U.S. economic sanctions programs have broad domestic and extra-territorial application, and are aggressively enforced against both U.S. and foreign companies. Businesses need to review and update their sanctions compliance programs to account for numerous changes in 2017 that further restrict trade with Cuba, Russia, North Korea, and Venezuela. Those changes include a significant expansion of "secondary sanctions," which target foreign businesses for transactions that have no nexus to the U.S., and new State Departments lists of restricted parties that may not be flagged by existing screening software. In addition to reviewing key developments in 2017, the article provides a refresher on the principal jurisdictional bases for application of U.S. sanctions laws, to help non-U.S. businesses better understand how and why these U.S. legal developments may affect them.

U.S. ECONOMIC SANCTIONS UPDATE: KEY CHANGES IN 2017 & WHAT THEY MEAN FOR U.S. AND NON-U.S. BUSINESSES

By Tahlia Townsend and Dana Stepnowsky*

I. Introduction

U.S. economic sanctions programs received top billing in the news this year, following major changes further restricting trade with Cuba, Russia, North Korea, and Venezuela, including a significant expansion of "secondary sanctions," which target foreign businesses for transactions that have no nexus to the U.S., but conflict with U.S. national security or foreign policy objectives.[1]

This article reviews some of the key developments and their practical significance for U.S. and non-U.S. businesses. To help non-U.S. businesses better understand how and why these U.S. legal developments may affect them, **Part II** provides a refresher on the principal jurisdictional hooks for application of U.S. sanctions laws. **Part III.A** reviews the scope and effect of new secondary sanctions on non-U.S. parties for engaging in transactions with North Korea; **Part III.B** reviews the scope and effect of revisions to sectoral sanctions on Russia and new sectoral sanctions on Venezuela; and **Part III.C** reviews the scope and effect of two new State Department lists of

[1] While 2017 was dominated by an increase in U.S. economic sanctions, in October 2017, the Trump Administration also revoked the Sudanese Sanctions Regulations, lifting long-standing blocking actions against the Government of Sudan and permitting U.S. persons to re-engage in a broad range of transactions with Sudan. *See* 82 Fed. Reg. 47287 (10/11/2017); State Department Announcement (10/6/2017); *see also* and T. Townsend & D. Stepnowsky, Recent OFAC Amendments – Sudan & Iran, Wiggin and Dana Advisory (1/24/2017). In light of separate and continuing restrictions imposed by the Trade Sanctions Reform and Export Enhancement Act of 2000 ("TSRA"), OFAC also issued General License A, which, subject to certain conditions, authorizes exports and re-exports to Sudan of agricultural commodities, medicine, or medical devices, to the extent permitted under the Export Administration Regulations. Due to Sudan's continuing designation as a state sponsor of terrorism, items subject to the Export Administration Regulations and controlled for anti-terrorism purposes require a license from the Department of Commerce Bureau of Industry and Security for export or re-export to Sudan.

restricted parties – the Cuba Restricted List of entities associated with the Cuban military, security and intelligence services, and the Section 231 List of entities associated with the Russian defense and intelligence sectors. Because the subject matter is dense, **Part IV** offers a tabular summary of the changes discussed in this article, and a few of the key compliance steps that companies may wish to take in response to the changes.

II. A Brief Refresher on OFAC Jurisdiction

The U.S. government asserts extremely broad jurisdiction to enforce its economic sanctions programs, including extra-territorially. Some of the bases for jurisdiction are unsurprising, but others are a significant trap for the unwary, potentially capturing transactions by foreign persons that have little or no connection to the U.S. Here is a brief reminder of the principal jurisdictional hooks for enforcement by the Department of Treasury's Office of Foreign Assets Control ("OFAC"), which administers most U.S. economic sanctions programs:

(1) U.S. presence: Persons located in, and activities occurring in, the U.S. must comply with U.S. sanctions laws. For non-U.S. companies, it's important to note that OFAC interprets this hook liberally, to cover any transaction that "touches" U.S. soil, including by movement of funds through a financial institution in the U.S. (e.g., dollar clearance activity).

(2) U.S. persons: U.S. persons, including citizens, dual citizens, lawful permanent residents, and entities (governments, corporations, partnerships, etc.) organized under U.S. law, must comply with U.S. sanctions laws irrespective of physical location. Further, U.S. persons are not only prohibited from direct engagement in transactions that would violate U.S. sanctions, but also from approving, guaranteeing, *or in any way facilitating* such transactions by non-U.S. persons outside the U.S. For non-U.S. companies, it is therefore important to be aware of possible board members, directors, or employees who hold U.S. citizenship or U.S. green cards, as well as possible management, marketing, referral, or shared service and support functions (processing of invoices, hosting of data, etc.) that may occur in or with support from the U.S.

(3) U.S. goods: Exports and re-exports of goods that are subject to U.S. export laws (typically goods manufactured in or exported from the U.S., or containing more than a *de minimis* amount[2] of U.S. content), generally also must comply with U.S. economic sanctions restrictions. Failure to comply may trigger enforcement not only by OFAC, but also by the Department of Commerce's Office of Export Enforcement ("OEE") as a result of the incorporation of many economic sanctions restrictions into the Export Administration Regulations ("EAR"). For non-U.S. companies, it is therefore critical to be aware of supply chain touchpoints with the U.S.

(4) U.S. ownership or control: Foreign businesses that are owned or controlled by U.S. persons generally are not directly subject to the requirements of U.S. sanctions laws, although such entities may need to take extra precautions to avoid "facilitation" by U.S. persons.

[2] The *de minimis* amount varies, but is typically 10 percent in the case of transactions involving U.S. sanctions targets.

However, the Iran and Cuba sanctions regulations do expressly extend to non-U.S. entities that are owned or controlled by U.S. persons.[3]

(5) Secondary sanctions – no U.S. nexus: A limited number of so-called "secondary sanctions" regimes permit imposition of sanctions on non-U.S. persons for conduct that has no U.S. nexus, but that involves U.S. sanctions targets – primarily Iran, North Korea, and Russia. For non-U.S. companies, secondary sanctions risks may arise from transactions involving the Islamic Revolutionary Guard Corps ("IRGC") and Iran-related Specially Designated Nationals (SDNs),[4] SDNs designated under Executive Orders 13224 and 13382 (relating to support for terrorism and proliferation of weapons of mass destruction), the transfer of armaments to Syria, certain transactions involving the Russian energy, defense, and intelligence sectors, and transactions supporting the North Korean energy, financial services, fishing, manufacturing, mining, and transport sectors.

Although not a jurisdictional issue, many multinational financial institutions include clauses broadly requiring compliance with U.S. (and other) economic sanctions in their general service agreements, overdraft facilities, credit agreements, and other contracts with their customers. These clauses sometimes go beyond the strict requirements of the law, requiring compliance by parties who would not normally be subject to U.S. regulations, and/or prohibiting transactions involving sanctioned countries and sanctioned parties even where such transaction could be lawfully conducted under a general or specific license. As a matter of contractual obligation and in the interests of preserving good relations with their banks, non-U.S. businesses may therefore find it necessary to pay close attention to U.S. economic sanctions requirements even where no jurisdictional hook for U.S. government enforcement exists.

III. Key U.S. Sanctions Developments in 2017

A. Secondary Sanctions for North Korea Transactions

[3] *See* 31 C.F.R. 560.215 (Iran); 31 C.F.R. 515.329 (Cuba). Per 31 C.F.R. 560.215(b), "an entity is 'owned or controlled' by a United States person if the United States person: (i) Holds a 50 percent or greater equity interest by vote or value in the entity; (ii) Holds a majority of seats on the board of directors of the entity; or (iii) Otherwise controls the actions, policies, or personnel decisions of the entity."

[4] The implementation of the Joint Comprehensive Plan of Action ("JCPOA") in January 2016 led to removal of the threat of secondary sanctions on foreign persons for a broad range of transactions with Iran and with many entities previously designated as Iran-related SDNs or Foreign Sanctions Evaders ("FSE"). This in turn created an opportunity for non-U.S. businesses to consider increased trade with Iran, but it did not completely remove the risk of secondary sanctions for foreign companies trading with Iran. In particular, Iran-related secondary sanctions continue to apply to non-U.S. persons who knowingly facilitate significant financial transactions with, or provide material or other support to, the IRGC and remaining Iran-related SDNs and FSEs. *See* Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions Under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day, A.6 (Dec. 15, 2016).

Secondary sanctions were first used to discourage non-U.S. businesses from engaging in trade with Iran. In 2016, the scope of Iran-related secondary sanctions was dramatically decreased as a result of the JCPOA although, as noted above, secondary sanctions do remain a possibility for transactions involving certain Iran-related sanctioned parties.[5] In 2017, Congress and the Trump Administration expanded the landscape of secondary sanctions risk for non-U.S. businesses by announcing new measures intended to curb global trade with North Korea.

Executive Order 13810 dated September 20, 2017 ("EO 13810" or "North Korea Order"), authorizes the imposition of secondary sanctions (primarily blocking of property and interest in property) on non-U.S. entities for a broad range of North-Korea-related activities, including: (i) participation in any "significant" import or export of goods, services, or technology to or from North Korea; (ii) operating in the energy, financial services, fishing, information technology, manufacturing, medical, mining, textiles, or transport industries in North Korea; and (iii) being owned or controlled by, acting on behalf of, or providing material assistance or support to a party designated under the Order.[6]

When a party is designated under the North Korea Order, their property and interests in property are blocked.[7] Due to OFAC's broad interpretation of "property and interests in property", U.S. persons and persons in the U.S. are prohibited from almost any kind of engagement with blocked parties, including providing or receiving goods or services, and also are required to hold the blocked property and report it to OFAC.[8] To date, most designations under EO 13810 have been of North Korean entities, but a number of Chinese individuals, businesses, and financial institutions have also been designated.[9]

So what do the new North Korea sanctions mean for U.S. and non-U.S. businesses?

For non-U.S. businesses, the new North Korea secondary sanctions create a choice between cutting business ties with North Korea or running the risk of being designated as a blocked party and facing civil forfeiture action by the U.S. Department of Justice. Non-U.S. entities wishing to avoid

---

[5] *See* Part I.(5) and associated footnotes.

[6] For a more complete description, see T. Townsend & D. Stepnowsky, *New Executive Order Extends the Reach of North Korea Sanctions to Foreign Businesses*, Wiggin and Dana Advisory (10/9/2017).

[7] For foreign financial institutions, the Secretary of the Treasury has the option of blocking property, but may elect instead (merely) to prohibit opening new correspondent and payable-through accounts in the U.S. and to impose strict conditions on the maintenance of pre-existing accounts.

[8] Non-U.S. persons are not subject to secondary sanctions for all transactions with parties designated under the Order, but run the risk of secondary sanctions to the extent that those transactions involve significant import or export to North Korea, or operation in one of the prohibited sectors of the North Korean economy, or constitute material assistance/support to a designated party.

[9] *See* OFAC Recent Actions, North Korea Designations, September 26, 2017, October 26, 2017, and November 21, 2017.

those risks may consider analyzing their customer and vendor databases to identify potential North Korea trade links. In addition, since secondary sanctions can be imposed for providing material support to parties designated under the North Korea order, non-U.S. entities may want to consider joining their U.S. counterparts in screening transactions for (and avoiding transactions with) parties that have already been, or appear to pose a high risk of later being, designated under EO 13810.

For U.S. businesses, even though U.S. persons were already broadly prohibited from transacting with North Korea, the new sanctions create a new risk of supply chain, customer, and logistics disruption because foreign customers and vendors may suddenly become subject to U.S. sanctions based on their involvement in North Korea-related trade. Accordingly, U.S. businesses, particularly those with significant customer or vendor relationships in North Korea trading partner countries (e.g., China and Russia), may wish not only to continue their existing OFAC screening protocols, but also to proactively identify and address North Korea risk in their international customer and supplier relationships, before further waves of designations turn existing suppliers and customers into blocked parties.

B. Updated Russian and New Venezuelan Sectoral Sanctions

Russia: In July 2014, OFAC issued a preliminary wave of sanctions targeting Russian interference with democratic processes and institutions in Ukraine. Rather than a comprehensive embargo of the kind maintained by the U.S. against Cuba and Iran, OFAC issued targeted, "sectoral sanctions" that prohibit U.S. persons from engaging in specific types of transaction with specific entities operating in specific sectors of the Russian economy (financial, energy, mining, and defense). The prohibited transactions are described in four directives (Directives 1, 2, 3, and 4), and the parties with whom U.S. persons are prohibited from engaging in the specified transactions are identified on the Sectoral Sanctions List ("SSIL"), along with an annotation specifying which directive or directives applies to that party. Unlike designation as an SDN, inclusion on the SSIL does not lead to blocking of all property and interests in property, only to a prohibition on U.S. persons engaging with the listed party (and those owned 50 percent or more, individually or in the aggregate, by such parties) in the kind of activity specified in the relevant directive.

Russian sectoral sanctions have been revised several times since their initial release, most recently in September and October 2017. The effects of the revisions are summarized in the table below.

Directive	Previous Prohibition	Revision
Dir. 1	Transactions in, provision of financing for, and other dealings in new debt of longer than 30 days maturity or new equity of persons subject to Dir. 1.	Reduces maturity period from 30 to 14 days.
Dir. 2	Transactions in, provision of financing for, and other dealings in new debt of longer than 90 days maturity of persons subject to Dir. 2.	Reduces maturity period from 90 to 60 days.
Dir. 3	Transactions in, provision of financing for, and other dealings in new debt of longer than 30 days maturity of persons subject to Dir. 3.	No change.

Directive	Previous Prohibition	Revision
Dir. 4	Provision, export, or re-export of goods, technology, or services (except financial services) in support of exploration or production for deepwater, Arctic offshore, or shale projects that: (i) have the potential to produce oil in the Russian Federation or its maritime area; and (ii) involve persons subject to Dir. 4, their property/interests in property.	Significantly expands the prohibition to include deepwater, Arctic offshore, or shale projects: (i) that are initiated on or after January 29, 2018; (ii) that have the potential to produce oil in any location; and (iii) in which any person subject to Dir. 3, their property, or their interests in property (a) has a 33% or greater ownership interest, or (b) owns a majority of the voting interests.

Venezuela: On August 24, 2017, President Trump took a similarly targeted approach when imposing new sanctions against Venezuela through Executive Order 13808. Existing sanctions on Venezuela blocked the property and interests in property of (and thus prohibited U.S. persons from dealing with) specific, designated Venezuelan government officials and persons involved in public corruption, human rights abuses and conduct undermining democracy in Venezuela. The new sanctions target financial transactions with the Government of Venezuela and entities it owns or controls, rather than specific, listed parties. In particular, except as permitted by several new general licenses, the new Venezuela sanctions against prohibit U.S. persons from engaging in or facilitating the following transactions:[10]

- Dealings related to new debt with a maturity of greater than 90 days of state-owned oil and gas company Petroleos de Venezuela, S.A. (PdVSA);
- Dealings related to new debt with a maturity of greater than 30 days, or new equity, of the Government of Venezuela, with the exception of new debt of PdVSA;
- Dealings related to bonds issued by the Government of Venezuela before August 25, 2017;
- Dealings related to dividend payments or other distributions of profits to the Government of Venezuela from any entity that it owns or controls, directly or indirectly; and
- Purchasing securities from the Government of Venezuela, other than securities qualifying as new debt of the Government of Venezuela with a maturity of 30 days or less, or new debt of PdVSA with a maturity of 90 days or less.

So what do the revised Russian and new Venezuelan sectoral sanctions mean for U.S. and non-U.S. businesses?

Both sets of sectoral sanctions apply primarily to U.S. persons and persons in the U.S. However, as noted above, non-U.S. businesses need to be attentive to all U.S. sanctions regimes given the complex jurisdictional web created by U.S. goods, U.S. person ex-patriot directors and employees, increasing pressure to use "shared services" that may involve persons located in the U.S., as well

[10] For additional information, please see T. Townsend & D. Stepnowsky, *New Sanctions Targeting Venezuelan Government and State-Owned Entities*, Wiggin and Dana, Advisory (9/5/2017).

as the ubiquity of broad sanctions-related representations and commitments in financial services agreements with U.S. and multinational banks.

Sectoral sanctions leave room for businesses to transact with designated parties in ways that fall outside the targeted scope of the prohibitions. For example, many exports and re-exports of goods and services to entities on the SSIL are permitted, provided that payment arrangements comply with the restrictions on new debt, and that the end use doesn't trigger Directive 4's deepwater/Arctic offshore/shale-oil prohibitions. However, such targeted sanctions pose unique compliance challenges, including the difficulty of crafting nuanced compliance procedures that successfully identify targeted entities and distinguish between transactions that are permitted and those that trigger one of the targeted prohibitions.

With respect to Venezuela, a critical challenge is accurately identifying restricted parties. OFAC has made clear that the prohibitions apply to the "Government of Venezuela, its property, and its interests in property, which includes entities owned 50 percent or more, individually or in the aggregate, by the Government of Venezuela."[11] The Executive Order defines "Government of Venezuela" broadly to include any person owned or controlled by, or acting on behalf of, the Government of Venezuela. Government-owned entities are prevalent in the Venezuelan economy, but there is no readily available list of such parties. Determining whether a Venezuela-related transaction is or is not prohibited therefore requires significant due diligence involving information about ownership and control that may be difficult to obtain absent use of (frequently expensive) third party business intelligence services.

With respect to Russian sectoral sanctions, it is critical to keep track of the different rules regarding permissible and impermissible debt and equity, which vary with the Directive and the date on which the debt or equity issued. And Directive 4's recent expansion to encompass certain oil-producing projects anywhere in the world, based on a 33 percent or greater SSIL entity interest, significantly increases the risk associated with exports and re-exports of goods and services for deepwater/Arctic offshore/shale oil production, and will require retooling of many companies' existing red flag and compliance review trigger lists. Finally, it is important to bear in mind that the sectoral sanctions discussed in this section are not the only U.S. sanctions regime affecting trade with Russia. Rather, sectoral sanctions must be considered in tandem with a comprehensive embargo on the Crimea region, a significant number of SDN designations of entities located in Russia, military end use and end user restrictions imposed on exports and re-exports of goods subject to the Export Administration Regulations, and the new State Department "Section 231" list – the last of which may create significant new risk and new compliance requirements for non-U.S. companies and is discussed in detail in the following section.[12]

---

[11] Frequently Asked Questions Regarding the Executive Order Imposing Additional Sanctions with Respect to the Situation in Venezuela, #513.

[12] The CAATSA also either authorizes or requires imposition of sanctions for a number of other Russia-related activities. A complete discussion is beyond the scope of this article, but for an overview see *Russia Sanctions Under CAATSA, A Quick Reference Table*, Wiggin and Dana Advisory (2017).

C. New State Department Lists of Restricted Parties in Cuba and Russia

In November 2017, the U.S. State Department published two new lists of restricted parties, one affecting trade with Cuba for U.S. and U.S.-owned/controlled entities, and the other exposing non-U.S. companies to the risk of secondary sanctions for trade with Russia's defense and intelligence sectors. These lists create significant new compliance challenges, not least because they are not included in OFAC's SDN List, OFAC's Consolidated Sanctions List (consolidating various OFAC lists other than the SDN List), or the Department of Commerce Bureau of Industry and Security's Consolidated Screening List, and the names of the affected entities may therefore not be flagged by companies' existing third party screening programs.

The Cuba Restricted List: On November 9, 2017, in furtherance of President Trump's June 2017 National Security Presidential Memorandum Strengthening the Policy of the United States Toward Cuba,[13] the U.S. State Department published a list of entities determined to be under the control of, or acting for or on behalf of, the Cuban military, intelligence, or security services (the "Cuba Restricted List").[14] The list accounts for a sizeable swath of Cuban trading activity, including two ministries, dozens of hotels, stores, and marinas, five major holding companies and 34 of those holding companies' subentities, as well as an assortment of "Entities Directly Serving the Defense and Security Sectors," including some common trading partners such as EMIAT and TECNOTEX.[15]

Inclusion on the Cuba Restricted List does not have the same effect as designation as an SDN, and does not result in freezing of assets.[16] Rather, in accordance with concurrent amendments to the

---

[13] 82 Fed. Reg. 48875 (10/20/2017).

[14] In addition to publication of the Cuba Restricted List, the U.S. government made changes to the Cuban Assets Control Regulations ("CACR") and the Export Administration Regulations ("EAR") that reinstituted certain prohibitions on travel to Cuba and revived a broader definition of *Prohibited Official of the Government of Cuba*. Both these changes have implications for compliance by U.S. persons and U.S.-owned foreign businesses. For more information, see T. Townsend & D. Stepnowsky, *Cuba Sanctions Changes: Trump Administration Restricts Travel and Transactions Involving Cuban Government; Expands Goods Exportable to Cuban Private Sector*, Wiggin and Dana Advisory (2017).

[15] The ministries on the list are MINFAR (Ministerio de las Fuerzas Armadas Revolucionarias) and MININT (Ministerio del Interior); the holding companies are CIMEX (Corporación CIMEX S.A.), Compañía Turística Habaguanex S.A., GAESA (Grupo de Administración Empresarial S.A.,) Gaviota (Grupo de Turismo Gaviota), and UIM (Unión de Industria Militar). EMIAT's full name is Empresa Importadora Exportadora de Abastecimientos Técnicos, while TECNOTEX is Empresa Cubana Exportadora e Importadora de Servicios, Artículos y Productos Técnicos Especializados.

[16] Only one entity on the Cuba Restricted List, Corporation CIMEX S.A., was previously designated as an SDN; however, the Cuba Restricted List also identified 16 subentities of CIMEX, which, if owned 50 percent or more by CIMEX, are also SDNs by operation of law in accordance with the 50 Percent Rule, which extends prohibitions to entities owned 50 percent or more, individually or in the aggregate, by one or more SDNs.

Cuba Assets Control Regulations ("CACR"), persons subject to U.S. jurisdiction are prohibited from engaging in any "direct financial transaction" with parties that are expressly enumerated on the Cuba Restricted List.[17]

A "direct financial transaction" is any transaction in which the Cuba Restricted List party is the originator or the ultimate beneficiary of a transfer of funds (whether by wire transfer, credit card, check or payment of cash),[18] and the prohibition on such transactions extends to many – but not all – situations in which the transaction would otherwise be authorized by a general license.[19]

The Cuba Restricted List will also be considered by the Department of Commerce's Bureau of Industry and Security ("BIS") during review of applications for licenses to export (or re-export) to Cuba items that are subject to the Export Administration Regulations. Exports (or reexports) to listed entities will generally be subject to a policy of denial. Existing BIS licenses involving Cuba Restricted List parties will remain valid, but renewals will be subject to denial, even if all terms remain the same.

The Russia Section 231 List: One of the dramatic sanctions developments in 2017 was Congress' near-unanimous passage of the Countering American's Adversaries Through Sanctions Act ("CAATSA"), authorizing and in some cases requiring the President to implement new sanctions with respect to North Korea, Iran, and Russia.[20] Section 231 of the CAATSA requires the President to impose sanctions on persons – including non-U.S. persons – who, on or after August 2, 2017 (the date that the CAATSA was enacted), knowingly engage in "significant transactions" with parties that are part of, or operating for or on behalf of, the Russian defense or intelligence sectors. The transaction does not need to have any U.S. nexus for sanctions to be imposed.[21]

---

[17] The 50 Percent Rule does not apply to subsidiaries of Cuba Restricted List entities. Rather, as stated on the State Department's Cuba Restricted List webpage, "[e]ntities or subentities owned or controlled by another entity or subentity on this list are not treated as restricted unless also specified by name on the list."

[18] *See* 31 C.F.R. § 515.209.

[19] OFAC has amended numerous general licenses to make it clear that they do not authorize transactions that would be prohibited by 31 C.F.R. § 515.209. However, other Cuba general licenses – including important authorizations for certain exports and re-exports to Cuba and associated imports for repair, for certain authorized humanitarian projects, and for global insurance policies covering individuals traveling to Cuba – were not adjusted to exclude direct financial transactions with entities on the Cuba Restricted List. For further details, see T. Townsend & D. Stepnowsky, *Cuba Sanctions Changes: Trump Administration Restricts Travel and Transactions Involving Cuban Government; Expands Goods Exportable to Cuban Private Sector*, Wiggin and Dana Advisory (2017).

[20] Public Law 115-44, 31 Stat. 886 (2017).

[21] The CAATSA also either authorizes or requires imposition of sanctions for a number of other Russia-related activities. A complete discussion is beyond the scope of this article, but for an overview see *Russia Sanctions Under CAATSA, A Quick Reference Table*, Wiggin and Dana Advisory (2017).

In October 2017, the State Department published a list of parties believed to be part of, or to operate for or on behalf of, the Russian defense or intelligence sectors ("Russia Section 231 List"). Inclusion on the Section 231 List does not have the same effect as designation as an SDN.[22] However, it puts U.S. and non-U.S. businesses on notice that they must avoid engaging in "significant transactions" with the listed entities or run the risk of themselves becoming the target of sanctions to be issued on or after January 29, 2018. The CAATSA provides a menu of potential sanctions and directs imposition of at least five from the list, which includes denial of export licenses involving sanctioned parties, Export-Import Bank assistance restrictions, prohibitions on making certain loans or dealing in sanctioned party debt and equity, denial of visas to corporate officers, exclusion from U.S. government contracts and, at the extreme end of the spectrum, prohibitions on dealing in property in which the sanctioned party has an interest.[23] Accordingly, secondary sanctions under Section 231 will not necessarily result in complete blocking of property (and the concomitant inability of U.S. persons to conduct transactions with the sanctioned party), but such a sanction is a possibility.

The State Department has stated that it will consider a variety of factors in determining whether a transaction is "significant" for purposes of Section 231, including the nature and size of the transaction, its significance to the Russian defense and intelligence sectors, and whether it has a significant adverse impact on U.S. national security and foreign policy interests.[24] At least as an initial matter, the State Department has said that it intends to focus on "significant transactions of a defense or intelligence nature" and that "[i]f a transaction … has purely civilian end-uses and/or civilian end-users, and does not involve entities in the intelligence sector, these factors will generally weigh heavily against a determination that such a transaction is significant."[25]

---

[22] A majority of the entities on the Section 231 List were already designated as SDNs, either by express designation or as a result of the 50 Percent Rule. Approximately a dozen of the entities are not SDNs; of these, a majority are on the SSIL and subject to Directive 3.

[23] *See* CAATSA, Section 235. As stated in the State Department's public Section 231 Guidance, "Section 231 … states that five or more of the sanctions described in Section 235 [of the CAATSA] shall be imposed ... [Those] sanctions … include, among others, prohibitions concerning property transactions, export license restrictions, Export-Import Bank assistance restrictions, debt and equity restrictions, visa ramifications for corporate officers, and United States government procurement prohibitions."

[24] Public Guidance on Sanctions with Respect to Russia's Defense and Intelligence Sectors Under Section 231 of the Countering America's Adversaries Through Sanctions Act of 2017 (10/27/2017)

[25] *Id*. The same guidance states that transactions likely will not be deemed significant if they are "necessary to comply with rules and regulations administered by the Federal Security Service, or law enforcement or administrative actions or investigations involving the Federal Security Service," including FSS rules, regulations and fees for import, distribution, or use of information technology products.

So what do the Cuba Restricted List and Russia Section 231 List mean for U.S. and non-U.S. businesses?

Due to the extended jurisdictional scope of the CACR, the Cuba Restricted List prohibitions apply directly to both U.S. businesses and U.S.-owned/controlled foreign businesses. These businesses were already subject to far-reaching restrictions on transactions in Cuba, with limited areas for permissible trade. The most significant impact of the new changes will likely be on travel to Cuba by persons subject to U.S. jurisdiction, requiring particular attention by entities such as travel companies and universities (including U.S.-owned overseas centers), which may have moved more quickly than other industry sectors to expand interactions with Cuba in the wake of Obama-era reforms. Notably, significant general licenses permitting certain exports and re-exports of goods and services from the U.S. to Cuba, certain authorized humanitarian projects, and global insurance policies covering individuals traveling to Cuba were not adjusted to exclude direct financial transactions with entities on the Cuba Restricted List, and recent changes to the EAR modestly expanded the range of goods that can be exported/re-exported from the U.S. to the Cuban private sector under EAR License Exception Support for the Cuban People ("SCP").[26] Some scope for business therefore remains.[27] Importantly, however, foreign companies relying on BIS licenses to re-export goods that are subject to the EAR but ineligible for transfer under SCP (notably including agricultural commodities, medicines, and medical devices)[28] will need to carefully review counterparties against the Cuba Restricted List. As noted above, existing licenses involving such parties remain valid but will become subject to a policy of denial if submitted for renewal, and the inclusion of entities such as EMIAT on the list make disruption of existing arrangements a real possibility.

The Section 231 List is a secondary sanctions device and, as such, creates risk for both U.S. and non-U.S. businesses. For non-U.S. businesses, the Section 231 List creates a choice between curtailing "significant" defense and intelligence sector-related business with North Korea, or running the risk of becoming subject to secondary sanctions. Risk mitigation requires adoption of new screening processes to identify transactions involving entities on the Section 231 List and new transaction review processes to determine whether a transaction is likely to be deemed "significant" by the State Department. In light of the guidance issued by the State Department, businesses engaging in large transactions involving products with defense or intelligence applications are at the highest risk as an initial matter.

---

[26] For further details, see T. Townsend & D. Stepnowsky, *Cuba Sanctions Changes: Trump Administration Restricts Travel and Transactions Involving Cuban Government; Expands Goods Exportable to Cuban Private Sector,* Wiggin and Dana Advisory (2017).

[27] Depending on the specific facts of the transaction, involvement of a Cuba Restricted List party in a transaction proposed to be conducted under License Exception SCP may suggest the need for additional due diligence to ensure that the proposed export or re-export is indeed for the private sector.

[28] Due to provisions of the Cuban Democracy Act and the Trade Sanctions Reform and Export Enhancement Act, medicines, medical devices, and agricultural commodities are not eligible for License Exception SCP. *See, e.g.,* 82 F.R. 51983 (11/9/2017).

For U.S. businesses, transactions with Russia already require significant attention in order to ensure compliance with sectoral sanctions, the embargo on the Crimea region, a significant number of Russia SDN designations, and military end use and end user restrictions for goods subject to the Export Administration Regulations. Because, as noted above, the Section 231 List is predominantly composed of entities that are subject to SDN or SSIL restrictions, companies with robust screening processes may not face significant additional risk of engaging in a prohibited transaction, although steps certainly do need to be taken to addresses the few Section 231 List entities that are not SDNs/SSIL targets. As with the new North Korea secondary sanctions, the more significant risk for U.S. businesses may be that of non-U.S. customers and suppliers suddenly becoming subject to secondary sanctions as a result of their transactions with Russia. Because the CAATSA gives the State Department some discretion regarding the sanctions to be imposed, secondary sanctions under Section 231 will not necessarily result in complete blocking of property, but it could.[29] Companies may therefore wish to conduct a pro-active review of the business interests of critical non-U.S. partners in order to identify partners at risk of conducting significant transactions with Section 231 entities, and plan accordingly.

Finally, both the Cuba Restricted List and the Section 231 List will likely require modifications to companies' existing restricted party screening procedures. As noted above, these lists are not part of OFAC's SDN List, OFAC's Consolidated Sanctions List, or the Department of Commerce Bureau of Industry and Security's Consolidated Screening List, and the names of the affected entities may therefore not be flagged by companies' existing third party screening programs. While some of the entities on the new lists are already subject to sanctions under a separate program, many are not. Accordingly, U.S. and non-U.S. businesses may need to revise screening procedures to include steps for reviewing the Cuba Restricted List and/or the Section 231 List, as well as training personnel to understand the nuanced nature of the prohibitions associated with enumeration on these lists, as opposed to the SDN List.

IV. Quick Reference Summary

A lot happened in the world of U.S. economic sanctions this year. A comprehensive review of all the changes is beyond the scope of this article, but we have endeavored to cover some of the key developments. Because the subject matter is dense, by way of memory aide we offer the following tabular summary of the prohibitions discussed above and a few of the key compliance steps that companies may wish to take in response to the changes.

Prohibition	Sample Compliance Steps	Relevance to Non-U.S. Parties
North Korea		
▪ "Significant" import or export of goods, services, or technology to/from NK ▪ Operation in NK energy, financial, fishing, IT, manufacturing, medical, mining, textiles, or transport	▪ Screen for parties designated under EO 13810 ▪ Review customers and vendors for NK trade links and make plans for any entities at risk of secondary sanctions as a result of those links	▪ Secondary sanctions regime – creates direct risk for non-U.S. parties

[29] *See* CAATSA, Section 235 and *supra* note 23.

Prohibition	Sample Compliance Steps	Relevance to Non-U.S. Parties
▪ Ownership/control by, or acting for, a party designated under EO 13810 ▪ Providing material assistance or support to a party designated under EO 13810		
Venezuela		
Dealings related to: ▪ New debt with a maturity > 90 days of Petroleos de Venezuela ▪ New debt with a maturity > 30 days, or new equity, of the Venezuelan Gvt (except new debt of PdVSA) ▪ Bonds issued by the Venezuelan Gvt before 8/25/17 ▪ Dividend payments or other distributions of profits to the Venezuelan Gvt from any entity that it owns or controls ▪ Purchasing securities from the Venezuelan Gvt, except new debt of Venezuela Gvt with a maturity <=30 days or new debt of PdVSA with a maturity of <=90 days	▪ Implement process to flag Venezuela transactions for compliance review ▪ Due diligence to identify persons owned or controlled by, or acting on behalf of, the Government of Venezuela, and entities owned 50 percent or more, individually or in the aggregate, by such parties ▪ Processes for distinguishing between permitted and prohibited transactions and documenting rationale ▪ Exporters may need to revise payment terms to avoid extending credit for more than permissible period	▪ Not a secondary sanctions regime and not directly applicable to U.S. owned/controlled foreign entities. However, foreign companies should be aware, so as to prevent approval or facilitation by U.S. persons and possible breach of sanctions clauses in banking agreements.
Russian Sectoral Sanctions		
▪ Maturity period reduced to 14 days for Directive 1 ▪ Maturity period reduced to 60 days for Directive 2 ▪ Maturity period remains 30 days for Directive 3 ▪ Scope of Directive 4 expanded to include deepwater, Arctic offshore, or shale projects: (i) that are initiated on or after 1/29/18; (ii) that have the potential to produce oil <u>in any location</u>; and (iii) in which any person subject to Dir. 3, their property, or their interests in property (a) has a 33% or greater ownership interest, or (b) owns a majority of the voting interests.	▪ Update existing SSIL compliance procedures to account for new maturity periods ▪ Exporters may need to revise payment terms to avoid extending credit for more than permissible period ▪ Update red flag list to ensure that oil-related transactions anywhere in the world (not just Russia) are escalated for compliance review ▪ Update end user and end use protocols for oil-related transactions to ensure collection of information necessary to distinguish between permissible and prohibited transactions	▪ Not a secondary sanctions regime and not directly applicable to U.S. owned/controlled foreign entities. However, foreign companies should be aware, so as to prevent approval or facilitation by U.S. persons and possible breach of sanctions clauses in banking agreements, and to prevent unauthorized re-export of goods subject to the EAR.
Russia Section 231 List		

Prohibition	Sample Compliance Steps	Relevance to Non-U.S. Parties
▪ "Significant transactions" with Section 231 List entities	▪ Update party screening process to include the Section 231 List ▪ Review customers and vendors for Russian defense and intelligence trade links and make plans for entities at risk of secondary sanctions as a result of those links ▪ Update red flag list to include ownership by a Section 231 List entity ▪ Review other Russia-related CAATSA requirements, assess risks and update processes accordingly[30]	▪ Secondary sanctions regime – creates direct risk for non-U.S. parties
Cuba Restricted List		
▪ "Direct financial transactions" with Cuba Restricted List entities	▪ Update party screening process to include review of the Cuba Restricted List ▪ Update red flag list to include ownership by a Cuba Restricted List entity ▪ Review and update any existing procedures for permitting travel to Cuba in light of changes ▪ Review and update any existing procedures for using non-travel-related OFAC general licenses, BIS export licenses or EAR license exceptions for Cuba ▪ Analyze any pending or proposed Cuba transactions to ensure compliance ▪ Review any existing BIS licenses for parties on the Cuba Restricted List and take appropriate steps in light of policy of denial for renewals of any such licenses ▪ Review and update as needed to account for other recent changes (e.g., expanded	▪ U.S.-owned/controlled foreign businesses must comply. ▪ Foreign entities holding BIS re-export licenses may also be directly affected. ▪ Other foreign entities should be aware, so as to prevent approval or facilitation by U.S. persons and possible breach of sanctions clauses in banking agreements, and to prevent unauthorized re-export of goods subject to the EAR.

[30] The CAATSA authorizes or requires sanctions for a number of other Russia-related activities. *See Russia Sanctions Under CAATSA, A Quick Reference Table*, Wiggin and Dana Advisory (2017).

Prohibition	Sample Compliance Steps	Relevance to Non-U.S. Parties
	definition of Prohibited Official of Government of Cuba)	

* Tahlia Townsend is a partner and Dana Stepnowsky is a senior associate in the International Trade Compliance Group of Wiggin and Dana LLP, with offices in Connecticut, Florida, New York, Pennsylvania, and Washington D.C. Tahlia and Dana can be contacted at ttownsend@wiggin.com and dstepnowsky@wiggin.com, respectively. Connect with us on LinkedIn for more insights into developments in US sanctions and export controls.