

## 2017 Year in Review

### Global Trade and Investment Group

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# Topics

- Sanctions
  - Expanded Restrictions
  - Lifted Restrictions
  - Unpredictability in the Year Ahead
  - Trends in Enforcement
- Anti-Money Laundering (“AML”)
- Committee on Foreign Investment in the United States (“CFIUS”)

# Expanded Restrictions

- The Trump administration has expanded restrictions against Cuba, North Korea, Russia and Venezuela
- Cuba
  - Tightening of sanctions against Cuba took effect on November 9, 2017
  - The restrictions focus on activity related to Cuban military, intelligence, and securities services or personnel
- North Korea
  - In September 2017, President Trump expanded sanctions against North Korea
  - Executive Order (“E.O.”) 13810 provides authority to designate U.S. or non-U.S. for certain activity involving North Korea, including commercial activity
  - E.O. expands threat of secondary sanctions for non-U.S. persons engaging in exports or imports of goods, technology, or services, including financial services by banks

# Expanded Restrictions

- Russia
  - Countering America's Adversaries Through Sanctions Act ("CAATSA")
  - Modified Directives 1, 2 and 4 pursuant to E.O. 13662
  - Authorizes broad new secondary sanctions for non-U.S. persons for certain activity Russia's defense and intelligence sectors, energy sector, and knowingly facilitating significant transactions on behalf of designated Russian persons
- Venezuela
  - New sanctions imposed in August 2017
  - Prohibits transactions related to:
    - Certain new debt of Petroleos de Venezuela, S.A. ("PdVSA")
    - The Government of Venezuela other than PdVSA
    - Certain bonds, dividend payments, and securities

# Lifted Restrictions – Sudan

- Sudan
  - All economic sanctions against Sudan and the Government of Sudan (under E.O. 13067 and 13412) were permanently lifted on October 11, 2017.
  - Exports and re-exports of items with U.S.-origin content still require a license from BIS
  - Targeted sanctions remain, as well as sanctions related to South Sudan and Darfur.

## Unpredictability in the Year Ahead – Iran

- In October 2017, President Trump declined to certify the Iran nuclear deal
- This action did not end U.S. participation in the nuclear deal and there is no immediate or material change to the Joint Comprehensive Plan of Action
- In January, the administration renewed waivers to maintain sanctions relief pursuant to the JCPOA
- Future of the nuclear deal in question?

## Trends in Enforcement

- Enforcement is on the rise, after a significant decline in 2016

Year	Number of Penalties or Settlements
2017	16
2016	9
2015	15
2014	23

- Increased enforcement actions against non-financial institutions
  - ZTE agreed to a combined civil penalty of \$1.19 billion – the largest penalty ever levied by the U.S. government for sanctions violations by a non-financial institution.

# Sanctions – Issues to Remember

1. Policies and procedures should stay current
  - Policies and procedures should always be in place
  - Rapid changes in sanctions require regular review and updates
2. Dynamic sanctions require dynamic screening
  - Daily updates to SDN List and SSI List necessitate regular reviews
  - Important for non-U.S. businesses due to broader use of “secondary sanctions”
3. Expanding use of SSI List requires scrutiny of payment terms



# Anti-Money Laundering – Upcoming Legal Changes

- Customer Due Diligence Rule
  - Final rule issued in May 2016 with an implementation deadline of May 11, 2018
  - Applies to covered financial institutions (banks, broker-dealers, mutual funds)
  - Made explicit previously implicit CDD requirements
  - New requirement to identify and verify the identity of beneficial owners of legal entities (including corporations, LLCs, and general and limited partnerships)
    - Two-pronged test for beneficial ownership: equity ownership and control
    - Can rely on information provided by the legal entity unless have reason to question reliability
    - Does not categorically apply retroactively
    - Exclusions for various categories of legal entities

# Anti-Money Laundering – Recently Proposed Legislation

- Counter Terrorism and Illicit Finance Act (Pearce/Luetkemeyer)
  - Would require companies to file beneficial ownership information with FinCEN
    - Similar proposals in prior bills and by the Obama Administration. The bill's definition of “beneficial ownership” has drawn criticism from business groups.
  - Would raise reporting thresholds, require Treasury to set AML examination priorities, expand information sharing, encourage use of innovative technology, and institute a “no-action” letter process
- Combating Money Laundering, Terrorist Financing, and Counterfeiting Act of 2017 (Grassley/Feinstein)
  - Makes it a criminal offense to misrepresent to a financial institution a fact concerning ownership or control of an account.
  - Includes funds stored in digital format (prepaid access devices and digital currency) in the definitions of monetary instruments and financial institutions, and requires a CBP report on a strategy to detect them at the border

# Anti-Money Laundering – Issues to Remember

- FinCEN requirements are floor, not a ceiling. Functional regulators (federal banking agencies, SEC, and CFTC) may impose additional requirements.
- AML and sanctions requirements are increasingly intertwined.
- Entities that are not “covered financial institutions” – including private equity, hedge, and venture capital funds – are nevertheless opting to have AML compliance structures in place.

# CFIUS - Developments

- CFIUS under the Trump Administration
  - Heavy scrutiny of transactions by China, Russia, and other sensitive jurisdictions believed to be a threat to national security
  - Significantly extended timelines of approval from 75+ days or more for sensitive transactions
- CFIUS possesses the ability to review any “covered transaction”
  - “Covered transactions” include any merger, acquisition, or takeover that could result in the control of a U.S. business engaged in interstate commerce by a foreign person
  - Approval by CFIUS provides “safe harbor”

# CFIUS – Proposed Legislation

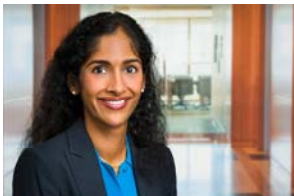
- The Foreign Investment Risk Review Modernization Act of 2017 (“FIRRMA”)
  - Proposed by bipartisan group of legislators led by U.S. Sen. John Cornyn, R-Texas, and U.S. Rep. Robert Pittenger, R-N.C., alongside co-sponsors including U.S. Sen. Dianne Feinstein, D-Calif.
  - Parallel legislation in both the Senate and House of Representatives to update and strengthen the legal authorities of CFIUS
- Key Provisions
  - Expansion of “covered transactions”
  - Establishing “short form” and mandatory notification procedures
  - Focus on critical technologies
  - “Countries of special concern”
  - Expansion of national security considerations
  - Mitigation of transactions risks through CFIUS and presidential authorities
  - Monitoring non-notified transactions
  - Extension of review prior and filing fee



# Questions?

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## LITIGATION



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Priya Aiyar, former Acting General Counsel of the Treasury Department, is a partner in the Litigation Department and Global Trade & Investment Practice Group in Washington. Her experience spans the financial services, energy, technology, and communications sectors. Priya focuses on representing clients in regulatory and enforcement matters, trial and appellate litigation, and internal and government investigations. Her service in senior positions in three agencies coupled with her background in private practice uniquely position her to help clients navigate a fast-changing regulatory environment.

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## GLOBAL TRADE & INVESTMENT



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David Mortlock is Chair of Willkie's Global Trade & Investment Group in Washington. He advises clients on international trade and government regulation of cross-border transactions, and compliance with U.S. regulations based on foreign policy and national security. David helps clients pursue their business goals in compliance with national security-based regulation, including:

- Compliance with U.S. sanctions, export controls, anti-money laundering regulations, and CFIUS reviews;
- Development of compliance programs;
- Due diligence for compliance by investment targets, vendors, and other partners;
- License requests with the Departments of the Treasury, Commerce and State;
- Internal investigations for potential violations of statutes and regulations;
- Self-disclosures of apparent violations to enforcement agencies; and
- Criminal and civil enforcement actions.

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