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## U.S. SANCTIONS ON RUSSIA

*The partial sanctions program that the U.S. has imposed on Russia is enabled by a complex web of statutes, executive orders, and implementing regulations. It includes new types of restrictions that have not previously been interpreted. The author describes the elements of the regime and the difficulties of compliance. He concludes that uncertainties in the program may discourage companies from engaging in transactions not expressly prohibited, thus giving the sanctions a broader reach than their actual legal scope.*

By Stephan E. Becker \*

Russia's involvement in the unrest in Ukraine has led the United States and other countries to impose economic sanctions on Russia. The sanctions do not constitute a comprehensive embargo, but rather seek to apply targeted pressure on Russia's defense, energy, and financial sectors, as well as companies and individuals identified as having a disruptive involvement in Ukrainian affairs. Because most types of economic interaction with Russia are still allowed, the sanctions in some respects present greater compliance challenges than other U.S. sanctions programs, such as for Sudan, that have broadly banned virtually all economic interaction.

This article reviews the legal bases of the U.S. sanctions on Russia and their general implications for companies doing business with that country.

As discussed below, the U.S. sanctions on Russia have been adopted mainly through Presidential Executive Orders issued under authority of the International Emergency Economic Powers Act (IEEPA)<sup>1</sup> and pre-existing discretionary authority under the Export Administration Regulations.<sup>2</sup>

### SANCTIONS ADOPTED UNDER THE IEEPA

#### *Legal Bases for Sanctions*

The President has issued Executive Orders based on authority previously granted by Congress to the President under the IEEPA,<sup>3</sup> the National Emergencies

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<sup>1</sup> 50 U.S.C. §§ 1701-1706.

<sup>2</sup> 15 C.F.R. §§ 730-774.

<sup>3</sup> 50 U.S.C. §§ 1701-1706.

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#### IN THIS ISSUE

- **U.S. SANCTIONS ON RUSSIA**

Act,<sup>4</sup> and the Immigration and Nationality Act of 1952,<sup>5</sup> among others.

The primary statute on which the President relies when imposing economic sanctions is the IEEPA. The IEEPA authorizes the President, after declaring a national emergency, to impose a broad range of restrictions on trade and commerce between persons subject to U.S. jurisdiction and the country that is the subject of the embargo. Specifically, IEEPA grants the President authority “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States ....”<sup>6</sup>

For example, there are relatively comprehensive embargoes imposed on the nations of Iran,<sup>7</sup> Sudan,<sup>8</sup> Syria,<sup>9</sup> and North Korea.<sup>10</sup> (The U.S. embargo of Cuba pre-dated the IEEPA and is maintained under the authority of other statutes.<sup>11</sup>) In addition, sanctions are

imposed on certain entities and individuals associated with those (and other) countries, as well as on entities and individuals sanctioned for reasons related to narcotics trafficking, counter-terrorism, non-proliferation, and other foreign policy concerns.

The President’s Executive Orders usually are amplified and implemented in more detail through regulations issued by the Treasury Department’s Office of Foreign Assets Control (OFAC). Each embargo is implemented through an independent set of regulations. The scope of most embargoes generally is similar, but they are not all identical.

When entities and individuals are sanctioned, their names are published by OFAC on the “List of Specially Designated Nationals” (SDN List). Among other things, the sanctions require persons subject to U.S. jurisdiction to “block” (freeze) the assets of SDNs and prohibit financial transactions with SDNs, either directly or indirectly, regardless of whether the transaction involves U.S.-origin products or technology. The restrictions apply to U.S. citizens and companies, and branches and subsidiaries of foreign companies within the United States. (In the case of the embargoes of Cuba and Iran, the restrictions apply also to foreign subsidiaries of U.S. companies).<sup>12</sup>

Some Russian entities and individuals were already sanctioned under pre-existing sanctions programs before

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<sup>4</sup> 50 U.S.C. §§ 1601-1651.

<sup>5</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

<sup>6</sup> 50 USC § 1701(a).

<sup>7</sup> Executive Orders 12959 (May 7, 1995), 13059 (Aug. 20, 1997), 13553 (Sept. 29, 2010), 13628 (Oct. 9, 2012), and 13645 (Jul. 1, 2013).

<sup>8</sup> Executive Orders 13069 (Nov. 4, 1997), 13400 (Apr. 27, 2006), and 13412 (Oct. 13, 2006).

<sup>9</sup> Executive Orders 13338 (May 12, 2004), 13399 (Apr. 26, 2006), 13460 (Feb. 15, 2008), 13572 (Apr. 29, 2011), 13573 (May 18, 2011), 13582 (Aug. 18, 2011), 13606 (Apr. 23, 2012), and 13608 (May 1, 2012).

<sup>10</sup> Executive Orders 13466 (Jun. 26, 2008), 13551 (Aug. 30, 2010), 13570 (Apr. 18, 2011).

<sup>11</sup> The United States maintains a comprehensive economic embargo of Cuba under an older statute, the Trading with the Enemy Act, 50 U.S.C. App. §§ 5, 16, as well as the Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001-6010, and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. §§ 6021- 6091. President Obama recently

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announced plans to re-establish diplomatic relations between the United States and Cuba. See <http://www.whitehouse.gov/issues/foreign-policy/cuba>. Although the United States still prohibits most trade and transactions with Cuba, the President eased licensing requirements in certain areas, particularly involving telecommunications and internet services, travel, remittances, and treatment of Cuban nationals in third countries.

<sup>12</sup> 31 C.F.R. § 515.329 and § 560.215. Some of the embargoes, in particular the embargoes of Iran and Sudan, impose obligations on non-U.S. persons not to re-export U.S. origin goods and technology to embargoed countries. See, e.g., 31 C.F.R. § 538.205.

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the United States took its first actions relating to Ukraine in March 2014. This article focuses on the sanctions that have been adopted specifically in relation to the unrest in Ukraine.

The main aspects of the sanctions have been imposed under a series of Presidential Executive Orders:

- Executive Order 13660 (March 6, 2014), blocks all property and interests in property that are in the United States, or within the possession or control of U.S. persons that belong to persons determined by the U.S. Government to be involved in the unrest in Ukraine, or to have misappropriated Ukrainian state assets. The order also provides authority to deny visas to such persons to prohibit their entry into the United States.
- Executive Order 13661 (March 17, 2014) provides authority to block the assets of and deny visas to additional categories of persons, including Russian government officials and entities operating in the arms and related materiel sector in Russia. This order also specifically named seven Russian government officials to be sanctioned.
- Executive Order 13662 (March 20, 2014) created a framework for a new type of sanctions, known as “sectoral sanctions,” that could be imposed on sectors of the Russian economy, including financial services, energy, metals and mining, engineering, and defense and related materiel.

OFAC has taken further actions to implement these orders, which fall generally into two categories. First, OFAC has designated a number of individuals and entities to be placed on the SDN List pursuant to Executive Orders 13660 and 13661; assets of those individuals and entities that are within U.S. jurisdiction are blocked, and persons subject to U.S. jurisdiction cannot do business with them. As of December 2014, 93 individuals and entities are designated under these orders. The individuals include Russian government officials, prominent Russian business persons with ties to the government, and separatist leaders. The designations also have included entities that have been nationalized in Crimea, are owned or controlled by a designated party, are related to or provide support to the Russian government, are separatist groups in Ukraine, or are entities in the arms and related materiel sector.

Second, OFAC has implemented the sectoral sanctions. The first step was the issuance of two

“directives” on July 16, 2014.<sup>13</sup> Directive 1 announced that the financial services sector of Russia is covered by the sectoral sanctions and designated certain Russian banks.<sup>14</sup> The sectoral sanctions, however, were not as broad as those for other persons on the SDN List. The sanctions were limited to transacting in, providing financing for, or otherwise dealing in new debt of longer than 90 days maturity, or new equity for these persons, their property, or their interests in property.<sup>15</sup> All other transactions remain unrestricted. On September 12, 2014, this directive was amended so that debt of longer than 30 days (rather than 90 days) is now covered.<sup>16</sup> As of December 2014, six financial institutions are designated under these sanctions.

Directive 2, also issued on July 16, announced that sectoral sanctions would be applied to Russia’s energy sector.<sup>17</sup> For this sector, sanctions were limited to transacting in, providing financing for, or otherwise dealing in debt of longer than 90 days maturity for these persons, their property, or their interests in property.<sup>18</sup> (No restrictions were placed on transactions involving new equity.) A revised version of Directive 2 was published on September 12, but the substance was not changed.<sup>19</sup> As of December 2014, four entities are designated under these sanctions.

Also on September 12, OFAC issued Directives 3 and 4. Directive 3 applies the sectoral sanctions to Russia’s defense and related materiel sector.<sup>20</sup> For this sector, the restrictions apply to dealings in new debt of

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<sup>13</sup> Directives 1 and 2 (as amended) under Executive Order 13662, [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13662\\_directives.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13662_directives.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Directive 1 (as amended) under Executive Order 13662, [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13662\\_directive1.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13662_directive1.pdf).

<sup>17</sup> Directive 2 under Executive Order 13662, [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo\\_13662\\_directive2.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo_13662_directive2.pdf).

<sup>18</sup> *Id.*

<sup>19</sup> Directive 2 (as amended) under Executive Order 13662, [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13662\\_directive2.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13662_directive2.pdf).

<sup>20</sup> Directive 3 under Executive Order 13662, [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13662\\_directive3.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13662_directive3.pdf).

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longer than 30 days.<sup>21</sup> Other dealings are not restricted. As of December 2014, one entity is designated under these sanctions.

Directive 4 prohibits any person subject to U.S. jurisdiction from providing, exporting, or re-exporting goods, technology, or services (except financial services) in support of exploration or production for deepwater, Arctic offshore, or shale projects that have the potential to produce oil for Russia, or in Russian waters, in relation to entities sanctioned under this directive.<sup>22</sup> As of December 2014, five entities are designated under these sanctions: Gazprom Neft, Gazprom OAO, Lukoil, Rosneft, and Surgutneftegas.

Entities sanctioned under the sectoral sanctions program are placed on the Sectoral Sanctions List (“SSI List”), which is distinct from the SDN List.<sup>23</sup>

### ***Interpretation and Application***

The sanctions have raised a number of issues of interpretation and application. OFAC has issued guidance in the form of “frequently asked questions” that deal with subjects such as the following.

*Fifty Percent Rule.* In the context of other sanctions programs, OFAC had previously issued guidance that an

entity owned directly or indirectly by an SDN was considered blocked regardless of whether such entity itself was listed as an SDN. On August 13, 2014, OFAC issued revised guidance in relation to the Russia sanctions, clarifying that the fifty percent rule applies to entities owned 50 percent or more in the aggregate by one or more SDNs.<sup>24</sup> In other words, if blocked person A owns 25 percent of an entity, and blocked person B owns 25 percent, the entity automatically will be treated as blocked. On the other hand, if a blocked person (or persons) does not own 50 percent, but controls the entity, the entity is not automatically blocked; OFAC advises proceeding with caution, however, as an entity controlled by an SDN could be designated as an SDN in the future.<sup>25</sup> The aggregation does not apply across the SDN and SSI Lists.<sup>26</sup> In other words, the ownership interest of an entity on the SSI List would not be aggregated with the ownership interest of an entity on the SDN List.

*Definition of “Debt.”* OFAC has clarified that “debt” includes bonds, loans, extensions of credit, loan guarantees, letters of credit, drafts, banker’s acceptances, discount notes or bills, and commercial paper.<sup>27</sup> The sectoral sanctions apply to new debt (with a maturity of 30 or 90 days, depending on the sector), including dealing in such debt and providing services in support of such debt.<sup>28</sup> The restrictions extend to rollover of existing debt, if the rollover results in the creation of new debt with the specified maturities.<sup>29</sup> OFAC has issued further guidance on such subjects as dealings in depositary receipts, counter-party credit risk, and revolving credit facilities. With regard to letters of credit, OFAC has explained that U.S. persons may advise or confirm a letter of credit issued on behalf of a non-sanctioned entity in which an entity subject to the sectoral sanctions is a beneficiary, because the letter of credit does not represent an extension of credit to the

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<sup>21</sup> *Id.*

<sup>22</sup> Directive 4 under Executive Order 13662, [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13662\\_directive4.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13662_directive4.pdf).

<sup>23</sup> On December 19, 2014, the President issued an Executive Order imposing a broad investment and trade embargo on Crimea, including prohibitions on the following: new investment in Crimea by U.S. persons wherever located, imports into the United States of goods, services, or technology from Crimea, and exports, re-exports, sales, or supplies of goods, services, or technology to Crimea. The Executive Order also provides for blocking the property of any person who is determined by the Treasury Department to be operating in Crimea, to be a leader of any entity operating in Crimea, to be owned or controlled by or acting on behalf of any persons blocked under the Executive Order, or to have materially assisted, financed, or otherwise supported any persons blocked under the Executive Order. Simultaneously with the issuance of the Executive Order, OFAC issued General License No. 4, authorizing the exportation or re-exportation of certain agricultural commodities, medicine, medical supplies, and replacement parts to Crimea. The Commerce Department is expected to issue rules under the Export Administration Regulations to implement the trade restrictions.

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<sup>24</sup> Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked, Aug. 13, 2014, [http://www.treasury.gov/resource-center/sanctions/Documents/licensing\\_guidance.pdf](http://www.treasury.gov/resource-center/sanctions/Documents/licensing_guidance.pdf).

<sup>25</sup> *Id.*

<sup>26</sup> Frequently Asked Question No. 373, Sep. 12, 2014, <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answers2.aspx#sectoral>.

<sup>27</sup> Frequently Asked Question No. 371, Sep. 12, 2014, <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answers2.aspx#sectoral>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

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sanctioned entity.<sup>30</sup> On the other hand, the restrictions can apply if a sanctioned entity is the applicant for the letter of credit.<sup>31</sup>

*Shale Projects.* OFAC also has issued guidance on the interpretation of the energy sector sanctions. For example, OFAC has clarified that the “shale projects” that are covered are those that have the potential to produce oil from shale formations, and not those projects that simply involve drilling through shale to locate or extract oil.<sup>32</sup>

*General Licenses.* OFAC has issued “general licenses” that permit certain transactions that would otherwise be prohibited under the sectoral sanctions, if the conditions of the general license are met. For example, General License 1A authorizes transactions related to derivatives that would ordinarily be prohibited by Directives 1, 2, and 3.<sup>33</sup> Similarly, General License 3 permits transactions with DenizBank A.S. that Directive 1 would ordinarily prohibit.<sup>34</sup>

## SANCTIONS UNDER EXPORT ADMINISTRATION REGULATIONS

The Export Administration Regulations (“EAR”) authorize the U.S. Department of Commerce, acting through its Bureau of Industry and Security (“BIS”), to regulate exports and re-exports of nearly all commercial products and technologies, including items considered “dual-use” because they have both commercial and military applications.<sup>35</sup>

The EAR apply to transactions that take place outside the United States, even when no U.S. person is involved. This is because the EAR apply to U.S.-origin items and technology, regardless of where they are located. Further, the EAR apply to non-U.S. products that incorporate more than “de minimis” controlled U.S. content.<sup>36</sup>

The EAR establishes when prior approval, in the form of an export license, is required for an export from the United States, or a re-export or retransfer that takes place outside the United States.<sup>37</sup> The level of control depends on the classification of an item or technology on the Commerce Control List and the final country destination of the item/technology.<sup>38</sup> The classification categories, known as Export Control Classification Numbers (“ECCNs”), are based on the categories in the multilateral Wassenaar Arrangement, while others are maintained on a unilateral basis by the United States.<sup>39</sup>

In April 2014, BIS initially froze all license applications for exports to Russia, and subsequently announced that it would deny applications involving proposed exports or re-exports of high technology items to Russia or occupied Crimea that contribute to Russia’s military capabilities.<sup>40</sup>

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Arms Regulations, 22 C.F.R. §§ 120 et seq., and nuclear products and technology regulated by the Department of Energy and the Nuclear Regulatory Commission.

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<sup>30</sup> Frequently Asked Question No. 395, Sep. 12, 2014, <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answers2.aspx#sectoral>.

<sup>31</sup> *Id.*

<sup>32</sup> Frequently Asked Question No. 418, Nov. 18, 2014, <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answers2.aspx#sectoral>.

<sup>33</sup> General License 1A Authorizing Certain Transactions Related to Derivatives Prohibited by Directives 1, 2, and 3 under Executive Order 13662, Sep. 12, 2014, [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine\\_gl1a.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_gl1a.pdf).

<sup>34</sup> General License No. 3 Authorizing Transactions Otherwise Prohibited by Directive 1 under Executive Order 13662, Oct. 6, 2014, [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine\\_gl3.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_gl3.pdf).

<sup>35</sup> The major categories of items not subject to the EAR are defense articles regulated under the International Traffic in

<sup>36</sup> For countries subject to full-scale embargoes (Cuba, Iran, Sudan, Syria, and North Korea) the de minimis threshold is 10 percent; for other countries, including Russia, the threshold is 25 percent. 15 CFR § 734.3.

<sup>37</sup> 15 C.F.R. § 730.

<sup>38</sup> *Id.*

<sup>39</sup> 15 C.F.R. § 738. The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies is a group of 41 countries that seeks to coordinate export control policies. Among the activities of the group is to develop common control list categories. *See* <http://www.wassenaar.org/index.html>. Decisions on whether to require or issue licenses are left to the individual participating states and therefore participation in the Wassenaar Arrangement does not affect the discretion of the U.S. government to establish control categories that are not in the Wassenaar control lists.

<sup>40</sup> Commerce Department Announces Expansion of Export Restrictions on Russia, Apr. 28, 2014, <http://www.bis.doc.gov/index.php/about-bis/newsroom/press-releases/107-about->

On August 6, 2014, BIS published a new rule on Russia Industry Sector Sanctions.<sup>41</sup> The regulation requires a license to export from the United States to Russia, re-export from a third country to Russia, or transfer within Russia any item that is subject to the EAR if (i) the item is covered by certain ECCNs or is listed in a new regulatory supplement that identifies items by certain “Schedule B” numbers and (ii) the item will be used directly or indirectly in exploration for, or production of, oil or gas in Russian deepwater, Arctic offshore, or shale formations in Russia.<sup>42</sup> There is a presumption of denial when the item is for use in one of these projects that has the potential to produce oil.<sup>43</sup> Unlike the OFAC sanctions, these EAR sanctions are not limited to projects involving the Russian companies on the SSI List; they apply more generally.

The following pre-existing ECCNs are included in the restrictions:

- ECCN 1C992, which covers certain commercial charges and devices;
- ECCN 3A229, which covers certain firing sets and equivalent high-current pulse generators;
- ECCN 3A231, which covers certain neutron generator systems;
- ECCN 3A232, which covers certain detonators and multipoint initiation systems;
- ECCN 6A991, which covers certain marine and terrestrial acoustic equipment; and
- ECCN 8A992, which covers certain vessels, marine systems, and related equipment and parts.

Items covered by these ECCNs previously could be exported to Russia without a license. Two new ECCNs were created specifically for this sanction:

- ECCN 8D999, which covers software specially designed for the operation of unmanned vessels used in Russia’s oil and gas industry; and

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bis/newsroom/press-releases/press-release-2014/665-commerce-dept-announces-expansion-of-export-restrictions-on-russia.

<sup>41</sup> 79 Fed. Reg. 45675 (Aug. 6, 2014).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

- ECCN 0A998, which covers oil and gas exploration data and software, including seismic analysis data, hydraulic fracturing design and analysis software and data, and hydraulic fracturing materials.<sup>44</sup>

As discussed above, the new rule included a list of items categorized by Schedule B numbers. Schedule B is a classification system used by the U.S. Census Bureau to collect statistical information on U.S. exports.<sup>45</sup> The Schedule B numbering system is based on the four- and six-digit headings and subheadings of the Harmonized System, the multilateral agreement on customs tariff classifications.<sup>46</sup> The categories listed describe items such as certain types of pipes, well tubings and casings, drill bits and tools, oilfield pumps, gas separation equipment, oil drilling and production platforms and machinery, and drilling derricks.<sup>47</sup>

In addition to these licensing restrictions for U.S. origin products and technology, BIS has implemented sanctions on specific Russian entities that parallel those of OFAC. BIS maintains the Entity List, a list of entities that have engaged in activities deemed contrary to U.S. national security or foreign policy.<sup>48</sup> For most entities on the list, a license is required for any person (including non-U.S. persons) to export, re-export, or retransfer any items subject to the EAR – even when a license would not otherwise be required to export to the country of the entity.<sup>49</sup> Approximately 30 Russian entities have been placed on the Entity List to prevent them from acquiring any U.S.-origin articles or technology.<sup>50</sup>

BIS has also added five Russian entities to the list with more limited restrictions – exports of U.S. origin items to those entities require a license only when the items are to be used in exploration for, or production of, oil or gas in Russian deepwater, Arctic offshore, or shale formations in Russia.<sup>51</sup> Unlike the other restrictions discussed above, this licensing requirement for these

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<sup>44</sup> *Id.*

<sup>45</sup> Export.gov, The Harmonized System, [http://www.export.gov/logistics/eg\\_main\\_018119.asp](http://www.export.gov/logistics/eg_main_018119.asp).

<sup>46</sup> *Id.*

<sup>47</sup> 79 Fed. Reg. 45675 (Aug. 6, 2014).

<sup>48</sup> 15 C.F.R. § 744 Supplement No. 4.

<sup>49</sup> *Id.*

<sup>50</sup> 79 Fed. Reg. 21394 (Apr. 16, 2014); 79 Fed. Reg. 24558 (May 1, 2014); 79 Fed. Reg. 42452 (Jul. 22, 2014); and 79 Fed. Reg. 45675 (Aug. 6, 2014).

<sup>51</sup> 79 Fed. Reg. 55608 (Sep. 17, 2014).

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specific entities applies to all U.S. origin items, if they are destined for use in such projects.<sup>52</sup> There will be a presumption of denial for these license applications when the projects have the potential to produce oil.<sup>53</sup>

BIS also prohibited the export without a license of certain items to Russia when the exporter knows that the item is intended for a “military end use” in Russia, extending a pre-existing restriction that already applied to China.<sup>54</sup> License applications for such items are subject to review on a case-by-case basis, with a policy of denial if the items would make a material contribution to Russia’s military capabilities. The listed categories are also subject to a license requirement if equipment in those categories is being sold for use in Russia by a “military end user,” regardless of actual use. A “military end user” means the national armed services, as well as the national guard and national police, government intelligence or reconnaissance organizations, or any person or entity whose actions or functions are intended to support “military end uses” as defined in the regulations.<sup>55</sup> Items not covered by one of the designated ECCN categories are not subject to this restriction.<sup>56</sup>

## PENALTIES FOR VIOLATIONS

Violations of regulations implemented under the IEEPA can be punished with criminal and civil penalties. The criminal penalties can include fines up to \$1 million, and up to 20 years imprisonment for individuals.<sup>57</sup> The civil penalties include fines of up to \$250,000 per violation or an amount twice the value of the transaction that is the basis of the violation.<sup>58</sup> OFAC’s regulations provide guidance for civil penalty

calculations and factors which may aggravate (increase) or mitigate (decrease) penalties.<sup>59</sup>

Penalties for violations of the EAR are also based on the provisions of the IEEPA and therefore the same penalty structure applies. In addition, BIS is authorized to penalize violations by issuing an order denying an individual or company the “privilege” of engaging in export transactions (known as a “denial order”).<sup>60</sup> The names of persons who are subject to denial orders are published on the Denied Persons List, and engaging in an export transaction involving U.S. origin goods with a person on the List is itself a violation of the regulations.<sup>61</sup> For foreign persons, a denial order has the effect of prohibiting the purchase or sale of any U.S. origin goods or technology, regardless of whether those goods or technology are otherwise controlled.

## NEW LEGISLATION

Reflecting intense congressional interest in U.S. relations with Russia, the Congress enacted the Ukraine Freedom Support Act of 2014, which the President signed into law on December 18, 2014. The statute requires sanctions to be imposed against Russian arms broker/exporter Rosoboronexport and government-owned companies that the President determines produce, transfer, or broker sales of defense articles to Syria, Ukraine, Georgia, or Moldova. The statute also provides authority for the President to impose sanctions against foreign persons who make investments in “special Russian crude oil projects,” against foreign financial institutions that facilitate sanctioned activities, and against Gazprom if it is determined that Gazprom is withholding gas supplies to NATO countries, Ukraine, Georgia, or Moldova. Upon signing the law, the President stated that “the Administration does not intend to impose sanctions under this law, but the Act gives the Administration additional authorities that could be utilized, if circumstances warranted.”<sup>62</sup> It remains unclear whether the Congress will take further action to attempt to pressure the President to tighten sanctions on Russia.

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> The list of ECCNs covered by this rule is contained in 15 C.F.R. Part 744, Supp. No. 2.

<sup>55</sup> 15 C.F.R. § 744.21.

<sup>56</sup> Other U.S. agencies have also adopted more restrictive licensing policies for Russia, including the State Department’s Directorate of Defense Trade Controls with respect to licenses under the International Traffic in Arms Regulations. U.S. arms trade with Russia has not been significant, however, so the impact of those policies has not been as significant as that of other sanctions.

<sup>57</sup> 50 U.S.C. §§ 1705.

<sup>58</sup> *Id.*

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<sup>59</sup> 31 C.F.R. Part 501, App. A.

<sup>60</sup> 15 C.F.R. Part 766 Supplement 1 at § II.

<sup>61</sup> Denied Persons List, <http://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/denied-persons-list>.

<sup>62</sup> White House Office of Press Secretary, Statement by the President on the Ukraine Freedom Support Act, *available at* <http://www.whitehouse.gov/the-press-office/2014/12/18/statement-president-ukraine-freedom-support-act>.

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## IMPLICATIONS FOR TRANSACTIONS AND COMPLIANCE

The U.S. sanctions create important hurdles and elements of due diligence for transactions involving Russia and Russian persons and entities. With regard to the determination of whether entities are subject to sanctions, parties cannot simply screen against the SDN and SSI Lists for exact matches; rather, they must investigate the full chain of ownership of the entities to see if the fifty percent rule applies. In the case of the sectoral sanctions, proposed transactions might not be prohibited, but the terms must be carefully analyzed to see if they fall within the categories of prohibited debt and equity covered by those sanctions. Similarly, transactions involving oil and gas exploration or production must be examined to determine whether they relate to deepwater, Arctic offshore, or shale projects, and whether they have even the potential to produce oil.

The European Union, Canada, and Australia have all adopted their own financial and embargo sanctions against Russia. Those sanctions are not identical to those of the United States, but are similar in nature. This can require understanding the differences between the sanctions under multiple jurisdictions to prevent violations. Moreover, non-U.S. banks (*e.g.*, BNP Paribas, HSBC, Standard Chartered Bank, ABN Amro) have been the subject of significant penalties – ranging up to billions of U.S. dollars – for violations of OFAC

sanctions involving other countries.<sup>63</sup> Accordingly, major international financial institutions generally are highly risk averse in matters involving OFAC sanctions. It should be expected that both banks and investors will be reluctant to enter into transactions that fall into “gray areas” of interpretation.

The sanctions under the EAR pose similar challenges, both for U.S. and non-U.S. companies. As discussed above, even where sanctioned persons and entities are not involved, U.S. export licenses may be required for transactions involving Russia’s energy sector. For non-U.S. companies, this possibility requires evaluating the sources of each item of equipment to be used to determine if any are subject to the EAR. Such an evaluation can itself be very burdensome.

In summary, the sanctions imposed on Russia include certain new types of restrictions that have not previously been the subject of interpretative rulings or enforcement cases, and therefore raise questions about their precise scope and meaning. This ambiguity, in turn, may discourage companies from engaging in transactions that are not expressly prohibited out of caution. Moreover, the uncertainty of the current situation in the Ukraine leads to expectations that the sanctions program may be expanded, depending on the success or failure of efforts to restore stability to the Ukraine. For these reasons, the impact of the sanctions in many instances will be greater than their actual legal scope. ■

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<sup>63</sup> See, *e.g.*, BNP Paribas: <http://www.justice.gov/opa/bnp-paribas.html>; HSBC - <http://www.justice.gov/opa/hsbc-pc-docs.html>; Standard Chartered Bank: <http://www.mainjustice.com/2012/12/10/justice-department-announces-settlement-with-standard-chartered-bank/>; and ABN Amro: <http://www.justice.gov/opa/pr/former-abn-amro-bank-nv-agrees-forfeit-500-million-connection-conspiracy-defraud-united>.