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Understanding & Coping with the Russian and Belarussian Sanctions & Export Controls

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PREPARED BY THE FOLEY & LARDNER
INTERNATIONAL TRADE & NATIONAL SECURITY TEAM

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Introduction

As we previously have reported, over the last two weeks the U.S. government has imposed sweeping sanctions and export controls restrictions on the Russian and Belarussian governments. With the U.S. government continuing to impose new restrictions, the Foley International Trade & National Security Team is tracking all new restrictions on dealings with Russian and Belarussian entities, as summarized in this Russian-Belarussian Sanctions & Export Controls white paper.

Due to the rapid changes in the Ukraine-related economic sanctions and export controls, we will be updating this white paper regularly to keep it as an up-to-date resource summarizing the current status of the relevant regulations. If you would like to receive updates to this white paper, please contact one of the authors listed below or your Foley relationship partner, and we will be happy to put you on our mailing list for updates to these rapidly evolving regulatory changes. Further, the impact of the new Ukrainian-related sanctions will be unique at each company. If you wish to discuss issues particular to your organization, please contact one of the Foley International Trade & National Security Team authors of this white paper:

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Overview

The last two weeks have seen the U.S. government — in close coordination with many other like-minded governments, particularly in the European Union — impose sweeping new sanctions and export controls that target both Russia and Belarus. Following the surge of Russian troops into Ukraine, the new measures are significant in size and scope, as they target Russia's largest financial institutions, restrict access to U.S. capital markets by the Russian government and many key Russian companies, restrict access to U.S.-origin technology (and in some cases even products produced using U.S.-origin technology), and even designate President Vladimir Putin himself as a blocked person. Taken together, the net result is that in a span of days Russia has become a country subject to some of the strictest U.S. economic sanctions and export controls, all on a coordinated basis with most other major economies.

Further, it is certain that additional sanctions are still coming, including expanding the list of sanctioned Russian oligarchs and, potentially, expanding efforts to remove additional Russian banks and perhaps other Russian financial systems from the Society for Worldwide Interbank Financial Telecommunication (SWIFT) messaging system, as announced on February 26, 2022.

As a result of this unprecedented ratcheting up of U.S. sanctions and export controls, every multinational company that sources from, sells to, or operates in Russia or Belarus, or directly or indirectly sells to Russian or Belarussian entities, needs to closely monitor all sanctions and export controls developments. These cautions apply both to U.S.-based entities and to non-U.S. entities that use the U.S. financial system, as the use of dollar-denominated transactions will generally trigger U.S. jurisdiction. Transactions that were subject to no restrictions only weeks ago are now potentially blocked or severely restricted, and transactions that are allowable today may be blocked tomorrow.

U.S. Sanctions and Restrictions Imposed to Date

The main restrictions imposed to date include:

- restrictions on the Russian economy, including restrictions on new debt and equity issued by major Russian state-owned enterprises;
- sanctions and full blocking imposed on selected Russian banks and other financial institutions;
- sanctions on Russian elites, including President Putin himself;
- sanctions on the Nord Stream 2 pipeline;
- sanctions on Belarus, for its support of the invasion of the Ukraine; and
- a sharp restriction on the ability of Russia to access U.S.-origin technology through export controls restrictions.

At the same time, the U.S. government also has issued certain *General Licenses* to allow targeted transactions with Russia to carve out certain types of favored transactions that otherwise would be restricted under the new rules. Even with these General Licenses in place, however, the net effect is to elevate Russia to a strict level of economic sanctions and export control restrictions that traditionally have only been seen against pariah countries like Iran and North Korea.

A summary of the current sanctions and export controls follow; we also will be providing regular updates to this white paper, to reflect new developments as they occur. In addition, we also provide compliance-related steps that companies impacted by these sweeping new measures should consider. Because of the rapidly changing nature of the sanctions and export control measures adopted, as well as the varying impact that these new restrictions can have on individual companies, we are available to discuss these issues with impacted entities. (Please find full contact information for the International Trade & National Security Team attorneys who are closely following these issues at the end of this white paper.)

Sanctions on the Russian Economy and Key Companies

On February 24, 2022, the U.S. government announced what it termed “Unprecedented & Expansive Sanctions Against Russia, Imposing Swift and Severe Economic Costs.” These sanctions are intended to impose a severe economic toll on the Russian economy, including a centerpiece of measures targeting 80 percent of all banking assets in Russia. With the sanctions specifically focusing on Russia’s two largest banks, as well as imposing restrictions related to new debt and equity for more than a dozen Russian state-owned enterprises (and certain large, privately owned financial institutions), the sanctions are designed to cut off large portions of the Russian economy from access to the U.S. financial system and the international banking community. When combined with previous sanctions announced earlier, which targeted the Russian Corporation Bank for Development and Foreign Economic Affairs Vnesheconombank (VEB) and Promsvyazbank Public Joint Stock Company (PSB), the U.S. government is taking square aim at the Russian financial sector, with the announced intention of undermining the entire Russian economy.

The issuance of Directive 3 under Executive Order 14024 restricts the ability of 13 major Russian state-owned enterprises and financial institutions (which hold assets of approximately $1.4 trillion and are financial pillars of the Russian financial system) from raising money in the U.S. capital market. In particular these restrictions, which are broadly similar to the sectoral sanctions imposed on a far smaller set of Russian enterprises in the wake of the 2014 annexation of Crimea, prohibit transactions by U.S. persons or dealings within the United States involving new debt of longer than 14 days maturity and new equity issued by the following entities: Alfa Bank, Alrosa, Credit Bank of Moscow, Gazprom, Gazprom Neft, Gazprombank, Rostelecom, RusHydro, the Russian Agricultural Bank, Russian Railways Sberbank, Sovcomflot, and Transneft.

As is true of existing sectoral sanctions on Russia, Directives 2 and 3 are targeted in scope, as both expressly provide that, absent some other prohibition under other sanctions authorities or executive orders, all other lawful U.S. activities involving the targeted entities are permitted, even for U.S. persons or where the U.S. financial system is used. Nevertheless, most multinational companies that are subject to U.S. jurisdiction will be looking to manage these relationships and to consider commercial alternatives, as there is a strong possibility that these entities could see further restrictions and perhaps even placement on the full Specially Designated Nationals (SDN) list if the U.S. government is looking for ways to tighten the sanctions.

Full Blocking Sanctions on VTB Bank and Other Financial Institutions

Pursuant to Executive Order 14024, the Office of Foreign Assets Control (OFAC) has enacted full blocking sanctions on state-owned VTB Bank (VTB), Russia's second-largest financial institution and the holder of approximately 20 percent of Russia's banking assets. Unlike the situation with Directive 3, this blocking categorizes VTB Bank as a full SDN. As a result of this action, all of the bank's property, and interests in property, that are or come within U.S. jurisdiction are frozen. Further, absent express authorization by OFAC, U.S. persons (and non-U.S. persons using the U.S. financial system) are generally prohibited from engaging in transactions involving VTB.

OFAC's normal Fifty Percent Rule, which applies its designations to any entities that are owned, directly or indirectly, 50 percent or more by one or more blocked persons, applies to VTB. Demonstrating the breadth of the U.S. sanctions response, VTB is one of the largest financial institutions that the U.S. Government ever has targeted with blocking sanctions. Further, OFAC simultaneously imposed blocking sanctions on Otkritie, Sovcombank, Novikombank, and dozens of their majority-owned subsidiaries. A current list of all sanctioned entities (under any OFAC sanctions program) can be found using the OFAC "Sanctions List Search" tool.

Sanctions on Sberbank's Correspondent and Payable-Through Accounts Activities

In addition to the blocking measures noted above, OFAC also has imposed correspondent and payable-through account (CAPTA) sanctions through the new Directive 2 under Executive Order 14024 on Sberbank. Although Sberbank was not designated as a full SDN, these sanctions will have a major impact because they target the largest financial institution in Russia and the main creditor for Russia's business economy. Effective March 26, 2022, U.S. financial institutions will be prohibited from opening or maintaining a correspondent or payable-through account for or on behalf of, or processing a transaction involving, Sberbank or any of its majority-owned subsidiaries. This restriction applies even if the correspondent or payable-through account is denominated in a currency other than U.S. dollars, as noted in OFAC FAQ 971.

This measure will have the practical effect of cutting off Russia's largest bank from the U.S. financial system and any U.S. dollar-denominated trade. To aid in identifying the foreign financial institutions subject to these new CAPTA sanctions, OFAC has published a List of Foreign Financial Institutions Subject to CAPTA (the "CAPTA List").

Sanctions on President Putin and Russian Elites (the "Oligarch Sanctions")

After coordinating actions with the EU following a meeting with NATO and other allies, OFAC took a step that it generally avoids, which was to designate four key Russian officials as full SDNs — President Vladimir Putin, Minister of Foreign Affairs Sergei Lavrov, Minister of Defense Sergei Shoigu, and Chief of the General Staff Valery Gerasimov — pursuant to Executive Order 14024. With this designation, President Putin joins the short list of international pariah heads of state that are fully sanctioned by OFAC (i.e., North Korea's Chairman Kim Jong Un, Syria's President Bashar al-Assad, and Belarus's President Alyaksandr Lukashenka).

This announcement follows sanctions designations against several oligarchs and so-called "enablers" of President Putin, pursuant to Executive Order 14024. The designated persons now include Sergei Ivanov, Andrey Patrushev, and Ivan Sechin, all of whom are adult children of close Putin associates, as well as several senior executives at certain state-owned banks. Notably, OFAC specifically warned that it "will designate more in the future if Russia's unprovoked campaign against Ukraine does not immediately conclude." Consistent with this announcement, President Biden announced on March 3, 2022, that additional oligarchs (and their family members) would be designated and subject to full blocking sanctions.

Sanctions on Nord Stream 2 Pipeline

On February 23, 2022, OFAC designated to the SDN List Nord Stream 2 AG, the Swiss company in charge of a major gas pipeline project that Germany halted the day before, as well as its chief executive officer. This halted the opening of the pipeline just weeks before its likely certification. These designations were made under the authority provided by the Protecting Europe's Energy Security Act of 2019, which the Biden administration had previously waived exercising in May of 2021. President Biden praised Germany for halting the certification of the pipeline project and noted that the two countries "closely coordinated our efforts to stop the Nord Stream 2 pipeline." OFAC accompanied this designation with General License 4, which provides a wind-down period. Notably, the wind-down period is markedly shorter than usual wind-down periods in that it expired on March 2, 2022 — just one week after the announcement of General License 4. Further wind-down activities, if they have not been completed, will need to apply for specific licenses to allow them to occur.

Sanctions on Belarusian Financial Institutions, Its Defense Sector, and Key Belarussian Elites

Because Russian troops partially used Belarus as a staging ground for the Ukrainian invasion, OFAC responded by imposing sanctions on 24 Belarusian entities and individuals. Although the Belarus-focused sanctions are highly targeted and far less serious than the sanctions against Russia, the designations show that OFAC is willing to target any country that supports or facilitates Russia's invasion of Ukraine. The Belarussian sanctions focus primarily on financial institutions and the defense sector in Belarus.

Specifically, pursuant to Executive Order 14038, OFAC designated the state-owned Bank Dabrabyt and the Belarussian Bank of Development and Reconstruction Belinvestbank (Belinvestbank), along with two of Belinvestbank's subsidiaries. This executive order also authorizes blocking sanctions against persons determined by the U.S. Secretary of the Treasury (in consultation with the U.S. Secretary of State) "to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, the Government of Belarus." This executive order was one that already was in place, as it previously has been used five times to implement sanctions targeting "the degradation of democracy in Belarus" under the Lukashenka regime. These sanctions implement the stated goal of U.S. Secretary of the Treasury Janet Yellen, who recently commented that, "due to the interconnectedness between the two countries, the actions Treasury took against Russia will also impose severe economic pain on the Lukashenka regime." When combined with the designation of the two Belarusian banks, these sanctions target approximately 20 percent of Belarus's financial sector.

In addition, OFAC expanded the list of previously targeted entities under Executive Order 14038 by designating ten Belarussian defense industry entities, as well as executives of some of those entities. These designations build on OFAC's December 2021 designation of five Belarusian defense firms "in response to the Lukashenka regime's blatant disregard for international norms and the wellbeing of its own citizens." Along the lines of the additions of key Russian officials, OFAC also added two senior officials of the Belarusian government's security apparatus — Belarusian Minister of Defense Viktor Khrenin and State Secretary of the Security Council of Belarus Aleksandr Volfovich — to the SDN List.

In addition to these designations, OFAC also targeted certain Belarusian elites who support the Lukashenka regime's suppression of democracy internally and its support for the Russian invasion of the Ukraine. The February 24, 2022, sanctions designate OOO Sokhra, which mines gold and promotes Belarusian industrial products in Africa and the Middle East. The designation also includes Aliaksandr Zaitsau, the owner
of the company.

The Issuance of General Licenses

The hallmark of the sanctions is to maximize the pain for the Russian and Belarussian economies while minimizing the impact on outside actors and the U.S. economy. Toward this end, OFAC also has issued numerous general licenses under the Russian Harmful Foreign Activities Sanctions Program, to carve out allowed activities that otherwise would be banned by the new sanctions measures:

- **General License 5** ***("Official Business of Certain International Organizations and Entities"):*** Authorizes transactions for the conduct of the official business of certain international organizations and entities, including the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies.
- **General License 6** ***("Transactions Related to the Exportation or Reexportation of Agricultural Commodities, Medicine, Medical Devices, Replacement Parts and Components, or Software Updates, or the Coronavirus Disease 2019 (COVID-19) Pandemic"):*** Authorizes certain transactions ordinarily incident and necessary to humanitarian trade in agricultural commodities, medicine, and medical devices. This General License, issued for humanitarian reasons, mirrors similar licenses found in most economic sanctions programs.
- **General License 7** ***("Authorizing Overflight Payments, Emergency Landings, and Air Ambulance Services"):*** Authorizes payment of charges for services rendered in connection with overflights of Russia or emergency landings in the Russia by aircraft registered in the United States or owned or controlled by U.S. persons. This General License also mirrors similar licenses found in other sanctions programs.
- **General License 8** ***("Authorizing Transactions Related to Energy"):*** A major carve-out that recognizes the importance of Russian energy exports to the world, particularly Europe. This General License authorizes, until June 24, 2022, certain transactions related to energy involving five named Russian entities and their subsidiaries. The General License broadly defines transactions "related to energy" to mean "the extraction, production, refinement, liquefaction, gasification, regasification, conversion, enrichment, fabrication, transport, or purchase of petroleum, including crude oil, lease condensates, unfinished oils, natural gas liquids, petroleum products, natural gas, or other products capable of producing energy such as coal, wood, or agricultural products used to manufacture biofuels, or uranium in any form, as well as the development, production, generation, transmission, or exchange of power, through any means, including nuclear, thermal, and renewable energy sources."
- **General License 9** ***("Authorizing Transactions Related to Dealings in Certain Debt or Equity"):*** Authorizes, until May 25, 2022, dealings in debt or equity of five named Russian entities and their subsidiaries, but only if the debt was issued prior to February 24, 2022. Any divestment or transfer of debt or equity relying on this General License has to be a transfer to a non-U.S. person. This provision is intended to allow U.S. persons to rid themselves of preexisting investments in these sanctioned entities.
- **General License 10** ***("Authorizing Certain Transactions Related to Derivative Contracts"):*** Authorizes, until May 25, 2022, the winding down of derivative contracts entered into with five named Russian entities and their subsidiaries prior to February 24, 2022. This General License

requires that any payments to a blocked person must be made into a blocked account, thus ensuring that the blocked persons cannot benefit from any funds freed up.

- **General License 11** ***("Authorizing the Wind Down of Transactions Involving Certain Blocked Persons"):*** A wind-down license that authorizes, until March 26, 2022, transactions ordinarily incident and necessary to the wind-down of transactions involving Otkritie, Sovcombank, VTB, or any entity in which one of those persons owns a 50 percent or greater interest.
- **General License 12** ***("Authorizing U.S. Persons to Reject Certain Transactions"):*** Authorizes, until March 26, 2022, U.S. persons to reject all transactions prohibited by Executive Order 14024 involving certain blocked persons. In other words, OFAC is temporarily allowing covered persons to reject, rather than block, certain transactions, thus allowing a transition to a full blocking regime for these persons. In most cases, use of this General License will trigger a requirement to file a rejection report with OFAC.
- **General License 13** ***("Authorizing Certain Administrative Transactions Prohibited by Directive 4 under Executive Order 14024"):*** Authorizes U.S. persons to pay taxes, fees, or import duties, and purchase or receive permits or licenses that otherwise would be prohibited by Directive 4, provided that such transactions are not used to authorize any debit to an account on the books of a U.S. financial institution of the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, or the Ministry of Finance of the Russian Federation.
- **General License 14** ***("Authorizing Certain Clearing and Settlement Transactions Prohibited by Directive 4 under Executive Order 14024"):*** Provides a carve-out for transactions involving Directive 4 entities "where the Directive 4 entity's sole function in the transaction is to act as an operator of a clearing and settlement system, are authorized, provided that: (i) there is no transfer of assets to or from any Directive 4 entity, unless separately authorized; and (ii) no Directive 4 entity is either a counterparty or a beneficiary to the transaction, unless separately authorized."
- **General License 15** ***("Russian Harmful Foreign Activities Sanctions Regulations")*****:** Authorizes transactions with "any entity owned 50 percent or more, directly or indirectly, by Alisher Burhanovich Usmanov that is not listed on OFAC's Specially Designated Nationals and Blocked Persons List," thereby carving out application of the Fifty Percent rule to the so-called blocked Usmanov entities.
- **General License 16** **(*Authorizing Activities Ordinarily Incident to Importing Certain Products Under Legacy Contracts):*** Authorizes transactions that are ordinarily incident and necessary to the importation into the "United States of crude oil; petroleum; petroleum fuels, oils, and products of their distillation; liquefied natural gas; coal; and coal products of Russian Federation origin pursuant to written contracts or written agreements entered prior to March 8, 2022," provided they occur before 12:01 a.m., eastern daylight time, on April 22, 2022. This General License allows the completion of previously scheduled energy imports while transitioning to the new general import ban imposed on Russian energy products.

OFAC also has issued two new General Licenses related to the Belarus Sanctions Program:

- **General License 6** ***("Official Business of the United States Government"):*** Authorizes all otherwise transactions for the conduct of the U.S. government's official business that otherwise would be prohibited by the Belarussian sanctions.
- **General License 7** ***("Official Business of Certain International Organizations and Entities")*****:** Authorizes transactions for the conduct of the official business of certain international organizations
and entities.

U.S. Export Controls Imposed to Date

Concurrent with the issuance of the new OFAC restrictions, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) on February 24, 2022 simultaneously issued a Final Rule on the Implementation of Sanctions Against Russia Under the Export Administration Regulations (EAR). The Final Rule dramatically expands the scope of the EAR to restrict exports, reexports, and in-country transfers to Russia. Notably, the Final Rule extends to both controlled and EAR99 items. Further, on March 2, 2022, BIS extended the same stringent export controls put in place for Russia to Belarus.

As summarized in a BIS Fact Sheet, the key changes were as follows:

1. BIS adopted new license requirements for all Export Control Classification Numbers (ECCNs) in Categories 3–9 of the CCL, including the addition of unilateral controls that were not previously controlled, especially for high-tech items that are not currently produced in Russia.
2. BIS adopted a "presumed denial" export licensing policy for Russia and Belarus, covering all controlled commodities subject to the Export Administration Regulations (EAR).
3. BIS expanded the existing Russia "military end use" and "military end user" controls to cover all items subject to the EAR, with limited exceptions relating to products designated as EAR99 food and medicine and items classified under ECCN 5A992.c or 5D992.c (certain types of encryption products), so long as these products are not intended for Russian "government end users" or Russian state-owned enterprises.
4. BIS expanded existing export controls on Russia and Belarus to include certain foreign products produced outside the United States using U.S. technology through the addition of two sets of rules, one aimed at general Russian users (the Russian Foreign Direct Product Rule) and one more restrictive rule aimed especially at Russian military end users (the Russian Military End-User Foreign Direct Product Rule).
5. BIS significantly restricted the use of EAR license exceptions where Russian exports are concerned.
6. BIS placed 49 new Russian entities and two Belarussian entities on the Entity List — a move that prohibits the sale or export of any U.S.-origin products, software, or technology to these parties.

Companies that export U.S.-origin products, products otherwise subject to the EAR, or products made with U.S. components should immediately familiarize themselves with these new restrictions before directly or indirectly selling, exporting, or reexporting any products to Russia/Belarus or to Russian/Belarussian entities.

New Export License Requirements

BIS now requires a license for exporting any controlled commodities to Russia or Belarus. This new restriction includes items appearing on the Commerce Control List (CCL) and classified under Export Control Classification Numbers (ECCNs) in Categories 3–9. Collectively these categories include semiconductors, microelectronics, and telecommunications items as well as lasers, sensors, navigation equipment, avionics, marine equipment, and aircraft components. These changes mirror similar commodity controls imposed by the United Kingdom and European Union (EU), which cover many of the same categories.

Companies that export any items in these categories will now need to obtain a BIS license before exporting, reexporting, or transferring them to Russia or Belarus. Significantly, however, BIS has adopted a “presumption of denial” for all items requiring an export license for Russia or Belarus. This means that BIS will not issue a license if the proposed exports will directly or indirectly benefit the Russian/Belarussian governments or the Russian/Belarussian defense sectors. It also means that BIS is currently less likely to grant an export license — and may reconsider previously granted export licenses — even if the underlying business is exclusively commercial.

These same restrictions also apply to so-called “deemed exports” — transfers of certain controlled technologies to Russian/Belarussian nationals located within the United States — even if they have a valid work or travel visa. Under the deemed export rules, the sharing of controlled technical data, or even providing access to the same, is prohibited for anyone who is a Russian or Belarussian national, even if they are here under a valid work visa. These prohibitions do not extend to persons who have become U.S. citizens or who are Legal Permanent Resident (i.e., green card holders), as they are no longer considered to be Russian or Belarussian nationals.

Companies that employ Russian/Belarussian nationals in the United States should immediately evaluate whether these employees hold a green card and, if not, whether so-called “deemed export licenses” may be required. Due to the broad coverage of the changes to the export controls, which cover nearly all of Chapters 3–9, most companies that deal with EAR-controlled products or technology will potentially need to conduct this analysis, even if they do not sell to Russia or to Russian entities. If they do employ any such persons, these companies need to immediately ensure that these non-U.S. persons do not have access to any controlled technical data or otherwise trigger application of the deemed export rules.

Other narrow exceptions address exports involving safety, humanitarian assistance, civil telecommunications infrastructure, and various government-to-government activities. There are also some exceptions designed to support the operations of partner country companies working in Russia or Belarus. These include narrow exceptions for items for use by the news media, certain software updates, and certain encryption items or communications devices not destined for Russian or Belarussian government end users. Each of these exceptions applies narrowly, however, and conditions in Russia, Belarus, and the surrounding region may complicate such exports. Companies that plan to rely on these exceptions should carefully review the relevant requirements before proceeding.

Exceptions

Exceptions to the license review policy, which are specific to an ECCN’s reasons for control and will be reviewed on a case-by-case basis, are for applications related to safety of flight, maritime safety, humanitarian needs, government space cooperation, civil telecommunications infrastructure, government-to-government activities, and to support limited operations of partner country companies in Russia.

There may be certain license exceptions that apply to the exports, reexports, and in-country transfers to Russia, but many of these license exceptions are only available under limited circumstances. For example:

- **License Exception TMP** (Temporary Imports, Exports, Reexports, and Transfers in Country) is available for items for use by the news media.
- **License Exception TSU** (Technology and Software Unrestricted) is available for software updates to civil end users that are subsidiaries of, or joint ventures with, companies headquartered in the United States or partner countries.
- **License Exception ENC** (Encryption Commodities, Software, and Technology) is available for encryption items, but not if they are destined for Russian government end users and Russian state-owned enterprises.
- **License Exception CCD** (Consumer Communication Devices) is available for certain consumer communication devices, but not if they are destined for government end users or certain individuals associated with the government.

As a result, persons relying on these license exceptions would need to conduct due diligence on the end users to ensure that they are complying with the precise scope of the license exceptions.

No case-by-case license application review or license exceptions are available for items subject to licensing requirements under the Russia MEU FDP Rule.

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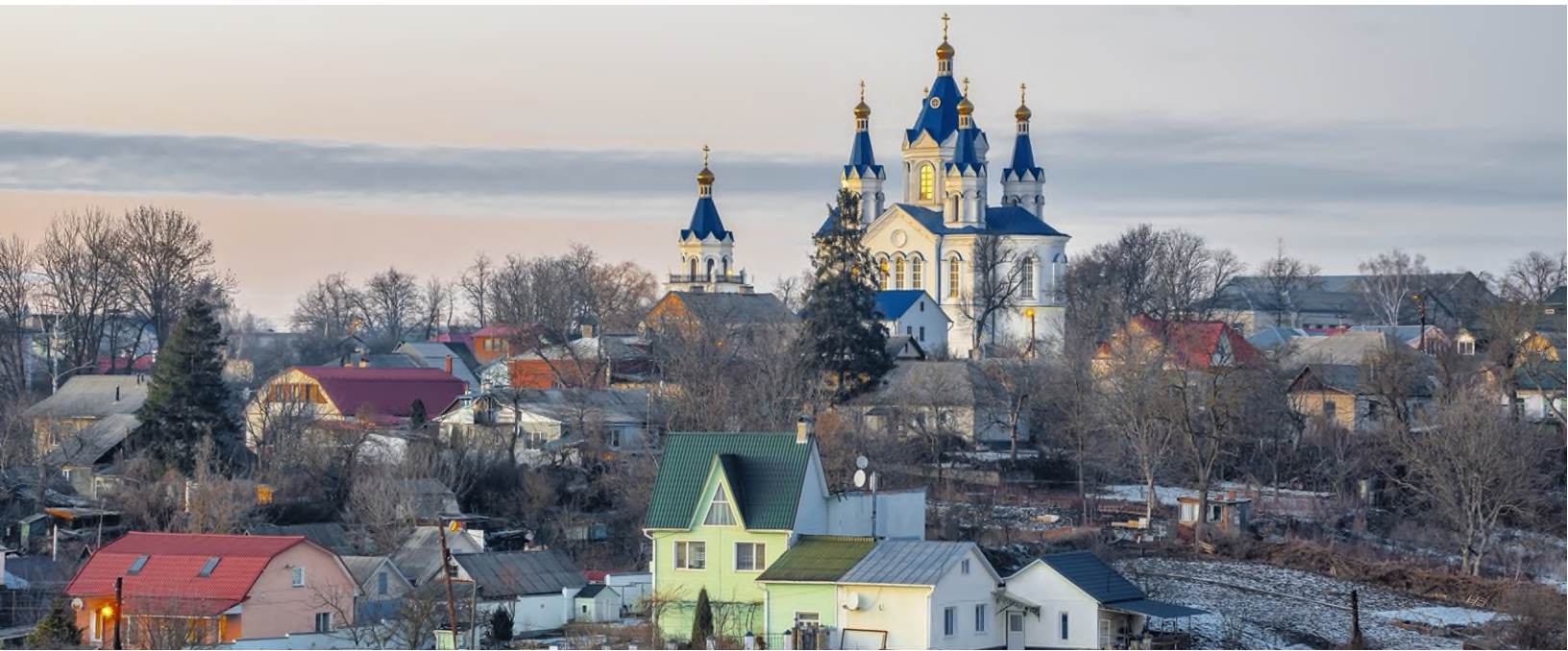
Foreign Direct Product Rules

BIS also established two new Foreign Direct Product Rules (FDPRs) that impact the sale of certain products manufactured outside the United States. The first rule applies to any exports, reexports, or transfers involving Russian or Belarussian territory and controls foreign-produced items that are either (1) the direct product of certain EAR-controlled software or technology that appears on the CCL or (2) major components or products that are the direct product of certain EAR-controlled software or technology appearing on the CCL.

Foreign-produced items subject to the EAR under this FDPR will now require a BIS license before they can be exported to Russia or Belarus, and BIS will apply the “presumption of denial” standard when reviewing license applications. Because this FDPR is so broad in its reach, companies located outside the United States, including subsidiaries and affiliates of U.S. companies, should carefully review any products they plan to export to Russia or Belarus for relevant U.S.-origin content or technology. Undertaking this review is particularly important for companies manufacturing and exporting products to Russia or Belarus or to Russian/Belarussian entities from countries in the Asia-Pacific region, where countries are somewhat less likely to impose their own controls on exports to Russia and Belarus and thus will not meet the coordinated carve-out for countries imposing similar restrictions under their own export control laws.

The second FDPR covers the Russian and Belarussian militaries. Here, BIS already has indicated that no license exceptions are available. Like the broader country-based FDPR discussed above, this restriction applies to foreign-produced items that are the direct product of any EAR-controlled software or technology on the CCL, or major components or such products that are the direct product of any EAR-controlled software or technology on the CCL.

Significantly, BIS also expanded restrictions on Russian/Belarussian Military End-Users (MEUs) and related military end uses to cover all items subject to the EAR — not just those classified under an ECCN. Although there are limited exceptions for food, medicine, and other humanitarian items designated “EAR99,” these exceptions do not apply to Russian/Belarussian government end users or Russian/Belarussian State-Owned Enterprises (SOEs). It is also important to note that this second FDPR targeting Russia MEUs does not currently apply to exports from NATO and EU member states. Many of



these jurisdictions have committed to issue their own sets of export restrictions, however, so companies should carefully consider any applicable local requirements before exporting to Russia.

New Entity, Sector & Territory Restrictions

BIS also took actions to restrict exports to certain entities, sectors, and territories. In particular:

- BIS added 49 new Russian entities and two new Belarussian entities to the Entity List. Most of these parties previously appeared on the MEU List, which BIS also expanded to include additional parties in the Russian/Belarussian defense industrial base.
- BIS imposed export restrictions for the disputed Crimea, Donetsk, and Luhansk regions of Ukraine — all of which are currently under Russian military occupation.
- On March 2, Secretary of State Antony Blinken announced that there will be further action to supplement the Final Rule to reflect announced new restrictions on exports to Russia's defense sector, including 22 Russian defense-related entities as well as companies that make combat aircraft, infantry fighting vehicles, missiles, unmanned aerial vehicles, and electronic warfare systems. These restrictions will be implemented through both OFAC sanctions and export control restrictions.

Collectively this means that companies must obtain a BIS license before exporting, reexporting, or transferring EAR-controlled items to anyone on the Entity List, anyone in the disputed Ukrainian regions, and anyone in the defense sector. And because BIS now applies the "presumption of denial" when reviewing these license applications, this new licensing requirement effectively imposes a trade embargo on all exports, reexports, and in-country transfers to these disputed regions. Notably, the license requirements are applicable for all items subject to the EAR, with the limited exceptions of food and medicine designated as EAR99 and certain EAR99 or ECCN 5D992.c software for internet-based communications. Further, anecdotal reports indicate that BIS is in the process of reviewing all previously granted licenses to Russia and Belarus as a means of complying with prior specific license grants to the new export control requirements. Given the presumed denial status now in place, companies should not rely on previously granted BIS licenses to support ongoing export sales unless they have determined that such exports are consistent with the current rules

Foreign Export Control Requirements

The EU, Japan, Australia, United Kingdom, Canada, and New Zealand have imposed or are currently imposing substantially similar export controls on Russia/Belarus and Russian/Belarussian parties. This multilateral approach to controls dramatically curtails the quantity and scope of products that can now be legally exported to Russia or Belarus. These foreign laws also are likely to overlap with U.S. export control requirements — especially when products made in foreign countries trigger the FDPRs discussed above or otherwise meet the 25 percent de minimis threshold under the EAR. Given the scope and complexity of these requirements, companies around the world should familiarize themselves with these overlapping rules and closely evaluate the content of any pending exports before exporting any goods, software, or technology to Russia or Belarus.

Recommended Compliance Measures

As noted above, the situation is rapidly changing. Further, the U.S. sanctions often are being implemented in coordination with economic sanctions in other countries, not only in the EU but also for countries that traditionally have not been as aggressive in applying economic sanctions, such as Japan. As a result, compliance is an exercise in keeping up with multiple legal regimes, which are changing on a constant basis and imposing rapidly changing (generally increasing) compliance responsibilities. As a result, compliance needs to be an individual exercise, based on an up-to-date understanding of the current rules.

At a minimum, however, the following are compliance measures that every company with exposure to the new sanctions and export controls should consider:

- **Set Up Procedures to Monitor Rapidly Changing Sanctions and Export Control Regulatory Changes.** Due to the rapidly changing controls, it is essential to set up a mechanism to stay up to date on U.S. and EU updates. Subscribing to the OFAC Updates is a good start, as is subscribing to updates to this white paper. In addition, OFAC posts answers to generally applicable questions asked by the public on the OFAC FAQ webpage. OFAC has posed initial FAQs on the Russian Harmful Activities Sanctions on its global FAQs. OFAC will be updating and expanding these FAQs regularly, and impacted companies should review updates frequently (which are announced using the OFAC email service and are posted on a special "recent updates" webpage) for additional responses and updates.
- **Assess Supply Chain Exposure.** The first steps are to get a good handle on goods imported from Russia or Belarus. Because Russia specializes in sales of energy, raw materials such as aluminum, and agricultural goods, these often are the first place to look for supply chain exposure. The assessment should consider both direct and indirect imports and should consider all affiliate purchases, due to the global nature of the sanctions.
- **Assess Sell-Side Exposure.** For companies that directly or indirectly sell to Russia or Belarus, it is important to have a full assessment of goods that are impacted by the sanctions. The assessment should consider all sales by all subsidiaries and affiliates.
- **Assess Third-Party Sales and Sourcing.** Because both the OFAC sanctions and export controls cover indirect purchases and sales, companies should carefully review their supply chains, and sales through third-parties such as distributors, to ensure that they are well aware of any potential indirect purchases and sales that may be connected to Russia or Belarus, or to Russian or Belarussian entities.
- **Assess Commercial Alternatives.** Companies should consider whether their current supply and sales arrangements are locked in by long-term contracts. If so, they should consider whether they have commercial alternatives to these arrangements (and whether their agreements give them force majeure-type ability to sever any such arrangements based upon the new sanctions and export controls).
- **Assess and Update Economic Sanctions and Export Controls Policies.** Most export control and economic sanctions policies that were state of the art several weeks ago are now obsolete, especially for countries that source from, sell to, or operate in Russia or Belarus. These should be updated.

- **Assess and Update Export Controls Internal Controls.** For the same reason, many companies should assess and update their export controls internal controls such as any stop, hold, and release operating procedures; any screening against the BIS Entity List; and any controls relating to shipments to Russia or Belarus.
- **Assess and Update Adequacy of Screening Controls.** Due to the rapid changes in the SDN lists, as well as the creation of new categories of Ukraine-related restrictions, multinational companies should be conducting screening daily, with assurances that their blocked-person lists are updated daily as well. A fresh review of all suppliers, customers, and distributors against the current lists also is prudent.
- **Train Relevant Personnel.** Companies that source from, sell to, or operate in Russia or Belarus should update their training for all impacted personnel.
- **Assess and Update Legal Terms & Conditions.** The rapidly changing sanctions are a good reminder that it is essential to have sanctions and export control language in all supply and sale contracts, purchase orders, and so forth. All such terms and conditions should be reviewed carefully in light of the new sanctions and export control restrictions.
- **Assess Products Potentially Subject to New Military Restrictions.** All products with potential military use should be carefully reviewed against the new export control restrictions if there is a possibility that they will be sold or exported, whether directly or indirectly, to Russia or Belarus.
- **Assess Products Potentially Subject to New Export Controls.** As noted above, even EAR99 products are subject to new controls. Thus, all impacted companies should carefully review even these products against the new export controls Final Rule.

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Looking for Help?

We are continuously monitoring regulatory concerns relating to the U.S. regulatory response to the Ukraine invasion carefully, and will be updating this white paper regularly. If you have any questions regarding the specific impact of the new sanctions and export control regulations on your company, please contact your Foley relationship partner or one of the authors of this publication:

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