another non-US person
  - but doesn’t authorize (without a specific license): any other unblocking of these designated companies’ property; or US persons to sell debt, equity or other holdings to, to purchase or invest in debt, equity or other holding in, or to facilitate such transactions with, directly or indirectly, such designated companies
  - and similar comprehensive reporting requirement under GL 12, by 17 May 2018
- Note: neither GL 12 or 13, as worded, gives the wind-down right for dealings with other possible companies owned by any newly named SDN individuals, but not through one of their companies listed in these GLs: specific license evidently would need to be applied for and granted to allow such wind-down
- *Newest GLs 12A and 14 (23 April 2018) further extend the term to 23 Oct. 2018 for maintenance / wind-down of contract relations with Rusal*
- New related OFAC 6 April and 23 April 2018 [FAQs 567-582](#) – giving guidance to US persons re continued relations with any such designated SDN company (or those also covered by the 50% rule) or individual, including:
  - Employment by or board service at such a company
  - Purchase/import of goods from such a company
  - Ownership of such a company’s shares or GDRs
  - Holding accounts or other property of such a company or individual
  - *Newest FAQs 575-582 (23 April 2018) address the specifics of newest GLs 12A and 14 (of the same date) re Rusal*

# Newest US Sanctions (cont'd)

- Specific licenses – needed (especially by a US person) for any activity vis-à-vis an SDN that is otherwise prohibited by law, absent coverage by general license
  - May be / are granted by OFAC to allow certain transactions such as purchases/sales or many transfers to or from an SDN for a longer period than an applicable general license allows (or if no general license applies)
  - For example, [see](#) the report of Swiss pump-maker Sulzer obtaining two such licenses, allowing (i) its buyback of shares from new SDN V. Vekselberg to reduce his holding to below 50%, and (ii) the unblocking of Sulzer's US bank accounts
  - And such licenses may be granted to allow US lawyers to advise and collect fees from SDNs on sanctions compliance issues (including possible help in trying for SDN delisting)
  - Indeed, Rusal evidently is already petitioning OFAC for SDN delisting (see OFAC Press Release and FAQ 576, both of 23 April 2018)
- Possible further/tougher legislation – two drafts proposed in US Congress
  - The “Stand with UK against Russia Violations Act” (draft bill of 5 April 2018):
    - Would, in the event a Russian Government officer, employee or agent is found to have knowingly participated in a future murder, attempted murder or assault committed outside of Russia against any expatriate, dissident or foreign national, require the President to
    - Issue regulations prohibiting US persons from engaging in transactions with, providing financing for, or in any other way dealing in future issuances of Russia sovereign debt
    - Designate Sberbank, VTB, Gazprombank, Bank of Moscow, Rosselkhozbank, VEB, and Promsvyazbank as SDNs
    - Establish penalties for violation, attempts or conspiracy to violate, or causing a violation of the above sanctions

# Newest US Sanctions (cont'd)

- The “DETER Act” (Defending Election from Threats by Establishing Redlines Act of 2018)
  - introduced by a few Senators in Jan 2018
  - would provide framework of possible triggers for required application of sanctions against some Russian companies under CAATSA
- Not clear whether/when either of these draft laws may move forward to enactment (particularly in view of the Trump Administration’s own imposition of additional sanctions in the meantime)
- But, as noted above, threatened further OFAC sanctions against Russian companies involved in supplying arms to Syria etc., anticipated in mid-April, have not yet materialized (the Trump Administration is reported to be hesitating)
- Russia is considering a draft bill (Law on Countermeasures against Unfriendly Actions of the United States of America and/or Other Foreign Governments) introduced on 13 April 2018 – which we are also following
- And there is another just-proposed new Russian law that would (i) impose criminal liability on any person in Russia, and (ii) substantial administrative fines on any (foreign or local) company in Russia, for compliance with US sanctions

# Basic Framework – US/EU

## • United States

- Treasury Dep't (*Office of Foreign Assets Control – OFAC*) "sectoral" sanction Directives, amended to date – most recently 6 April 2018 (based on EO 13662 from March 2014)
  - *generally applies only to "US persons" and any persons / entities in the US (citizens / green card holders, US companies (including branches abroad), and US subs / branches of foreign companies)*
  - but may also be applied to non-US persons anywhere, for activity that causes (i) US persons to violate or (ii) a violation to occur within the US
    - ❖ note large fines levied against certain European banks for such (involving Iran, Syria, Sudan sanctions)
    - ❖ and the Zarrab case in US court (involving apparent Iran / Turkish bank conspiracy)
  - and the (newly expanded) SDN designations / sanctions also administered by OFAC
  - and now Treasury's further expansive secondary sanctions authorities under CAATSA (*slides 29-41*)
- Commerce Dep't (*Bureau of Industry and Security – BIS*) export restrictions – 15 CFR §746.5, "Russian Industry Sector Sanctions", amended most recently 20 Dec. 2017
  - applies to activities of any "US person" or within the US
  - and also to US-origin goods, technology, software etc. or with sufficient US-origin controlled content, wherever located
  - and watch for likely further BIS regs. update to (among other things) keep pace with the newly-broadened OFAC Directive 4 reach, with respect to "items subject to the EAR"



# Basic Framework – US/EU (*cont'd*)

- State Dep't
  - has primary authority for CAATSA section 231 (and several more parts), and supporting authority for most other Russia / related sections
  - also has had / will continue to have important behind-the-scenes role in inter-agency consultations on Treasury / Commerce application of already-existing Russian sanctions
- CAATSA enacted 2 Aug. 2017...and State / Treasury Guidances of late Oct. 2017 – see:
  - full summary discussions at slides 29-41
  - the 29 Jan. 2018 CAATSA-based Reports/Lists for Congress (see slides 38-39)
  - the newest 15 March 2018 OFAC SDN-, FAQ- and FSB-related General License clarifications re cyber activities and to synchronize with CAATSA (see slide 26)
  - and the newest 6 April 2018 SDN designations (see slides 3-5)
- Crimea-focused Executive Order (EO) 13685 of 19 Dec. 2014 ... and Crimea-related SDNs
  - near-total embargo (as for Cuba), OFAC-administered, amended most recently 26 Jan. 2018
  - and related BIS implementing rules of 29 Jan. 2015
- *Bottom line: US Russia-sanctions analysis is now like peeling a very complex onion!*

# Basic Framework – US/EU (*cont'd*)

- **European Union**

- EU Council Regulation No. 833/2014 of 31 July 2014 – as amended by Reg. Nos. 960/2014 of 8 Sept. 2014, 1290/2014 of 4 Dec. 2014, 2015/1797 of 7 Oct. 2015, and 2017/2212 of 30 Nov. 2017
  - applies to EU nationals and companies
  - or anything happening in whole or part within EU territory
  - or involving an EU-registered aircraft / vessel
- Commission Guidance Notice (16 Dec. 2014, as amended 25 Sept. 2015) on application of certain provisions
- Currently in effect to 31 July 2018 (extended as of 21 Dec. 2017)
- And SDN-like “blacklist” Reg. No. 269/2014 of 17 March 2014
  - and updates since then (including re the Siemens turbines scandal of 2017 – see slide 54)
  - currently in effect to 15 Sept. 2018 (last extended 12 March 2018)
- And, re Crimea
  - EU Council Reg. No. 692/2014 of 23 June 2014 – as amended by Reg. No. 825/2014 of 30 July 2014, and Reg. No. 1351/2014 of 19 Dec. 2014
  - hits investments in oil & gas and other mineral resources E&P, power, transport, telecoms
  - currently in effect to 23 June 2018 (extended as of 19 June 2017)
- Nothing new yet from EU (or UK) post-Skripal poisoning etc. – will there be?

# US Sectoral Sanctions – OFAC

## Finance / Capital Markets

- The OFAC SSI sanctions prohibit without license:
  - Per Directive 1 (as amended 29 Sept. and effective 28 Nov. 2017, per CAATSA): new debt financing with maturity >14 days (*revised down from >30 days*), or new equity financing, for these designated entities or their subs (50%-or-more owned), and transactions with or dealing in such debt or equity
    - *Bank of Moscow* (note: doesn't exist as entity anymore – consolidated within VTB now)
    - *Gazprombank*
    - *Russian Agricultural Bank (Rosselkhozbank)*
    - *Sberbank* (note – one limited license given)
    - *VEB*
    - *VTB*

(except depositary receipts based on pre-existing shares – per FAQ 391)

- And note OFAC's expanded bank SSIs List (by several additions to date)
  - singling out many specific VEB, VTB, Sberbank, Gazprombank and Russian Agricultural Bank subs/affiliates – in Russia, Europe, and elsewhere
  - all of these were technically covered already under the 50%+ ownership rule – so they are named / singled out just for emphasis / clarity, to help stop circumvention, etc.
  - but also now any of these named subs would need official OFAC delisting if/when no longer 50%+ owned by its "named SSI parent" (*e.g.*, RDIF – no longer a VEB sub, but still on SSI List)

# US Sectoral Sanctions – OFAC (*cont'd*)

## Finance / Capital Markets (*cont'd*)

- Per Directive 2 (as amended 29 Sept. and effective 28 Nov. 2017, per CAATSA): new debt financing with maturity >60 days (revised down from >90 days) for these designated entities or their subs (50%-or-more owned), and transactions dealing in such debt
  - *Gazpromneft*
  - *Novatek*
  - *Rosneft*
  - *Transneft*
- and here again, note the amended SSI Lists issued since 2015 to date – singling out several specific Rosneft, Novatek and Transneft subs – to which the same two above-noted coverage caveats apply
- Per Directive 3 (still as of 12 Sept. 2014 – not amended): new debt financing, maturity >30 days, for Russian Technologies (Rostec) or its subs (50%-or-more owned), and transactions / dealing in such debt
  - and note that Rostec is now also a CAATSA Section 231 listed defense-industry entity (see slide 40 re the added Rostec-dealings burdens/risks this entails, for US as well as non-US persons)
  - and Rostec subsidiary Rosoboronexport is now also an SDN, per the new 6 April 2018 designation
- See related OFAC FAQs
  - FAQ 395 as amended, re permissible / prohibited US persons' activities with regard to L/Cs involving designated companies under Directives 1, 2 and 3
  - FAQ 419 as amended, re permissible / prohibited payment terms for US persons' sale of goods / provision of services to, and progress payments for long-term projects with, designated companies under Directives 1, 2 and 3
  - FAQ 371 re correspondent banking – OK only if the underlying transaction is (thus seems stricter than under EU rules – *i.e.*, mere use of \$, without more, could violate)
- And note OFAC General License 1B (of 28 Nov. 2017 superseding 1A of 28 Sept. 2014), authorizing transactions by US persons (and otherwise within the US) involving derivative products having value linked to underlying asset that is prohibited debt (or equity) under Directives 1-3 (and see related updated FAQ 372).

# US Sectoral Sanctions – OFAC (*cont'd*)

## Energy

- Directive 4 prohibits (*as amended 31 Oct. 2017, effective 29 Jan. 2018, per CAATSA*) without license
  - The provision, export or re-export, directly or indirectly, of goods, services (except financial services) or technology
    - “in support of exploration or production for deepwater, Arctic offshore, or shale projects that have the potential to produce oil” in Russia
    - involving any of these designated entities or their subs (50%-or-more owned)
      - *Gazprom*      • *Gazpromneft*      • *Lukoil*      • *Rosneft*      • *Surgutneftegas*
  - And keep in mind various SSI List amendments to date – singling out the same several Rosneft, Gazprom and Surgutneftegaz subs (and again with same above-noted coverage caveats applying)
  - Note also the 2015 BIS special designation of South Kirinsky field (only part of it is deep water) ... which could possibly be expanded to other such “borderline” fields – and might well be applied by OFAC too in practice
  - *And now, per CAATSA section 223, Directive 4 scope is expanded to cover such projects worldwide, where one or more of the five designated Russian companies has/have a (i) ≥33% ownership interest or (ii) a majority of the voting interests*
    - but this scope expansion applies only to such outside-Russia projects that are “initiated” after 29 Jan. 2018 – which means (per new FAQ 536) the date when the host government (or its authorized agency etc.) “formally grants exploration, development, or production rights to any party”
    - thus, should not apply to outside-Russia projects where the Russian company obtained its interest at any time after the initial gov’t grant of rights (but there could be fact/law/interpretation nuances here)
    - note also that, per related FAQ 537, OFAC’s “50% rule” – regarding involvement of SSI entit(y)(ies) in such project – will apply to determine whether either of the sanction thresholds (≥33% direct or indirect ownership interests or majority of voting interests) is passed
    - and the reported notices from Oracle, Microsoft and other IT supply leaders to the five Directive 4 companies re inability to deal with them further on the newly-covered outside-of-Russia projects

# US Sectoral Sanctions – OFAC (*cont'd*)

## Energy (*cont'd*)

- Note OFAC FAQ 413 (and similar BIS) clarification that “deepwater” = over 500 feet
- And OFAC FAQ 418 (and similar BIS)
  - Clarification that “shale project” doesn’t include E&P *through* shale to locate or extract oil in reservoirs
  - Also, apparently, not all hard-to-extract = shale (not addressed further in newest Oct. 2017 FAQ updates)
- And OFAC FAQ 421
  - Re “Arctic offshore” = north of Arctic Circle
  - Including an Oct. 2017 clarification that this bar *doesn't* cover horizontal drilling operations originating onshore that extend to seabed areas above Arctic Circle
- And OFAC FAQ 420 – re only production (and *not* midstream / downstream) activities are covered

# US Sectoral Sanctions – OFAC (*cont'd*)

## Energy (*cont'd*)

- For in-Russia projects, the Directive 4 reference to “*in Russia or in other maritime area claimed by [Russia] and extending from its territory*” – is understood to mean/include
  - Any other offshore areas (inland / territorial seas, EEZ or Shelf) that aren’t Arctic (this per a BIS FAQ answer, and analogous explanations under other-country sanctions rules (and consistent with EU Reg. clarifications)
  - And the Caspian Sea zone claimed by Russia (the EU sanction might not cover this?)
  - As well as the Black Sea shelf area extending from Crimea (despite non-recognition by US as being part of Russia)
- And note the FAQ 414 clarification that this sanction doesn’t apply if an otherwise-covered project has potential to produce only gas
  - But *does* apply if potential for both
  - Often not clear; factual / evidentiary showing may be key here
  - *And note that BIS (and likely OFAC too) considers condensate = oil* (this seemingly helps explain the 2015 special designation of South Kirinsky field)

# US Sectoral Sanctions – OFAC (*cont'd*)

## Energy (*cont'd*)

- The Directive 4 export ban thus covers essentially
  - All US-origin goods, US-origin services (*except for financial services*), tech. assistance and technology in respect of such projects
  - To the five main listed companies and their subs (and expressly including the added named Rosneft, Gazprom and Surgutneftegaz subs)
  - And also to/for use at the South Kirinsky field
  - And note reports of the US government's expressed opposition to a Japanese consortium's proposed joint development with Rosneft of the similarly situated Central Tatarsky field – might lead to eventual BIS designation of that field too (and possibly some others?)
  - The carve-out for financial services (includes clearing transactions and providing insurance re such activities – per OFAC FAQ 412 – but see also the further explanation in FAQ 415)
- There have been some license applications / favorable actions under Directive 4 (but still a much stricter approach than in the EU to date)
- Note the “support services” compliance focus / risk



# US Sectoral Sanctions – OFAC (*cont'd*)

## General

- All four directives (re finance / capital markets, and energy) also expressly prohibit
  - Any transaction that evades or avoids, has that purpose, or causes a violation of, or attempts to violate any of the directive prohibitions
  - Any conspiracy formed to violate any of same
  - And again, note in this respect the several SSI List supplements to date – singling out, essentially just for anti-circumvention emphasis, several subs/affiliates of
    - Rosneft, Gazprom, Novatek, Transneft and Surgutneftegaz (under Directives 2 and 4)
    - and VEB, VTB, Sberbank, Gazprombank and Russian Agric. Bank (under Directive 1)
- Possible penalties
  - Civil: up to circa \$295,000 (per most recent inflation adjustment) *per violation*, or up to twice the value of the transaction that was the basis for the violation
  - Criminal: up to \$1 million per violation
  - And individuals could be imprisoned (for up to 20 years) for criminal violations
- *And remember: while these OFAC Directives apply directly only to US persons, now there is risk of application to non-US companies/individuals also – per the CAATSA secondary sanctions (slide 40 below)*

# US Sectoral Sanctions – BIS

## Export / Reexport Restrictions

- The basic-limited August 2014 initial BIS Russia sanctions / license requirements – applying to *any* Russian end-users/uses
  - When the exporter knows the items will be used directly or indirectly in exploration for or production of *oil or gas* in Russian deepwater, Arctic offshore, or shale formations
  - Or is unable to determine whether the item will be used in such projects
  - And *presumption of denial* when for use in such projects “that have the potential to produce oil” (here again, grey area where could produce both gas and oil)
  - And importantly, as noted above, BIS considers that condensate = oil
- This August 2014 reg. sanctions:
  - Only specifically designated ECCN items and also several listed types of drill pipe, casings, wireline, downhole equipment (per Supp. No. 2 to §746.5 of the EAR)
    - for *all* Russian entities
    - when used in Russian deepwater, Arctic offshore, or shale projects
- Expressly including, but not limited to
  - *drilling rigs*
  - *parts for horizontal drilling*
  - *drilling and completion equipment*
  - *subsea processing equipment*
  - *Arctic-capable marine equipment*
  - *wireline & down-hole equipment*
  - *drill pipe and casing*
  - *software for hydraulic fracturing*
  - *high pressure pumps*
  - *seismic acquisition equipment*
  - *remotely operated vehicles*
  - *compressors, expanders, valves, risers*

# US Sectoral Sanctions – BIS (*cont'd*)

## Export / Reexport Restrictions (*cont'd*)

- Further, the same five OFAC-designated Russian energy companies (per Directive 4) have been on the BIS “Entity List” since Sept. 2014
  - *Gazprom*     • *Gazpromneft*     • *Lukoil*     • *Rosneft*     • *Surgutneftgas*
- Plus now 15 specifically named Rosneft subs since 2015 and 51 named Gazprom subs since 2016 (essentially the same as OFAC named)
- Also likely (but not automatically) applies to some owned or controlled subs – see BIS Entity List FAQ 134 (depends on nature of sub / its activities, control, and other factors)
- This specific Entity List designation imposes (re these companies, and at least several subs) – *see slide 13*
  - A new license requirement for export, re-export, or transfer of “*all items subject to the EAR*”
    - for the 5 initially named energy sector companies (and likely most subs)
    - when used in Russian deepwater, Arctic offshore, or shale projects
    - and now also certainly for all the expressly named Rosneft and Gazprom subs
    - and for the South Kirinsky field too
  - *If... or if...* (the same oil/gas target projects litany applies here – and the rules of (i) denial presumption for oil projects, and (ii) condensate = oil, are applied here too)

# US Sectoral Sanctions – BIS (*cont'd*)

## Export / Reexport Restrictions (*cont'd*)

- And, per August 2015 amendment, BIS added Gazprom's South Kirinsky field (Sea of Okhotsk, part of Sakhalin-3 areas project, off Sakhalin Island) to Entity List
  - Regardless whether in deepwater portion or not (the field has both)
  - This special designation was likely based on some particular factors
  - More such fields might eventually be named too – e.g., Rosneft's Central Tatarskiy?
- Also further 2015, 2016 and 2017 amendments, adding many new Russian, Crimean, W. European and other OFAC-named SDN companies to the BIS Entity List
- *And more new BIS tightening and broadening updates seem likely (but not yet)*
  - *Per the 2017 CAATSA-initiated expansion of OFAC Directive 4, and/or*
  - *Per the expanded OFAC SDN List*

# US Sectoral Sanctions – BIS (*cont'd*)

## Export / Reexport Restrictions (*cont'd*)

- What is “*subject to the EAR*”?
  - All items in / moving in transit through the US
  - All US-origin items, wherever located
  - And
    - *foreign-made goods that incorporate controlled US-origin goods*
    - *foreign-made software that is comingled with controlled US-origin software*
    - *foreign-made goods that are “bundled” with controlled US-origin software*
    - *foreign-made technology that is comingled with controlled US-origin technology*
  - ... in quantities exceeding the de minimis levels (see 31 CFR §§734.3 and .4)
    - currently 25% for Russia, other than encryption technology
    - *but there are intricate rules re what items “count” here* Certain foreign-made direct products of US-origin technology or software
  - Certain commodities, produced by any plant or major component thereof outside the US, that is direct product of US-origin technology or software
- *Note: includes even in-country transfers between entities (e.g., within Russia)*
- And BIS also has discretion to apply these sanctions more broadly (*i.e.*, without direct deepwater, Arctic offshore or shale link) – for any Russian users – if perceived unacceptable risk of diversion etc. (per 31 CFR §746.5(a)(2))

# US Sectoral Sanctions – BIS (*cont'd*)

## Export / Reexport Restrictions (*cont'd*)

- Note: BIS FAQ clarifications and license applications / actions (including re offshore drilling) – quite strict to date, like OFAC
- And see BIS 22 May 2015 Guidance on Due Diligence to Prevent Unauthorized Transshipment / Reexport of Controlled Items to Russia
  - Expresses BIS concern “about efforts by front companies and other intermediaries who are not the true final end users...”
  - Special focus on third-country freight forwarders and other dubious parties listed as an export item’s final destination
- Related note: be wary of relying on a “we only shipped to a third-country distributor / warehouse” defense (generally for Russia, and for Crimea in particular – see slide 28 below)
- Possible penalties
  - Essentially same as for OFAC, and now CAATSA too, sanctions violations (see slides 17 and 41)
  - Plus denial of US export privileges (including that no one can export US items to the penalized company)

# US Direct Sanctions – SDNs

## Specially Designated Nationals (SDN) List

- A few industry executives / oligarchs have been on the OFAC's SDN list since 2014 (and expanded further in 2015-2018) – most notably
  - Messrs. Sechin, Timchenko, Rotenberg, and Technopromexport's CEO (per the Siemens turbines scandal)
  - And most recent 6 April 2018 dramatic expansion: including Messrs. Vekselberg and Deripaska – *but note also the latest 23 April 2018 OFAC mitigative pronouncements re Rusal / Deripaska* (see slides 3-5)
  - Also many other Russian (and some European) business and political figures, and Russian gov't officials
- Such individual-person listing
  - Bars US persons' dealings with them or their controlled companies, blocked assets etc.
    - generally measured by  $\geq 50\%$  shareholding (*including by two or more SDN people*) – see OFAC FAQs 398-402
    - *and note the vast expansion of this list per the 6 April 2018 designations of Deripaska, Vekselberg (and some others), the their also-designated main holding companies, and the hundreds of  $\geq 50\%$ -owned subsidiaries thereof*
  - But doesn't bar dealing with non-SDN company where SDN person is just officer/director, etc. (e.g. Sechin-Rosneft ... and now also Miller-Gazprom, Kostin-VTB, etc. )
    - except has been interpreted to bar having an SDN-individual executive signing a contract on behalf of a non-SDN company (OFAC FAQs 398 and 400)
    - and see the July 2017 OFAC \$2 million penalty imposed on ExxonMobil for Mr. Sechin's signing Rosneft JV documents in 2014 – now under challenge by ExxonMobil in federal court
    - but a US person serving on a Russian company board of directors together with an SDN person seems OK (e.g. Rosneft – Dudley/Sechin) – as opposed to bar on a US person's serving on board of an SDN company (see FAQ 568)
    - and also need keep in mind separate SSI sanctions/restrictions re such companies

# US Direct Sanctions – SDNs (*cont'd*)

## Specially Designated Nationals (SDN) List (*cont'd*)

- The further 2015 - 2018 SDN designations – persons, companies (including some Europeans and others) – evidently controlled by and/or for assisting suspected evasion by some existing SDNs and some Russian state agencies and institutions (including Main Intelligence Dept., Federal Security Service, FAU Glavgosekspertiza)
- And the 26 Jan. 2018 addition of, among others, several Russian companies and officials considered to have been involved in the transfer of four turbines made by a Siemens Russian JV company to Crimea (*including the Russian JV partner company Power Machines – this is already having project reverberations outside Russia too*)
- Several Crimean commercial port and transport companies (and some Russian ships that call in Crimea), banks and resort complexes are also named
- And also a number of companies involved in the Kerch Strait and other Russia/Crimea transport projects have been added (and also Chernomorneftegaz (annex-Ukrainian state oil & gas co., nationalized by Crimean gov't)
- Also a number of Russian defense industry companies (as just supplemented 6 April 2018)
  - *Now including even Rosoboronexport (Russia's giant arms-export company – a sub of Rostec ... on existing SSI per OFAC Directive 3)*
  - *And its subsidiary Russian Financial Corp (RFK Bank)*
- And note that in June 2017 Khudainatov's Independent Petroleum Co. ("NNK") was put on SDN List, for alleged oil dealings of an NNK subsidiary with North Korea – reportedly being challenged at OFAC
- These are the US "direct" sanctions (as opposed to the SSI "sectoral" sanctions)
  - All US persons' dealings with – including payments to or receipt of goods/services from – SDNs and their subsidiaries are generally prohibited (and must block their assets)
  - Possible penalties – essentially same as above for other OFAC (and BIS) sanctions violations



# US Direct Sanctions – SDNs (*cont'd*)

## Specially Designated Nationals (SDN) List (*cont'd*)

- Reminder note: the State Dep't new CAATSA Section 231 listing of the Russian defense/intelligence entities does not impose SDN (or any other sanctions) on them
  - But
    - many were already SDNs and some were SSIs (including Rosoboronexport – now is both), and
    - there is likely to be some chilling effect in practice on US/other companies' willingness to do business with them, and
    - companies that continue to do some kinds of "significant transactions" with them risk having some SDN-like sanctions imposed on *themselves* under CAATSA Section 235 (see slide 4 above)
  - See further discussion on this at slide 34 below
- Two general licenses issued by OFAC to respond to / correct overbroad reach of the 1 Sept. 2016 and 29 Dec. 2016 designations of GGE and FSB as SDNs (connected to GGE's activities in Crimea and FSB alleged involvement in hacking / election-tampering):
  - OFAC General License No. 11 of 20 Dec. 2016 (entitled "Authorizing Certain Transactions with FAU Glavgosekspertiza Rossii" - GGE)
    - gives blanket authorization for "all transactions and activities ... that are ordinarily incident and necessary to requesting, contracting for, paying for, receiving, or utilizing a project design review or permit from [GGE]'s office(s) in [Russia]"
    - except for carving out (i.e., still prohibiting) anything to do with GGE relating to Crimea

# US Direct Sanctions – SDNs (*cont'd*)

## **Specially Designated Nationals (SDN) List (*cont'd*)**

- OFAC General License No. 1A of (as amended 15 March 2018 to take account of / synchronize with CAATSA) under the cyber-related sanctions – entitled “Authorizing Certain Transactions with the Federal Security Service” (FSB)
  - Gives authorization for “all transactions and activities ... that are necessary and ordinarily incident to ... requesting, receiving, utilizing, paying for, or dealing in licenses, permits, certifications, or notifications issued or registered by [FSB] for the importation, distribution, or use of information technology products in Russia”
  - But export, reexport, or provision of any goods or technology subject to the EAR requires BIS license, and fees payable to FSB shouldn't be  $\geq$  \$5,000 annually
  - Compliance with FSB law enforcement / administrative actions or investigations as well as regulations administered by FSB is authorized
- And note OFAC FAQs 501-504 (as amended 15 March 2018) repeating/clarifying certain points of General License No. 1A
  - Exportation of hardware and software directly to FSB or when FSB is an end-user is prohibited
  - No license is needed to travel to Russia / clear Russian border control, which is under FSB jurisdiction

# US Direct Sanctions – SDNs (*cont'd*)

## **Specially Designated Nationals (SDN) List** (*cont'd*)

- And follow-up BIS Entity List revisions of:
  - 20 Dec. 2017 – adding two Russian military-related design/production entities for production of a cruise missile system (and associated equipment) having a range considered to be prohibited by treaty
  - 22 June 2017 – adding some more OFAC Crimea-related SDN entities – thus essentially blocking exports/reexports to them having the requisite US content; and
  - 18 April 2017 – to jibe with OFAC General License No. 1 (now 1A) in relation to FSB
- *And note the related carve-out, per Oct. 2017 State Dep't CAATSA Section 231 Guidance, on required regulatory dealings with the FSB – while generally Section 231 warns / sets new risk re "significant transactions" with FSB (see slide 36 below)*
- And Oct. 2016 US federal court decision (in the Zarrab case) that may be seen/used to expand extraterritorial jurisdiction to enforce US sanctions vs. foreign companies
- OFAC "Guidance on the Provision of Certain Services..." of 12 Jan. 2017
  - Provides some clarity as to what a US person (citizen or green card holder) legal counsel (in-house or outside) or compliance officer can/can't do in advising a non-US company (employer, client) on the legality of proposed transactions under the US sanctions laws
  - Essential point: can freely advise on whether complies/violates (and approve if complies) – but can't otherwise "facilitate" by voting at Board level, signing the contract, etc.

# US Crimea Sanctions

- Crimea-focused Executive Order (EO) 13685 of 19 Dec. 2014
  - Bars all new direct or indirect US investments / transactions into Crimea – including for energy sector / offshore areas
  - And see the 29 Jan. 2015 BIS rules implementing the 19 Dec. 2014 EO
- And see 30 July 2015 OFAC Advisory Release re circumvention / evasion by omitting critical information in financial and trade transactions (further to the EO)
  - OFAC warns re
    - various patterns / practices in financial transactions that hinder correspondent banks' efforts to identify and interdict
    - (note the substantial fines suffered in recent years by various European banks for similar-type violations of OFAC sanctions against countries other than Russia)
    - and similar practices in context of trade transactions – including in distributorship arrangements covering Russia
    - and advises various types of mitigation measures for these risks
- Note also these OFAC Crimea-related General License exceptions
  - No. 4 of 19 Dec. 2014, permitting various food and agricultural products (including soft drinks, cigarettes, etc.) and medicines, medical supplies and devices
  - No. 9 of 22 May 2015, permitting common internet-based communications (and see related OFAC FAQ 454)

# CAATSA / Guidances / Lists

- CAATSA (Countering America's Adversaries Through Sanctions Act)
  - Signed into law by President Trump on 2 August 2017 (after passage through both Houses of Congress by near-unanimous vote)
  - Full text is [here](#) (Public Law 115-44) – the Russia-related part is Title II, spanning sections 201-292
  - Eastern Ukraine/Crimea situation, alleged US (and European) election meddling, and Syria seem to be the three bases now
  - Broadens / toughens the pre-existing sanctions as contained in six Executive Orders, the Ukraine Freedom Support Act of 2014 (the "UFSA") and another 2014 law in support of Ukraine (now amended by CAATSA)
  - Also has framework authorization for *some new primary sanctions* (aimed at US persons, or dealings having some other nexus to US) and *secondary sanctions* (aimed at non-US persons – and not needing any US nexus)

# CAATSA / Guidances / Lists (*cont'd*)

- Dramatically widens the gap between US and EU sanctions against Russia
  - despite the CAATSA Title II intro. statement that the President “should continue to uphold and seek unity with European and other key partners” on Russia sanctions
  - and note – the President’s two CAATSA signing statements also emphasized the importance of coordination with allied countries and not harming US business
  - and the follow-up State and OFAC Guidances reiterated that the US authorities intend to engage/coordinate closely with allied/partners countries in interpreting / enforcing the new CAATSA secondary sanctions powers
- By Presidential Memorandum of 29 Sept. 2017,
  - CAATSA implementation functions delegated mostly to State and Treasury Dep’ts (and in consultation with Director of National Intelligence)
  - with primary responsibility given to one or the other on CAATSA article-by-article basis
- CAATSA also covers Iran and North Korea – introducing stiffened primary and secondary sanctions with regard to those two countries
  - the North Korea part is aimed primarily at foreign companies/banks (de facto focus on Chinese, Russian, etc.) doing various types of business directly or indirectly there
  - note that Independent Oil Co. (“NNK”) of Russia is now an SDN in this connection
  - and have in mind also the tightened anti-Venezuela sanctions – can affect some Russian companies – *but Venezuela, North Korea, Iran are not further covered here*

# CAATSA / Guidances / Lists (*cont'd*)

- CAATSA's basic content (as Russia-relevant)
  - Codification by statute
    - Of the existing blacklist (SDN) and sectoral (SSI) sanctions enacted by the series of Executive Orders since 2014 against Russia
    - Which will make it harder for President Trump (and his successors) to narrow or otherwise loosen any of these sanctions by executive action – and would require new legislation to repeal CAATSA (recall the old Jackson-Vanik Amendment's decades-long life!)
  - State / Treasury Dep'ts in late Oct. 2017 issued first Guidances (and FAQs, Entity List, revised Directives) per various sections of the new law
    - State Dep't on 27 Oct. issued initial CAATSA section 231(d) List of entities in the Russian defense / intelligence sectors: section 231 requires President to impose sanctions on any US or non-US person, wherever located, that the President determines has knowingly engaged in a "significant transaction" with any Russian defense/intelligence sector entity on the [List](#) (and associated [Public Guidance](#) – see further slide 34 below)
    - State Dep't also issued Oct. 31 [Public Guidance](#) on CAATSA sections 225 (requiring President to impose sanctions on non-US persons that invest in certain types of oil projects in Russia) and 232 (giving President discretion to impose sanctions on US or non-US persons that invest or are otherwise involved substantially in construction/modernization/repair of Russian energy export pipelines) – see further slides 33 and 35 below
    - OFAC (Treasury Dep't) on 31 Oct. issued its initial [Guidance](#) (including some revised and new FAQs) to implement various CAATSA provisions for which it has primary authority – including an amended / expanded Directive 4 (re Arctic offshore, deepwater and shale projects) and three other CAATSA provisions (see further slides 33-36 below)
    - and see FAQs 540-547 and 579 (all from 31 Oct. 2017 or after) re "significant transaction", "facilitation" and other related CAATSA application issues

# CAATSA / Guidances / Lists (*cont'd*)

- CAATSA stiffens existing OFAC Directives 1, 2 and 4 (*this is for US persons*)
  - *Directive 1*: permissible “new debt” of designated Russian banks is reduced from max. 30 to 14 days
  - *Directive 2*: permissible new debt of designated Russian energy cos. is reduced from max. 90 to 60 days
  - *Directive 4*: the prohibition on goods/services/technology involvement in deepwater, Arctic offshore or shale projects is expanded from Russia to worldwide
    - ❖ but, for outside Russia, applies to only new projects
    - ❖ if one/more of designated Russian energy companies has  $\geq 33\%$  ownership or  $>50\%$  voting interest
  - All now triggered by OFAC amendments of the relevant directives – see slides 11-17 above
- Per CAATSA section 223(a), expansion of OFAC sanctions potential industry coverage (beyond financial services, energy, engineering/defense-related) – see FAQ 539
  - to *state-owned* (i) railway (= RZhD, the Russian State Railway), and (ii) mining & metals companies (*e.g.*, state-owned uranium producer?)
  - but shipping industry is left off this expanded list; and nuclear power industry also doesn’t appear despite earlier consideration of including it
  - and even as to railway and mining & metals sectors, the Oct. 2017 OFAC Guidance makes clear that this is only discretionary and that “maintaining unity with partners” is important
- Requiring review and approval by Congress before the President can terminate or waive existing sanctions (or grant any non-routine-type license that “significantly alters” US foreign policy re Russia)



# CAATSA / Guidances / Lists (*cont'd*)

- *Requiring* the President to impose sanctions – from a few menus of possibilities, mostly involving penalties re business with/in the US – in various contexts (upon findings, and with some carve-outs / waiver possibilities) including against:
  - per CAATSA section 225 (and see 31 Oct. State Dep't Guidance), *non-US* companies and individuals that knowingly make significant investment in deepwater, Arctic offshore or shale oil projects in Russia (as written, could be whether or not one of the Directive 4 Russian companies is involved – and the new Guidance doesn't clarify)
  - per CAATSA section 226 (and see 31 Oct. OFAC Guidance), *Russian and other foreign financial institutions ("FFIs")* that knowingly engage in / facilitate "significant" transactions involving any of the Directive 4-type oil projects in Russia, certain defense-related activities, or Gazprom's withholding of gas supplies
  - per CAATSA section 228 (and see the 31 Oct. OFAC Guidance), *non-US* companies and individuals that knowingly
    - ❖ materially violate, attempt or conspire to violate or cause a violation of any Russia sanction
    - ❖ facilitate "significant transactions" (including "deceptive or structured transactions") for or on behalf of any person that is subject to a Russia sanction – or child, spouse, parent or sibling the new OFAC Guidance goes some way to calm fears of over-expansive application with respect to SSI sanctioned entities (see slide 36 below for details)
    - ❖ but note also the section 225 newly-stiffened requirement to impose sanctions on any FFI that knowingly facilitates a significant financial transaction for any SDN

# CAATSA / Guidances / Lists (*cont'd*)

- per CAATSA section 231 (and see 27 Oct. State Dep't List and Guidance), *US or non-US* companies and individuals that knowingly engage in significant transaction with a Russian defense/intelligence sector entity on this List
  - ❖ see the List (linked at slide 31) – and note that a company's appearance on it doesn't itself mean any new sanction against it ... but most are already SDNs or SSIs (*Rosoboronexport, which was on the list, has now been made an SDN*)
  - ❖ these include some defense-sector companies that also have important civilian-oriented production (*e.g.* Sukhoi, Tupolev, and holding companies United Aircraft, United Shipbuilding) but the State Dep't Guidance (in FAQ) stresses that:
    - ✓ for now at least, purely civilian end-use/end-user transactions, not involving intelligence sector, are not likely to be considered "significant"
    - ✓ and that transactions with FSB (which is also on the List) are unlikely to be considered "significant" if necessary to comply with FSB rules or law enforcement / admin. actions / investigations involving FSB re import / distribution / use of IT products in Russia and payment of related processing fees to FSB (*i.e.*, this dovetails with OFAC General License No. 1 of 2 Feb. 2017 – see slide 26 above)
  - ❖ and there are some indications that only the actual listed companies and not their subsidiaries are covered (but this awaits authoritative confirmation)
- per CAATSA section 233 (and see 31 Oct. OFAC Guidance), *US or non-US* companies and individuals that with actual knowledge make or facilitate investments into privatization of Russian state-owned companies (of \$10M, or combination \$1M+ bites for \$10M total in a year) where the process "unjustly benefits" RFG officials or their close associates / family (this may well be hard to assess)

# CAATSA / Guidances / Lists (*cont'd*)

- Per CAATSA section 232 (and see 31 Oct. State Dep't Guidance), creating *discretionary* power for the President, in *coordination with US allies*, to impose various possible sanctions on US or non-US companies or individuals that knowingly invest or are otherwise involved substantially in the construction (or modernization, repair) of *energy export pipelines* by Russia – *namely*:
  - make an investment that directly and significantly contributes to Russia's ability to construct energy export pipelines, or
  - sell, lease or provide to Russia, for such construction purpose, goods, services, technology, information or support that could directly and significantly facilitate the maintenance or expansion of the construction, modernization or repair of Russian energy export pipelines
  - if any of the above has fair market value of > \$1 million, or an aggregate fair market value of > \$5 million during any 12-month period
  - and consider further on this
    - ❖ the State Dep't Guidance repeats the statutory wording re this sanction being "discretionary" and the importance of coordination with allies (and also notes intent to "avoid harming the energy security of our allies")
    - ❖ thus, despite the separate CAATSA statement of US policy "to continue to oppose the Nordstream 2 pipeline" (see section 257(a)(9)), seems enforcement against Nordstream may well not materialize
    - ❖ further comfort in the Guidance: the section 232 sanction focus is to be on investments/projects initiated on/after 2 Aug. 2017
      - ✓ and "a project is considered to have been initiated when a contract for the project is signed"
      - ✓ further Guidance statement that investments / loan agreements made before 2 Aug. 2017 wouldn't be subject to section 232 sanctions
      - ✓ and this: section 232 wouldn't target investments / other activities related to standard maintenance of pre-existing pipelines
    - ❖ but note the most recent (April 2018) Congressional negative focus/pressure re Nordstream
    - ❖ there is also some concern that this sec. 232 sanction might be imposed against companies/banks financing planned Turkstream gas pipeline expansion
    - ❖ final important Guidance clarification: section 232 covers only energy export pipelines that originate in Russia, and *not* those originating outside and transiting through Russia (*thus, safe harbor for the CPC pipeline*)

# CAATSA / Guidances / Lists (*cont'd*)

- Thus (in addition to the potential new sanctions against US persons for certain conduct), a range of possible “secondary sanctions” (*i.e.*, aimed at non-US persons) has been introduced
  - whether or not there is any US person / US nexus – but OFAC’s CAATSA Guidance reflects recognition that it would be inappropriate to penalize any/all foreigners’ activities – *i.e.*, various possible dealings with mere SSIs – that aren’t prohibited for a US person
  - for example
    - ❖ per OFAC’s section 226 Guidance, FFIs are not to be subject to sanctions solely on basis of knowingly facilitating significant financial transactions on behalf of an SSI listed under Directives 1-4
    - ❖ and per OFAC’s section 228 Guidance:
      - ✓ a transaction isn’t “significant” if US persons wouldn’t need a specific OFAC license to participate in it
      - ✓ and if involves only an SSI entity there must also be a deceptive practice (attempt to obscure, conceal, evade) to be considered “significant”
      - ✓ and even if an SSI entity is involved, and also involves deceptive practices, it is still not automatically “significant” – rather, totality of circumstances (bearing in mind the below-specified factors) are considered

# CAATSA / Guidances / Lists (*cont'd*)

- what is a “significant” transaction (in “totality of the facts and circumstances”)?
  - ❖ in the State Dep’t and OFAC Guidances, there are slightly differing elaborations of the “totality of facts and circumstances” factors taken into account, in view of the differing focuses of the specific CAATSA provisions at issue – but basic similarity
  - ❖ the State Dep’t Guidance on section 231 implementation (re transactions with listed Russian defense / intelligence entities) highlights
    - ✓ relation to / significance of US national security and foreign policy interests, and significance of defense / intelligence nature
    - ✓ versus goods/services for purely civilian end-use / end-user weighing heavily against determination of significance
    - ✓ and also notes that unity with allied countries will be taken into account as a factor ... even with regard to such countries’ purchase of Russian military equipment (from SDN/SSI entities on the CAATSA section 231 List) – and note reports of, for example, India’s continued substantial weapons purchases from Russia
  - ❖ the State Dep’t Guidance on section 225 (re investments into certain types of Russian oil projects) notes, among the significance factors, “the relation and significance of the investment to the Russian energy sector”
  - ❖ the OFAC Guidances on sections 226 (re certain energy or defense-related activities etc.) and 228 (facilitating significant transactions for any sanctioned entity etc.) set out several factors
    - ✓ keying on size, number, frequency, nature, management’s level of awareness / whether part of pattern of conduct / nexus with blocked person (for FFIs’ financial transactions) / impact on statutory objectives / whether involves deceptive practices
    - ✓ and other factors deemed relevant on case-by-case basis

# CAATSA / Guidances / Lists (*cont'd*)

- CAATSA section 241 Report and Lists:
  - US Treasury Dep't on 29 Jan. 2018 issued its required Report to Congress (per CAATSA sec. 241) re Russia's senior political figures, oligarchs and parastatal entities
  - Comprising an [unclassified main report](#) with list-appendices, and a classified annex (submitted only to Congress)
  - This Report was not a sanctions list (as stated in the Report itself, and in OFAC's accompanying FAQ 552 of 30 Jan. 2018, and in CAATSA sec. 241 itself)
    - inclusion of individuals or entities "does not and in no way should be interpreted to impose sanctions on those individuals or entities"
    - or to "constitute the determination by any agency that any of those individuals or entities meet the criteria for designation under any sanctions program"
    - or to "in and of itself, imply, give rise to, or create any other restrictions, prohibitions, or limitations on dealing with such persons by either US or foreign persons"
    - or to "indicate that the US Government has information about the individual's involvement in malign activities"
  - The unclassified part listed
    - 114 senior political figures – in the Presidential Administration, Cabinet of Ministers, and "other senior political leaders" (including the CEOs of many of Russia's largest majority state-owned companies such as Messrs. Miller, Sechin, Gref, Kostin and Chemezov – some of whom were already SDNs)
    - 96 "oligarchs" – Russian individuals having a net worth estimated at more than \$1 billion – (apparently taken from the Forbes list, set out in alphabetical order)

# CAATSA / Guidances / Lists (*cont'd*)

- The classified annex apparently featured
  - a list of Russia’s “parastatal entities” (companies having ≥ 25% state ownership and 2016 revenues of >\$2 billion – see such a [list](#), in Russian, created/published by *Kommersant* on 30 Jan. 2018), an assessment of their role in the Russian economy, etc.
  - the oligarchs’ (apparently including some not included on the unclassified list of 96) “closeness to the Russian regime” and sources of income, location of assets, etc.
  - an overview of key US economic sectors’ exposure to Russian persons and entities
  - an analysis of possible impact of additional sanctions on these persons/entities
- Mixed messages from Trump Administration upon release of the 29 Jan. Report/Lists
- *But the newest 6 April 2018 SDN individuals designations come from among those on the 29 Jan. 2018 list (thus starkly eroding the above-noted Jan. 2018 words of comfort)*
- And companion 29 Jan. 2018 report to Congress on the Effects of Expanding Sanctions to include Russian Sovereign Debt and Derivative Products (per CAATSA sec. 242)
  - Had an [unclassified main text](#); not clear if it also has a classified annex
  - Did not recommend in favor of such sanctions expansion – given the effects this would have on the US and European, as well as the Russian, financial markets
  - But proposed new draft US law contemplates possible sanction re Russian sovereign debt (see slide 6 above)

# CAATSA / Guidances / Lists (*cont'd*)

- Some further CAATSA interpretative / application points
  - There are open issues as to whether all these tightened and new anti-Russia secondary sanctions may be imposed against *Russian* as well as other non-US companies / individuals
    - by the technical CAATSA wording, yes – but such imposition against “target-country” persons isn’t traditional in US sanctions practice
    - and the fact of only CAATSA Section 226 (amending UFGA section 5) being expressly aimed at “*Russian and other foreign financial institutions*” (emphasis added) might be taken as another sign that otherwise Russian entities/individuals are not intended to be caught (*i.e.*, they are and can continue to be more easily targeted by existing/future primary sanctions as SDNs or SSIs)
    - but, needless to say, there can be no guarantees here
  - In any event, here again the mere possibility/threat of such application against otherwise non-sanctioned or at least non-SDN Russian companies/banks may now make them pause before doing any possible sanctions-targeted business with sanctioned or possibly sanctioned Russian companies (especially with SDNs) under any of the CAATSA provisions – *and see OFAC’s 6 April 2018 press release specific reminder in this regard*
  - And some non-Russian companies/banks are becoming more cautious about doing any such business with Russian companies (whether sanction targets or not) in general ... *all the more so with OFAC’s 6 April new SDNs announcement*
  - Exemption for Russian suppliers in connection with NASA or DoD space launches
  - And note various threatened Russian counter-measures in response to CAATSA ... *and now more are threatened in response to the 6 April new SDN designations (per 13 April draft law in Duma)*



# CAATSA / Guidances / Lists (*cont'd*)

- CAATSA – Potential Penalties (same as for OFAC / BIS regs. violations – based on underlying laws)
  - Civil: up to circa \$295,000 (per most recent inflation adjustment) *per violation*, or up to twice the value of the transaction that was the basis for violation
  - Criminal: up to \$1 million per violation and individuals could be imprisoned (for up to 20 years) for criminal violations
  - These being in addition to the CAATSA-referenced menus of potential sanctions themselves – for non-US persons, involving various penalties re business in/with the US (and which can also include some possible penalties against CEOs / other officers of a sanctioned company)
- Possible Consultation with US Authorities
  - US and allied-nation companies have started seeking private clarifications from State and Treasury Dept's re the vagueries of possible CAATSA application to their Russian dealings
  - For example, note the recently reported approach to / blessing from State Dep't re a non-US energy major's participation in Russia deepwater drilling
  - But we suppose most Russian companies will be hesitant to do seek such (except for already-designated SDNs applying for delisting etc. – *including Rusal in April 2018*)

# EU Sectoral Sanctions

## Overview

- The EU sanctions regime (most recently amended by Reg. No. 2017/2212 of 3 Nov. 2017) focuses on financial, energy, and dual-use / military sectors
  - Was fairly well coordinated with the US regime ... but no longer, with CAATSA and newest SDNs!
  - *E.g.:* no sanctions on anything re gas-focused projects (given Europe's dependence on Russian gas supplies) ... and maybe not interpreted to cover condensate (see slide 15 above)?
  - And no sanctions on any oil & gas projects with Russian participation outside Russia (or on Russian energy export pipelines)
  - And guidance notice exempting correspondent banking (payment / settlement services) from the loan/credit bans – thus maybe more lenient than analogous US rule / interpretation
  - *And, unlike the US, no broad-reach blacklisting into leading commercial entities (like Rusal, Basel, EN+, Renova and their owners, CEOs of leading state-owned companies, etc.)*
- Much easier to grasp the basic EU rules than the US ones (and all the more so now, with the newest US acts) – essentially all in one document's four corners
- *But the devil (?) is in the diversity:*
  - Each member state competent authority interprets, authorizes (where called for) or denies, enforces, and sets / imposes its own penalties
  - Unlike the US ... where this is all uniform, federal-level stuff
  - Though some coordination / consistency is called for in the Reg.
  - And see EU Commission Notice of 16 Dec. 2014 (as amended 25 Sept. 2015) – FAQs

# EU Sectoral Sanctions (*cont'd*)

## Energy

- Per the initial July 2014 energy-sector sanctions / authorization regime (Reg. art. 3):
  - Prior authorization is required for sale, supply, transfer or export, directly or indirectly, of the items *listed in Annex II*
    - to *any person or entity* in Russia or elsewhere
    - if for use in Russia (clarified to include its EEZ and continental shelf)
    - note that some of the Annex II item descriptions were refined / narrowed by Dec. 2014 amendment
  - Authorization is to be considered / granted by competent authority “*of the member state where the exporter is established*”, per some general EU rules

# EU Sectoral Sanctions (*cont'd*)

## Energy (*cont'd*)

- But authorization shall *not* be granted for supply etc. of Annex II items
  - if reasonable grounds to determine that is for Russian oil (including condensate?) E&P projects:
    - ❖ in waters deeper than 150 meters (circa 492 feet)
    - ❖ in offshore areas north of the Arctic Circle
    - ❖ in shale formations by way of hydraulic fracturing (but not including E&P activities *through* shale formations to locate/extract oil from non-shale reservoirs)
    - ❖ *note*: not clear whether the US oil = condensate interpretation applies
  - *except for*
    - ❖ execution of obligation arising from contract concluded before 1 August 2014 – or, per Dec. 2014 liberalization, from “ancillary contracts necessary for the execution of such contracts”, or
    - ❖ items necessary in case of certain events threatening health, safety or environment
  - in fact, many such license applications / approvals to date (for European and US companies, and EU subsidiaries / JVs of Russian energy companies)
  - and note – EU has not followed US CAATSA / OFAC Directive 4 expansion of coverage to any such project worldwide having ≥33% ownership or >50% voting interest by designated Russian company(ies) ... and is not likely to

# EU Sectoral Sanctions (*cont'd*)

## Energy (*cont'd*)

- Restricted activities include (per Reg. art. 3a, as amended Dec. 2014):
  - Provision, directly or indirectly, of specified types of “associated services necessary for” deepwater, Arctic offshore, shale oil E&P projects (same litany-detail as art. 3 – see slide 43 above) in Russia including in its EEZ and shelf:
    - these specified types of services:
      - *drilling*
      - *well testing*
      - *logging*
      - *completion services*
      - *supply of specialised floating vessels\**
    - (\* *Note*: 25 Sept. 2015 Guidance Notice FAQ 5 exempts “supply vessels such as platform supply vessels, anchor handling tug and supply vessels or emergency response vessels”)
    - the same exceptions apply for
      - ❖ execution of an obligation arising from a prior (pre-12 Sept. 2014) contract / agreement or follow-on ancillary contracts, or
      - ❖ services necessary in case of certain events threatening health, safety or environment
    - again, apparently no scope for authorization here – rather, a pure prohibition for/to all (if neither of the above two carve-outs applies)

# EU Sectoral Sanctions (*cont'd*)

## Energy (*cont'd*)

- Also, provision of the following services related to any Annex II items needs authorization from national competent authority (per art. 4.3 – existing since the initial July 2014 version of the Reg., and as refined by the Dec. 2014 amendment):
  - Technical assistance (or brokering services) re Annex II items and re provision, manufacture, maintenance and use of those items directly or indirectly
    - to anyone in Russia (including its EEZ and Shelf)
    - or to anyone in any other country if concerns items for use in Russia (including EEZ / Shelf)
  - Financing or financial assistance re Annex II items – including grants, loans and export credit insurance
    - for any sale, supply, transfer or export of those items
    - or for any provision of related technical assistance
    - also (as above for technical assistance) directly or indirectly to anyone in Russia (including its EEZ / Shelf) or to anyone in another country for use in Russia (including its EEZ / Shelf)
  - Per art. 4.4, authorizations may be granted on same basis as set out in art. 3 (and possible emergency services, with prompt post-reporting – per arts. 4.3 and 3.5)

# EU Sectoral Sanctions (*cont'd*)

## Finance – for Energy (and Military) Sector Companies

- Prohibits (per Reg. art. 5.2) purchase or sale of, provision of investment services for or assistance in issuance of, or other dealings with, certain debt or equity securities (and money-market instruments) issued after 12 Sept. 2014 by
  - *Rosneft, Transneft, Gazpromneft* (the three currently designated entities engaged in “sale or transportation of crude oil or petroleum products” – per Annex VI), their non-EU subs (>50% owned), or persons or entities acting at their behalf / direction
  - Applies to debt securities with maturity >30 days (note OFAC Directive 2 now will be = 60 days max.)
  - And note the relevant “transferable securities” definition – “... which are negotiable on the capital market” (some uncertainty re equity investment in LLC-type cos.)
  - And see 25 Sept. 2015 FAQ 30 allowing modifications to transferable securities depending on materiality – *i.e.*, if would not “actually or potentially result in additional capital being made available”
- And same basic prohibition re the 3 designated Russian entities connected with military-sector goods/services – including United Aircraft Corp. (per Annex V), with exception for space / nuclear sector entities (and a hydrazine exception)

# EU Sectoral Sanctions (*cont'd*)

## Finance – for Russian Banks

- Prohibits (per Reg. art. 5.1) purchase or sale of, provision of investment services for or assistance in the issuance of, or other dealings with, “*transferable securities*” or money-market instruments
  - issued by the 5 Russian banks designated in Annex III (Sberbank, VTB, Gazprombank, VEB, Rosselkhozbank – Russian Agricultural Bank)
    - or their non-EU subs (>50% owned)
    - so, essentially the same as in US OFAC sanctions
  - or persons or entities acting on their behalf or at their direction
- Applies to
  - debt securities issued (i) from 2 Aug. to 12 Sept. 2014, with maturity >90 days; and (ii) after 12 Sept. 2014, with maturity ≥30 days (note OFAC Directive 1 now is = 14 days max.)
  - and to equity securities issued after 12 Sept. 2014
- See 25 Sept. 2015 FAQs 27-28, addressing what EU subs of targeted Russian bank entities can/can't do (including warning re passing on funds = circumvention)



# EU Sectoral Sanctions (*cont'd*)

## Loans – for Energy (and Military) Sector Companies and Banks

- Prohibits (per Reg. art. 5.3) directly or indirectly making or being “part of any arrangement to make” new loans / credits with maturity >30 days after 12 Sept. 2014 to any entity covered under the previous two slides – namely
  - the three Russian energy-sector companies (per Annex VI)
  - the five Russian banks (per Annex III)
  - the three Russian military-sector companies (per Annex V)
  - or their non-EU subs, or persons acting on their behalf or at their direction
- And see 25 Sep. 2015 Guidance Notice, FAQ 25
  - rollover of an existing debt is allowed, subject to 30-day maturity restriction
  - but succession of rollovers each with maturity of  $\leq 30$  days may = circumvention

# EU Sectoral Sanctions (*cont'd*)

## Loans – for Energy (and Military) Sector Companies and Banks (*cont'd*)

- Certain carve-outs provided (per Reg. art. 5.3, amended as of Dec. 2014)
  - *Trade finance exemption*: for “loans or credit having a specific / documented objective to provide financing for non-prohibited imports or exports of goods and non-financial services between the [EU] and any third State” (intended for use by targeted entity)
  - *But not* for purpose of *funding* any such entity (see art. 12)
  - Practical approach to the interplay here: compliant vs. circumvention? (see Reg. art. 12)
  - And see 25 Sept. 2015 Guidance Notice FAQ 6: this exception “should be interpreted narrowly” (but also FAQs 6-16 clarifics.)
- And note further EU FAQ clarifics. (per Guidance Notice as amended 25/09/15)
  - Post-Sept. 2014 cancellation of a pre-Sept. 2014 loan = prohibited new loan (FAQ 20)
  - A new term deposit at a targeted bank isn’t barred (but see FAQ 21 re circumvention)
  - Correspondent banking (or other payment / settlement services) is in itself ≠ making or being part of arrangement to make new loan or credit (FAQ 22, and FAQ 2)
  - Payment terms / delayed payment for goods/services ≠ prohibited loan/credit (but warning re “not in line with normal business practice” / circumvention – FAQ 24)

# EU Sectoral Sanctions (*cont'd*)

## Loans – for Energy (and Military) Sector Companies and Banks (*cont'd*)

- And note art. 5.4 (introduced by Dec. 2014 clarific.) – carving out from the general prohibition *new drawdowns / disbursements under pre-12 Sept. loan/credit contracts*
  - If
    - “all the terms and conditions” of such were agreed pre-12 Sept. 2014 and haven’t been modified since then; and
    - before 12 Sept. 2014 “a contractual maturity date has been fixed for the repayment in full of all funds made available ...”
  - Possible issues re
    - whether “all” terms and conditions really mean *all* (ref. FAQ 30 by analogy?)
    - treatment of typical carry-type loans – re the “repayment in full” aspect
- Again, see the various 25 Sept. 2015 Guidance Notice FAQ clarifics.
- Note – here again, many such license applications / approvals to date (experience varying by member state)
- Also note a UK law now granting power to impose fine of £1 million or 50% of transaction value, for EU financial sanctions breaches as of 1 April 2017

# EU Sectoral Sanctions (*cont'd*)

## Important Overarching Provisions

- The Reg. also bans knowing and intentional participation in activities having object or effect of circumventing the above prohibitions (Reg. art. 12)
- But, per art. 10, no liability without knowledge or reasonable cause to suspect that actions would violate
- Jurisdictional reach – the Reg. applies (art. 13 – and see 25 Sept. 2015 FAQ 3):
  - Within EU territory (or on board aircraft / vessels under member state jurisdiction)
  - To any person, wherever located, who is an EU member state national
  - To any entity, wherever acting, that is incorporated in an EU member state
  - To any entity “in respect of any business done in whole or in part within the Union”
- *Note the distinctions between US / EU regs. reach – especially now with CAATSA!*
- The “no claims ... shall be satisfied” provision (Reg. art. 11)
  - But without prejudice to “judicial review of the legality of the non-performance of contractual obligations in accordance with this Regulation”
  - Interesting for lawyers
- And note Rosneft’s (and GPN’s) thus-far unsuccessful UK/EU court challenge to its designation as SSI-sanctioned entity

# EU Crimea Sanctions

- Reg. No. 692/2014 as amended
  - Bars sale, supply, transfer, export of goods and technology (per an Annex II) to any Crimean company or for use there
  - Covers oil & gas / other mineral resources and E&P, transport, telecoms, power sectors
  - And further general ban on financing, corporate acquisitions, JVs, investment in real estate, construction / engineering services, investment services, tourism services
- And see EU Information Note to EU Business Operating and/or Investing in Crimea/Sevastopol (Joint Working Doc. SWD/2014) of 17 July 2014
  - As amended 11 August 2014 and most recently 10 June 2015
  - Gives updated summary of restrictions now in effect for EU-connected commercial activity there (though no real interpretive guidance)
- Note the still-reverberating July 2017 scandal re Siemens gas turbines that found their way to Crimea (evidently without the company's knowledge and despite its compliance program/efforts)
- And EU's Sept. 2017 "blacklist" Reg. amendment to allow member state authorities to permit certain types of payments to Crimean Sea Ports

# EU Direct Sanctions (SDN-like)

- The EU's SDN-like "blacklist" Reg. No. 269/2014 of 17 March 2014
- And more names have been added in several update regs. to date
- Individuals and entities (incl. a few added in 2017 per the Siemens turbines affair)
- All dealings with the blocked assets of listed persons (or their subs or certain other affiliates) etc. are generally prohibited
- Currently in effect to 15 Sept. 2018 (extended as of 12 March 2018)
- Note a published joint article of 17 June 2015 by ICC, LCIA and SCC on "The potential impact of the EU sanctions against Russian on international arbitration administered by EU-based institutions"
  - Seeks to reassure Russian parties
  - Notes availability of exemption for payment of legal fees and related expenses
  - But in fact some Russian state-owned companies are shifting preference from LCIA or ICC to Singapore or Hong Kong arbitration (and corresponding choice of law)

## Our Global Reach

Africa  
Asia Pacific  
Europe  
Latin America  
Middle East  
North America

## Our Locations

Almaty	Chicago	Houston	Orange County	Shanghai*
Astana	Dallas	London	Paris	Silicon Valley
Beijing*	Dubai	Los Angeles	Philadelphia	Singapore
Boston	Frankfurt	Miami	Pittsburgh	Tokyo
Brussels	Hartford	Moscow	Princeton	Washington, DC
Century City	Hong Kong*	New York	San Francisco	Wilmington



**Morgan Lewis**

\*Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan Lewis operates through Morgan, Lewis & Bockius, which is a separate Hong Kong general partnership registered with The Law Society of Hong Kong as a registered foreign law firm operating in Association with Luk & Partners.