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## Outside Counsel

### Bear Traps: The Wide, Uncertain Reach of Russian Sanctions

The U.S. enactment in August of the Russian Sanctions Review Act significantly magnifies the risks from sanctions for international business and investment. The uncertainties created by tension between the President and Congress were themselves the catalyst in creating the platform to ramp up sanctions and limit Presidential autonomy in waiving them. The fast moving situation on the world stage seems to have moved the American political scene towards sanctions having bigger teeth, which will actually be used. In trying to predict the future course of sanctions enforcement in this short article, we focus on three key areas: (1) the widening of the net from sanctioned individuals to their families; (2) the application of the evasion provisions to foreign persons; (3) the bringing of new classes within existing sanctions.

#### Widening the Net

S.241 of the Countering of America's Adversaries Through Sanctions Act requires detailed reports to be submitted to congressional committees on senior foreign political figures and oligarchs in the Russian Federation. The oligarchs are as determined by their closeness to the Russian regime and their net worth, an identification of the corruption indices of those individuals and, what has been found most alarming by those who, though not obvious targets, fear that they might just be affected, the estimated net worth and known sources of income of the individuals and their family members (including spouses, children, parents and siblings) including assets, investments and other business interests and relevant beneficial ownership information. In other words, high net worth Russians and their family members,

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if they have had any interaction with the Russian government, are clearly within the cross-hairs of U.S. sanctions.

#### Evasion

As to whether the reports to Congress are the tip of an iceberg, our crystal ball points us to the evasion provisions. The sanctions impose tough penalties on so-called secondary evaders, applying to any person or entity—even if they are not a U.S. person—that knowingly “facilitates significant deceptive or

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structured transactions” for or on behalf of any sanctioned person or entity. The term *knowingly* is defined not only as meaning that a person has actual knowledge but also *should have* known of the conduct, the circumstance, or the result. The evasion provision is therefore of very broad scope, potentially subjecting to penalties third parties that may be negligent in executing transactions where the beneficial parties are not fully or accurately disclosed. By way of example only, a person that violates, attempts to violate, conspires to violate or causes a violation is subject to penalties. Whether evasion has the recognized English law meaning which is distinct from the perfectly proper activity of avoidance within the law is yet to be seen. If reports as envisaged come to be prepared, the number

of individuals dealt with may be small, but the wealth covered is likely to be vast. This may be a forerunner to shutting down at least one of the commonly used devices which prevent sanctions from biting: assets that are held in a trust set up by or for the sanctioned individual who is excluded from the beneficiary list. While technically these sanctions apply to “U.S. persons,” a U.S. person is defined to include any entity organized under the laws of the United States or any individual state, which includes “a foreign branch of such an entity.” Moreover, because the vast majority of international business is conducted in U.S. dollars, any financial institution which moves sanctioned funds through New York is potentially subject to penalties. This may lead financial institutions to demand far more scrutiny of trust structures so that they show that they have done appropriate due diligence to avoid sanctioned funds. As an adjunct to looking through the trust to see for what the assets are actually used, the information in the reports causes concern to those who fear being targeted.

The evasion provisions will cause worry among professional advisers, bankers and investment managers alike, who may be at risk of being liable as secondary sanctions evaders for establishing structures that involve sanctioned persons or persons or investments, directly or indirectly.

#### Broader Sanctions

The stage is set for broader sanctions if relations with the Russian Federation deteriorate—there has been talk of bringing media within their scope, especially if supportive of President Putin’s policies. Other areas are also easy to contemplate as vulnerable. The Russia Sanctions Review Act added major new sanctions, including against persons or entities that (1) undermine cybersecurity; (2) invest certain amounts in Russia’s energy export sectors; (3) conduct “significant” transactions with Russian defense and intelligence agencies; (4) commit acts of “sig- ➤ Page 6

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# Sanctions

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nificant corruption”; (5) provide support to the Syrian government; or invest \$10 million or more in the privatization of Russian state assets. The law allows (but does not require) the penalization of companies constructing pipelines to transport Russian natural gas in Europe. In sum, the new sanctions bring in a mixed bag of logical targets, like supporters of the Assad regime or hackers, and global businesses who are doing normal, essential activities like shipping gas to Western Europe or exploring for energy.

## Our Crystal Ball Speaks

The time for thorough and speedy reviews by vulnerable family offices is clearly *before* new sanctions have been imposed and definitely before individuals are placed on the sanctions list. The scope for maneuvering will diminish radically if not evaporate after that time. We are approaching a time where the stresses of our global financial and legal infrastructure are becoming ever more acute and family offices and professional advisers will need to tread carefully to avoid the unanticipated and harsh bite of sanctions.