

CLIENT ADVISORY: THE OLIGARCH REPORT

Review, Analysis and Recommendations related to Section 241 of the Countering America's Adversaries Through Sanctions Act

Not later than January 29, 2018, the Secretary of the United States Treasury, currently Steven Mnuchin, will submit to the United States Congress a detailed report on oligarchs and parastatal entities in the Russian Federation. The requirement that the Secretary submit his report comes from Section 241 of the



Countering America's Adversaries Through Sanctions Act (hereinafter CAATSA or the Act), signed into law on August 2, 2017. That portion of the report which will focus specifically on senior foreign political figures and oligarchs, as called for in CAATSA Section 241(a)(1), has become a source of increased inquiry and speculation. Neither the Treasury Department nor the State Department has yet to issue guidance specific to Section 241 and any such guidance might not come until after delivery of the report. In this Wolf Global client advisory, we examine Section 241(a)(1) and provide our analysis, expectations and recommendations.

STATUTORY CONSTRUCTION AND ANNOTATION OF CAATSA SECTION 241

CAATSA Section 241 provides in pertinent part that:

(a) [N]ot later than 180 days after the date of the enactment of this Act, the Secretary of the Treasury, in consultation with the Director of National Intelligence and the Secretary of State, shall submit to the appropriate congressional committees a detailed report on the following:

(1) Senior foreign political figures and oligarchs in the Russian Federation, including the following:

(A) An identification of the most significant senior foreign political figures and oligarchs in the Russian Federation, as determined by their closeness to the Russian regime and their net worth.

(B) An assessment of the relationship between individuals identified under subparagraph (A) and President Vladimir Putin or other members of the Russian ruling elite.

(C) An identification of any indices of corruption with respect to those individuals.

(D) The estimated net worth and known sources of income of those individuals and their family members (including spouses, children, parents, and siblings), including assets, investments, other business interests, and relevant beneficial ownership information.

(E) An identification of the non-Russian business affiliations of those individuals.

We expect the report will be prepared by attorneys, investigators and analysts from the Department of the Treasury, which includes, but is not limited to, the Office of Foreign Assets Control (OFAC) and the Financial Crimes Enforcement Network (FinCEN).

We believe the attorneys, investigators and analysts from the Department of the Treasury will have the benefit of information and intelligence developed by the State Department, which would include, but which would not be limited to, information and intelligence

contained in cables written and transmitted by U.S. Embassies to the State Department in Washington; as well as information and intelligence from throughout the Intelligence Community, of which the Treasury Department and State Department are members, but which also includes, but is not limited to, the Central Intelligence Agency (CIA), the Defense Intelligence Agency (DIA), the National Security Agency (NSA), the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), and the Department of Homeland Security (DHS), among others, all of which are coordinated by the Office of the Director of National Intelligence.

We believe the volume of information and intelligence available to the attorneys, investigators and analysts preparing the report should increase the accuracy of the report and reduce the likelihood of false positives.

The Act identifies the appropriate congressional committees to which the report shall be submitted as the Committee on Banking, Housing, and Urban Affairs, the Committee on Foreign Relations, and the Committee on Finance of the Senate; and the Committee on Foreign Affairs, the Committee on Financial Services, and the Committee on Ways and Means of the House of Representatives.

Senior foreign political figures and oligarchs in the Russian Federation, including the following:

We read the use of “and” in 241(a)(1) to reflect a view by the drafters of CAATSA that senior foreign political figures and oligarchs are not necessarily the same; that in Russia, not all senior foreign political figures are oligarchs and not all oligarchs are senior foreign political figures.

Senior Foreign Political Figures

U.S. law uses the term *senior foreign political figures* to refer to those individuals referred to internationally as *politically exposed persons* (PEPs). The term is most regularly used in the context of banking regulations, which require heightened scrutiny, or *enhanced due diligence*, of persons who, by nature of their particular political status or their relationship to a person of particular political status, are in a position to engage in bribery, corruption and kleptocracy and, therefore, could utilize a private banking account to launder the proceeds of that activity.

U.S. law provides the following definition.

- (1) The term *senior foreign political figure* means:
 - (i) A current or former:
 - (A) Senior official in the executive, legislative, administrative, military, or judicial branches of a foreign government (whether elected or not);
 - (B) Senior official of a major foreign political party; or
 - (C) Senior executive of a foreign government-owned commercial enterprise;
 - (ii) A corporation, business, or other entity that has been formed by, or for the benefit of, any such individual;
 - (iii) An immediate family member of any such individual; and
 - (iv) A person who is widely and publicly known (or is actually known by the relevant covered financial institution) to be a close associate of such individual.
- (2) For purposes of this definition:

- (i) *Senior official or executive* means an individual with substantial authority over policy, operations, or the use of government-owned resources; and
- (ii) *Immediate family member* means spouses, parents, siblings, children and a spouse's parents and siblings.

31 CFR 1010.605(p). Indeed, Section 241 goes on to define senior foreign political figure to have the meaning given that term in section 1010.605 of title 31 or any corresponding similar regulation or ruling.

It is not illegal to be a politically exposed person and it is not illegal for a bank to open or maintain a banking relationship with a politically exposed person. It is, however, illegal to engage in bribery, corruption, kleptocracy and money laundering. Therefore, to prevent the use of the global financial system to launder money or finance terrorism, banks are required to conduct enhanced due diligence when opening and maintaining banking relationships with politically exposed persons.

Oligarchs

U.S. law, to include CAATSA, does not define oligarch and dictionary definitions are vague.

Merriam-Webster offers the following definitions:

Oligarch: a member or supporter of an oligarchy.¹

Oligarchy: 1. government by the few.
2. a government in which a small group exercises control especially for corrupt and selfish purposes.²

Oxford Dictionaries offers the following definitions:

- Oligarch: 1. a ruler in an oligarchy.³
 2. (especially in Russia) a very rich business leader with a great deal of political influence.
- Oligarchy: 1. a small group of people having control of a country or organization.⁴

We observe that the term oligarch, particularly Russian oligarch, has become almost synonymous with “Russian billionaire” or “wealthy Russian businessman,” and we believe it may be in that spirit that CAATSA refers to oligarchs.

An identification of the most significant senior foreign political figures and oligarchs in the Russian Federation, as determined by their closeness to the Russian regime and their net worth.

We believe that the use of “and” in the first clause of 241(a)(1)(A) requires identification of the most senior foreign political figures in the Russian Federation and the most significant oligarchs in the Russian Federation, thereby further reflecting the view, alluded to above, that not all senior foreign political figures in Russia are oligarchs, and not all oligarchs in Russia are senior foreign political figures.

We believe the insertion of a comma after the first clause of 241(a)(1)(A) and the use of “and” in the second clause should mean that the significance of a PEP or oligarch will be determined based on both his closeness to the Russian regime and his net worth. Although surprising considering the climate in which the Act was written, by using “and” as opposed to “or” in the second clause of 241(a)(1)(A), technically, a Russian PEP without wealth would not be considered significant for purposes of the report called for by CAATSA, and a wealthy Russian businessman with no political influence would not be considered significant for purposes of CAATSA.

An alternative reading of 241(a)(1)(A) focuses attention on the use of the plural and looks at the universe of senior foreign political figures and oligarchs and evaluates them against two criteria—their closeness to the regime and their net worth. Construction notwithstanding, we believe either reading may be used to support a decision to determine that a particular individual is significant.

An assessment of the relationship between individuals identified under subparagraph (A) and President Vladimir Putin or other members of the Russian ruling elite.

Section 241(a)(1)(B) requires that, once an individual has been identified as either a significant senior foreign political figure in the Russian Federation or a significant oligarch in the Russian Federation, an assessment shall be conducted in order to determine his relationship to Russian President Vladimir Putin or other members of the Russian ruling elite.

An identification of any indices of corruption with respect to those individuals.

Section 241(a)(1)(C) will lead to some of the most actionable intelligence contained in the report. As explained above, it is not illegal to be a senior foreign political figure and it is not illegal to be a wealthy businessman. It is illegal to engage in, among other things, corruption.

The estimated net worth and known sources of income of those individuals and their family members (including spouses, children, parents, and siblings), including assets, investments, other business interests, and relevant beneficial ownership information.

We believe Section 241(a)(1)(D) is self-explanatory and we do not expect the information required pursuant to 241(a)(1)(D) to be treated as if it is for human interest purposes or mere dramatic effect. Rather, we believe net worth and known sources of income will be relevant to how the information contained in the report can be utilized.

An identification of the non-Russian business affiliations of those individuals.

We also believe Section 241(a)(1)(E) is self-explanatory and will identify the global business activities and global reach of, particularly, Russian oligarchs. These could include joint ventures with non-Russian companies, relationships with non-Russian partners, projects outside of Russia, and even investments in U.S. real estate.

HOW THE REPORT WILL BE USED

Section 241 of CAATSA, calling for the report on senior foreign political figures and oligarchs, does not create a new criminal offense. It is not against the law to be a senior foreign political figure or politically exposed person. It is not against the law to be a Russian billionaire. It is against the law to engage in bribery, corruption, kleptocracy, money laundering or to violate any other provision of an interested jurisdiction's criminal code.

Government

We believe the report will probably provide a helpful overview, background and explanation on the state of affairs in Russian politics and business, and perhaps any interrelatedness. We also believe the report could be used to identify companies and persons for imposition of sanctions. We also believe the report could be used for other legal, law enforcement, and intelligence purposes.

Banks

Because the report will be unclassified, we expect it to be public and, therefore, we expect it to be used worldwide by banks which, since the imposition of Ukraine-related sanctions in 2014, have exercised caution when interacting with wealthy Russian clients. This does not mean the report will require banks to begin closing the accounts of anyone named in the

report, nor should it unless the Secretary of the Treasury uses the report as a basis to block or sanction persons named therein. Individuals named in the report should, however, be prepared for the fact that they might have to address issues that are raised in the report and might have to answer new questions from their banks in the wake of the report.

It is also important to note that there is no official PEP list and we do not believe the report called for by CAATSA creates an official list of PEPs. We simply believe that the report will be an additional source that will be checked and considered by banks in order to identify politically exposed persons.

Commercial Partners

We believe the report could be used by prospective commercial partners conducting due diligence.

Media

Finally, we believe the report will likely be used by the media to help the public better understand Russian politics and business, and perhaps any interrelatedness, and to provide background information on persons named in the report.

RECOMMENDATIONS

The United States Government does not act arbitrarily or capriciously and there are means by which to seek redress or provide additional information. Even in the case of individuals who are blocked or sanctioned by the United States Treasury Office of Foreign Assets Control, there are means by which to file a petition for removal from an OFAC list.

For Banks, Commercial Partners and the Media

We believe the report is being prepared by attorneys, investigators and analysts who will have had access to information and intelligence not necessarily available to the general public, and who will have had the opportunity to carefully evaluate and consider that information and intelligence in developing their report.

For banks, commercial partners and the media, we recommend a professional, responsible approach to the report.

Banks and commercial partners, in particular, may wish to consider enhanced due diligence of individuals or companies named in the report. In the case of individuals identified as senior foreign political figures, the law already requires that banks conduct enhanced due diligence. In the case of individuals identified as oligarchs, enhanced due diligence might help mitigate some of the concerns associated with Russian clients and partners since the imposition of Ukraine-related sanctions in 2014. Enhanced due diligence will lead to more information. The availability of more information will allow for more informed decisions.

For Individuals Named in the Report

Regardless of whether an individual or his company is added to an OFAC list, the report will likely have legal, commercial, political, geopolitical and reputational consequences.

Persons who believe they may be impacted by the report, rightly or wrongly, may wish to consider an independent due diligence investigation, also referred to as self due diligence or reverse due diligence, in order to identify or address those issues, accusations or allegations that could cause concern on the part of the attorneys, investigators and analysts

who will be preparing the report called for by Section 241, or that could cause concern on the part of banks or commercial partners, or that could become a subject of media interest.

Importantly, an independent due diligence investigation and the report it produces is not intended, nor should it be used, to cover up or whitewash issues, accusations or allegations. Rather, an independent due diligence investigation and the report it produces is simply intended to identify issues, accusations or allegations relevant to the due diligence process and, where necessary, compile and provide information and evidence of which third parties might not have been previously aware or to which third parties might not have previously had access. Beyond that, the independent due diligence investigation and the report it produces may be used to identify areas for improvement or change and to develop a strategic communications plan that allows honest, transparent, effective communications while navigating legal, commercial, political, geopolitical and reputational risks. To be certain, however, independent due diligence can only reveal the truth; it cannot change it.

If it is believed that the attorneys, investigators or analysts preparing the report called for by CAATSA would benefit from additional information or evidence, or if it is believed that banks, commercial partners or the media would benefit from additional information or evidence, then an independent due diligence report is an appropriate vehicle by which to deliver that additional information.

This client advisory is intended to highlight certain issues and is not intended to be comprehensive or to provide legal or other professional advice. If you have questions, you should contact your counsel or other advisors and, on matters related to our work, we welcome you or them contacting us.

¹ <https://www.merriam-webster.com/dictionary/oligarch>

² <https://www.merriam-webster.com/dictionary/oligarchy>

³ <https://en.oxforddictionaries.com/definition/oligarch>

⁴ <https://en.oxforddictionaries.com/definition/oligarchy>