

**CLIENT ALERT**

**THE U.S. PASSES ADDITIONAL SANCTION PROVISIONS TARGETING THE CONSTRUCTION OF NORD STREAM 2 AND TURK STREAM 2 PIPELINES.**

January 4, 2021

Last week, the United States Senate and House of Representatives voted to override President Trump's veto and passed the National Defense Authorization Act (NDAA) for year 2021.

Section 1242 of NDAA 2021 contains the Protecting Europe's Energy Security Clarification Act (PEESCA). PEESCA authorizes the imposition of sanctions against persons/entities involved in specified activities related to construction of the Nord Stream 2 (NS2) and second line of TurkStream (TS2) pipeline projects. When completed, those projects will transport natural gas from Russia to Europe. The activities targeted in PEESCA include vessel-related transactions for construction of the pipelines and the provision of insurance to such vessels. With the passage of NDAA 2021, PEESCA has also become law.

**BACKGROUND**

In 2019, the U.S. enacted the Protecting Europe's Energy Security Act (PEESA) as part of NDAA 2020. PEESA authorized the imposition of sanctions on vessels engaged in pipe-laying at depths of 100 feet or more below sea level for the construction of NS2, TS2, or any successor project.

PEESA also authorized sanctions against foreign persons determined by the U.S. authorities to have knowingly "sold, leased or provided" the said pipe-laying vessels or "facilitated deceptive

or structured transactions to provide those vessels for the construction of such a project." The authorized sanctions include blocking the foreign person's assets subject to U.S. jurisdiction and denying visas and entry into the U.S. of the foreign person's corporate officers and principal shareholders. PEESA became law in December 2019.

In summer 2020, bi-partisan groups of Senators and Congressmen proposed bills to the Senate and House, respectively, to amend PEESA. The amendments sought to "clarify" PEESA and enlarge the scope of activities within its reach. The amended language proposed in the respective House and Senate bills differed slightly. The bills were eventually incorporated into the NDAA 2021 bills being considered by Congress.

Throughout the remainder of 2020, the NDAA 2021 bills (with the proposed amendments to PEESA) continued to progress through the congressional process. Meanwhile, the Trump Administration took additional steps to ramp up the sanctions targeting NS2 and TS2.

On July 15, 2020, the U.S. Department of State issued revised guidance on the implementation of section 232 of the Countering America's Adversaries Through Sanctions Act (CAATSA).

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Section 232 permits the imposition of sanctions against anyone who knowingly makes investments over a monetary threshold “that directly or significantly contributes to the enhancement of the ability of Russia to construct energy export pipelines.” Section 232 also authorizes sanctions against anyone who sells, leases or provides to Russia goods, services, technology, information, or support meeting a fair market value threshold if such “is able to directly or significantly facilitate the maintenance or expansion of the construction, modernization, or repair of energy export pipelines.”

Exercising its discretion under section 232, the State Department had previously adopted a policy whereby section 232 would not apply to projects initiated after CAATSA’s enactment in 2017. This policy effectively excluded NS2 and TS2 from section 232’s purview. That policy changed on July 15, 2020. With its updated July 2020 guidance, the State Department confirmed that section 232 would now apply to NS2 and TS2. The guidance also suggested a broad interpretation of section 232 as applied to NS2 and TS2.

Then, on October 20, 2000, the State Department issued new guidance with respect to the implementation of PEESA. The guidance clarified the interpretation of the language in PEESA authorizing sanctions against those who “provide” pipe-laying vessels for the construction of NS2, TS2 or any successor project. The guidance explained:

*...[T]he phrase knowingly “provide[d] those [pipe-laying] vessels for the construction of such a project” in [PEESA] Section 7503(a)(1)(B) may cover foreign firms or persons who provide certain services or goods that are necessary or essential to the provision or operation of a vessel engaged in the process of pipe-laying for such projects. Such activities subject to sanctions pursuant to PEESA or other authorities may include, but are not limited to, providing services or facilities for upgrades or installation of equipment for those vessels, or funding for upgrades or installation of equipment for those vessels.*

The guidance further reiterated that “the Department of State and the Department of the Treasury are prepared to use the full range of sanctions authorities to halt construction of these pipelines.”

At the same time, the guidance confirmed that sanctions would not apply to activities related to the safety of the crew, vessel or environment, or to persons engaged in activities necessary for or related to the repair or maintenance of or environmental remediation with respect to the pipeline projects.

The enactment of PEESCA came next.

## PEESCA

In late 2020, the Senate and House of Representatives reconciled their different versions of NDAA 2021 including the provisions of PEESCA. The reconciled bill was passed by both the Senate and House in December 2020 and presented to President Trump for signature. President Trump vetoed the NDAA 2021 bill due to disagreement about provisions unrelated to PEESCA. NDAA 2021 then returned to Congress where each house voted to override the veto.

As explained, NDAA 2021 and its incorporated PEESCA became law with the veto override. PEESCA contains several additional provisions which expand the potential scope of PEESA sanctions.

Among other things, PEESCA now authorizes sanctions against vessels that engage in pipe-laying or “*pipe-laying activities*” for the construction of NS2 or TS2. Pipe-laying activities are defined as meaning “activities that facilitate pipe-laying, including site preparation, trenching, surveying, placing rocks, backfilling, stringing, bending, welding, coating, and lowering of pipe.”

PEESCA also authorizes sanctions against foreign persons who are determined to have knowingly:

- (i) sold, leased, or provided, or facilitated selling, leasing, or providing, those vessels for the construction of such a project;
- (ii) facilitated deceptive or structured transactions to provide those vessels for the construction of such a project;
- (iii) provided for those vessels underwriting services or insurance or reinsurance necessary or essential for the completion of such a project;
- (iv) provided services or facilities for technology upgrades or installation of welding equipment for, or retrofitting or tethering of, those vessels if the services or facilities are necessary or essential for the completion of such a project; or
- (v) provided services for the testing, inspection, or certification necessary or essential for the completion or operation of the Nord Stream 2 pipeline.

PEESCA also contains several exceptions including with respect to provisions intended for the safety of the crew, vessel or the environment; activities necessary or related to the repair or maintenance of or environmental remediation with respect to a pipeline project as described in PEESCA; and activities conducted by certain governments or governmental entities.

PEESCA is styled as requiring a report to Congress of those determined to have engaged in the described activities within 60 days after PEESCA is enacted and every 90 days thereafter. PEESCA contains a wind-down period providing that sanctions may not be imposed if a person has, not later than 30 days after PEESCA’s enactment, “engaged in good faith efforts to wind down operations that would otherwise subject the person to the imposition of sanctions.”

Significantly, PEESCA includes a government consultation requirement which was added as part of the congressional reconciliation process. Under this provision, before imposing sanctions under PEESCA, the State Department “shall consult with the relevant governments of Norway, Switzerland, the United

Kingdom, and member countries of the European Union” with respect to the imposition of such sanctions. In addition to identifying those engaged in sanctionable activity, the periodic reports due to Congress must also describe of the nature of the governmental consultations and any concerns raised by any of the governments in connection with such consultations.

### **Potential Implications**

The enactment of PEESCA is another step in the United States’ effort to impose and/or expand sanctions on entities involved in the NS2 or TS2 pipeline projects. It remains to be seen how aggressively PEESCA will be enforced. By its text, PEESCA has a potentially broad reach. Those considering engaging in transactions related to the construction of NS2 or TS2 should evaluate their potential risks under PEESCA and the guidance published by the State Department.

We continue to monitor developments in this area and are available to assist clients in understanding and examining how these developments may affect their business opportunities. If you have any questions about the contents of this alert or would like further information regarding U.S. sanctions, please feel free to contact us.

*This Client Alert is only a general summary for informational purposes. It and its content are not intended to be and should not be used or construed as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.*

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