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United States Responds to the Crisis in Ukraine with Additional Sanctions and Export Controls

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The United States has now imposed additional new sanctions and sweeping export controls that not only target key pillars of the economies of Russia and Belarus but will also have significant collateral effects across a wide range of other sectors in Russia. These latest measures follow an initial tranche of sanctions announced on February 21 and 22, 2022, which we discussed in depth in our alert from last week. Following the surge of Russian troops into Ukraine in an invasion that the White House condemned as "an unprovoked and unjustified attack," the new measures are significant in size and scope and range across targeting Russia's largest financial institutions, restricting access to U.S. capital markets, restricting access to technology, and even designating President Vladimir Putin personally for blocking sanctions. Cumulatively, sanctions and export controls announced over the past week represent U.S. efforts to exert "unprecedented diplomatic and economic costs on Russia." We enter the upcoming week with potentially more of these efforts in store—including the removal of select Russian banks from the Society for Worldwide Interbank Financial Telecommunication ("SWIFT") messaging system, as announced on February 26, 2022.

Sanctions on the Russian Economy

The new round of U.S. sanctions announced on February 24, 2022 includes "significant and unprecedented" action to impose a severe economic toll on the Russian economy, including measures that target almost 80 percent of all banking assets in Russia. The sanctions specifically target Russia's two largest banks and also impose restrictions related to new debt and equity in more than a dozen Russian state-owned enterprises and large privately-owned financial institutions. Combined with the measures announced earlier in the week, these measures are designed to cut off large portions of the Russian economy from access to the U.S. financial system, crimping the ability of major Russian enterprises both to engage in dollar-denominated trade and to raise new capital.

Full Blocking Sanctions on VTB Bank and Other Financial Institutions

Pursuant to Executive Order ("E.O.") 14024, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") has enacted blocking sanctions on state-owned VTB Bank ("VTB"), Russia's second-largest financial institution and the holder of almost 20 percent of Russia's banking assets. As a result of this action, all of the bank's property and interests in property that come within U.S. jurisdiction are frozen and, except as authorized by OFAC, U.S. persons are generally prohibited from engaging in transactions involving VTB. By operation of OFAC's Fifty Percent Rule, similar restrictions apply to any entities that are owned, directly or indirectly, 50 percent or more by one or more blocked persons, including VTB. Notably, VTB is among the largest financial institutions that the United States has ever targeted with blocking sanctions.

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In addition to VTB, the United States concurrently imposed blocking sanctions on Otkritie, Sovcombank, Novikombank, and dozens of their majority-owned subsidiaries.

Correspondent and Payable-Through Account Sanctions on Sberbank

In a further measure targeted at Russia's financial sector, OFAC imposed correspondent and payable-through account ("CAPTA") sanctions through new Directive 2 under E.O. 14024 on Sberbank, the largest financial institution in Russia and the main creditor of Russia's economy. Although stopping short of full blocking sanctions like those imposed on VTB Bank—presumably on account of Sberbank's sheer size and centrality to the Russian economy—effective as of 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. The practical effect of this measure is that Russia's largest bank has been cut off from the U.S. financial system and U.S. dollar-denominated trade. The foreign financial institutions that are subject to CAPTA sanctions are identified on OFAC's List of Foreign Financial Institutions Subject to CAPTA ("CAPTA List").

Restrictions on New Debt and Equity

OFAC also issued Directive 3 under E.O. 14024 to place new debt and equity restrictions on 13 major Russian state-owned enterprises and financial institutions. Together, the targeted firms hold assets of nearly $1.4 trillion and will now be restricted from raising money in the U.S. capital market. In particular, these restrictions—which are broadly similar to the sectoral sanctions imposed on certain Russian enterprises in the wake of the Kremlin's 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: Sberbank, AlfaBank, Credit Bank of Moscow, Gazprombank, Russian Agricultural Bank, Gazprom, Gazprom Neft, Transneft, Rostelecom, RusHydro, Alrosa, Sovcomflot, and Russian Railways. From a policy perspective, these measures are designed to severely limit Russia's ability to raise new capital for its military activities in Ukraine.

Crucially, like existing sectoral sanctions on Russia, both of the new Directives announced by OFAC (Directives 2 and 3) are narrow in scope as both expressly provide that, absent some other prohibition, all other lawful U.S. nexus activities involving the targeted entities are permitted.

General Licenses

Concurrent with these sanctions, OFAC issued eight general licenses applicable under the Russian Harmful Foreign Activities Sanctions Program:

- 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.

- 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.

- 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.

- General License 8, "Authorizing Transactions Related to Energy," authorizes, until

June 24, 2022, certain transactions related to energy involving five named Russian entities and their subsidiaries. Transactions "related to energy" is specifically defined 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 issued prior to February 24, 2022. Any divestment or transfer of debt or equity relying on this authority must be made to a non-U.S. person.

- 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. Any payments to a blocked person must be made into a blocked account.

- General License 11, "Authorizing the Wind Down of Transactions Involving Certain Blocked Persons," 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 (rather than block) all transactions prohibited by E.O. 14024 involving certain blocked persons that are not authorized. Persons relying on this general license should review the implications for their rejected transaction reporting obligations to OFAC.

Sanctions on President Putin and Russian Elites

Following a meeting with NATO and other allies on Friday, February 25, 2022, OFAC designated Russian President Vladimir Putin, Minister of Foreign Affairs Sergei Lavrov, Minister of Defense Sergei Shoigu, and Chief of the General Staff Valery Gerasimov to the Specially Designated Nationals and Blocked Persons ("SDN") List pursuant to E.O. 14024. With this designation, President Putin joins the "exceedingly rare" company—including North Korea's Chairman Kim Jong Un, Syria's President Bashar al-Assad, and Belarus's President Alyaksandr Lukashenka—of sitting heads of states personally targeted by U.S. sanctions.

The announcement of sanctions against President Putin as an individual comes one day after OFAC also designated several members of the Russian elite—also called "enablers" of the President by OFAC—to the SDN List pursuant to E.O. 14024. Notably, OFAC designated Sergei Ivanov, Andrey Patrushev, and Ivan Sechin, all of whom are adult children of close Putin associates who had themselves either been previously designated or who were re-designated in connection with this latest round of sanctions. Additionally, OFAC designated several senior executives at state owned banks. In listing out the key Russian elites that have so far been designated, OFAC warned that it "will designate more in the future if Russia's unprovoked campaign against Ukraine does not immediately conclude."

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 an eponymous gas pipeline project that Germany halted the day before, as well as its chief executive officer. 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 2021. In announcing this significant policy shift, President Biden applauded 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 that provides a short, one-week wind-down period that expires on March 2, 2022.

Sanctions on Belarusian Financial Institutions and Defense Sector

After Russian troops positioned in Belarus launched an invasion in Ukraine on February 24, 2022, OFAC responded that same day by imposing sanctions not just on Russia but also on 24 Belarusian entities and individuals. Compared to the sanctions imposed on Russia, these Belarus-focused sanctions remain highly targeted. However, designations of Belarusian entities and individuals indicate Treasury's serious approach to any country that supports or facilitates Russia's invasion of Ukraine. The sanctions issued on February 24, 2022 focus primarily on two sectors of the Belarusian economy: financial institutions and the defense sector.

Belarusian Financial Institutions

Pursuant to Executive Order 14038, OFAC designated the state-owned Bank Dabrabyt and Belarussian Bank of Development and Reconstruction Belinvestbank ("Belinvestbank"), along with two of Belinvestbank's subsidiaries. E.O. 14038, issued in August 2021, 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." E.O. 14038 has previously been used to implement sanctions targeting "the degradation of democracy in Belarus" under the Lukashenka regime.

U.S. sanctions on certain Russian financial institutions (discussed above) are already expected to have a significant impact on the Belarusian economy. U.S. Secretary of the Treasury Janet Yellen commented that, "due to the interconnectedness between the two countries, the actions Treasury took against Russia [on Thursday, February 24, 2022] will also impose severe economic pain on the Lukashenka regime." When combined with the designation of the two Belarusian banks, these sanctions targeted nearly 20 percent of Belarus's entire financial sector.

Belarusian Defense Sector

OFAC also targeted Russia's reliance on the Belarusian defense and related materiel sector by designating ten defense industry entities, as well as executives of some of those entities, pursuant to E.O. 14038. 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."

In addition to these entities, OFAC 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.

Belarusian Elites

Beyond targeting financial institutions and the defense sector, OFAC continues to target Belarusian elites who support the Lukashenka regime's erosion of democracy in Belarus. The February 24, 2022 sanctions also included the designation of Aliaksandr Zaitsau and his company OOO Sokhra, which engages in gold mining and the promotion of Belarusian industrial products in Africa and the Middle East. According to OFAC, Zaitsau continues to maintain close ties to the Lukashenka family.

Concurrent with these designations of Belarusian entities and individuals, OFAC issued two general licenses related to the Belarus Sanctions Program:

- General License 6, “Official Business of the United States Government,” authorizes all otherwise prohibited transactions for the conduct of the U.S. Government’s official business.

- 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.

Expansion of Export Controls Targeting Russia

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 uses several policy tools, each described below, to create a dramatic expansion of restrictions on exports, reexports, and in-country transfers to Russia.

Importantly, in a notable gesture of multilateral coordination, BIS incorporated several exclusions for “partner countries” in the restrictions. “Partner countries” refer to those countries that are adopting or have expressed intent to adopt substantially similar export controls measures to those the United States has adopted, and can be found in a list provided in Supplement No. 3 to Part 746 of the EAR. Currently, “partner countries” include the European Union member states, Australia, Canada, Japan, New Zealand, and the United Kingdom.

Expansion of Item-Based Licensing Requirements

The Final Rule imposes additional license requirements for export, reexport, and in-country transfer to Russia of all items with Export Control Classification Numbers (“ECCNs”) in Categories 3–9 of the Commerce Control List (“CCL”)—which include, among others, dual-use items used in electronics design, development and production, computers, telecommunications, manufacturing, aerospace, navigation, and marine applications. The new license requirements impact items described under 58 separate ECCNs that were not previously controlled for export to Russia, and BIS will review all such license applications with a presumption of denial unless the planned exports are in support of a short list of end uses, such as safety of flight. The expansion of items controlled for export to Russia also means that foreign-made items that incorporate U.S.-controlled content that were not previously subject to U.S. export control licensing requirements will now be subject to those requirements when destined for Russia, unless they are being exported from countries that are adopting export controls similar to those the United States has now adopted. As a result, companies exporting from many countries may now need to reassess whether their products have become subject to BIS licensing requirements due to these changes.

Additionally, in line with earlier sanctions announced on February 21, 2022, there are new license requirements that impose an effective trade embargo on all exports, reexports, and in-country transfers to the separatist regions of Ukraine—the so-called Donetsk People’s Republic (“DNR”) and Luhansk People’s Republic (“LNR”). The license requirements are applicable for all items subject to the EAR, other than food and medicine designated as EAR99 and certain EAR99 or ECCN 5D992.c software for Internet-based communications.

These changes went into effect on February 24, 2022.

Extension of Export Licensing Requirements to New Products Produced Using Controlled Software and Technology

The United States has long controlled certain foreign-made products that were produced directly from certain national security-controlled U.S. software and technology or from plants or components of plants that were produced from this software and technology. Because these controls, called Foreign Direct Product (“FDP”) rules, hinge on the use of controlled software and technology, they effectively extend U.S. export controls to products made outside of the United States that do not otherwise incorporate U.S. content. Under this rule, U.S. export controls could be applied not only to chips that incorporate U.S.-origin processors, but also to any chips that are manufactured using certain U.S. equipment.

In 2020, seeking a new way to restrict supply chains to Huawei affiliates designated on BIS’s Entity List, BIS created a new FDP rule to reach semiconductors, computers, and telecommunication items that were directly produced using U.S.-origin software, technology, plants, or major components of plants that were destined for supply chains that involved Huawei in almost any role. BIS defined the concept of “direct product” in an especially broad way to include not only any item that incorporates any part, component, or equipment produced using the defined items, but also to capture any item used in their production. Thus, even products that were merely tested using the controlled equipment would now require export licensing when Huawei-affiliated entities designated on BIS’s Entity List were involved. The few short regulatory provisions and footnotes that described this new rule sent trade compliance specialists scrambling, even within suppliers many tiers removed from Huawei, to determine whether the software, technology, or equipment they were using to make their products was export-controlled in ways that made their products suddenly subject to new U.S. export licensing requirements.

In the Final Rule announced on February 24, 2022, BIS has now created two new FDP rules that will impact not just a single company in Russia, but a broad swath of both low- and high-technology sectors in the Russian economy. The first is an FDP rule that applies to all exports, reexports, and in-country transfers ultimately destined for Russia (the “Russia FDP Rule”), and the second is an FDP rule that applies to all exports, reexports, and in-country transfers ultimately destined for Russian military end users (the “Russia MEU FDP Rule”). We compare these rules side-by-side in the below table.

Russia FDP Rule	**Russia MEU FDP Rule**
Export of foreign-produced item would require a license if it is: 1. Produced with *certain* U.S.-origin software or technology subject to the EAR (*i.e.*, software or technology classified in CCL categories 3 through 9) or by certain plants or major components that are themselves the direct product of *certain* U.S.-origin software or technology subject to the EAR (again, software or technology classified in CCL categories 3 through 9); AND 2. Ultimately destined to Russia or will be incorporated into or used in the production or development of any part, component, or equipment produced in or destined to Russia.	Export of foreign-produced item would require a license if it is: 1. Produced with *any* software or technology subject to the EAR that is on the CCL or by certain plants or major components that are themselves the direct product of *any* U.S.-origin software or technology on the CCL; AND 2. Involves an entity with a “footnote 3 designation” on the Entity List as a party to the transaction, or there is knowledge that the item will be incorporated into or used in the production or development of any part, component, or equipment produced, purchased, or ordered by any entity with a “footnote 3 designation” on the Entity List.
Does not apply to foreign-produced items that would be designated as EAR99 (items not listed on the CCL), which includes many consumer items used by the Russian people.	Applies to all foreign-produced items, including those designated EAR99, with limited exceptions.

For the Russia MEU FDP Rule, the “footnote 3 designation” means that an entity will have, under the “license requirement” note on its Entity List designation, a citation that says “See § 734.9(g).[3]” Along with the creation of the Russia MEU FDP Rule, BIS immediately assigned the “footnote 3 designation” to nearly 50 entities, which means that a license is required to export, reexport, or transfer all FDP items to these entities and that license applications will be reviewed under a policy of denial. Forty-five of these entities, including the Ministry of Defence of the Russian Federation, were previously on the Commerce Department's Military End User ("MEU") List, but have now been moved to the Entity List, thus subjecting them to broader restrictions. Two new entities—the International Center for Quantum Optics and Quantum Technologies LLC, and SP Kvant—were newly added to the Entity List with footnote 3 designations.

Currently, all partner countries are fully excluded from the scope of both new FDP rules. This means that items produced in the partner countries would not be subject to the FDP rules' licensing requirements.

Although BIS has given exporters until March 26, 2022 to comply with the new FDP rules, we expect that it will take many companies much longer to assess whether the items they are making are now subject to either of the two new Russia-specific FDP rules. Especially given the breadth of the Russia MEU FDP Rule, we expect that many companies outside of Russia will simply cease all supply to designated and potential military end users in Russia.

Expansion of Military End Use and Military End User Controls

The Final Rule also expands the existing Russia 'military end use' and 'military end user' controls to all items subject to the EAR, with limited exceptions. Previously, the 'military end use' and 'military end user' controls had applied only to a subset of items identified in Supplement No. 2 to Part 744 of the EAR. Now, these controls apply broadly, with limited exceptions for food and medicine designated as EAR99 and items classified as ECCN 5A992.c or 5D992.c, so long as they are not for Russian "government end users" or Russian state-owned enterprises.

License Review Policy and License Exceptions

License requests under these new requirements will be reviewed with a policy of denial with limited exceptions. Exceptions to the license review policy, which are specific to an ECCN's reasons for control and would 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.

Next Steps

On February 26, 2022, the White House, together with the European Commission, France, Germany, Italy, the United Kingdom, and Canada, issued a joint statement announcing their commitment to impose further sanctions in response to “Putin’s war of choice,” including the removal of select Russian banks from the SWIFT network, the principal messaging system for global financial institutions to send and receive transaction-related information. In response to concerns that Russia has built up its foreign reserves to withstand the blow of Western sanctions, the countries also committed to preventing the Russian Central Bank from deploying its international reserves in ways that undermine the impact of sanctions. Japan signed on the joint statement during its day on February 27, 2022, completing the entire G7’s support for these upcoming measures.

A constant subject of policy discussions since the 2014 annexation of Crimea, removal of Russian banks from SWIFT did not seem to be gathering global support until just days ago. The joint statement represents both a seismic shift in policy and an impressive example of multilateral coordination, and the countries will be launching a joint task force that would carry on the spirit of coordinated sanctions implementation by identifying and freezing assets of sanctioned persons. However, details of how to achieve the selective SWIFT removal or Central Bank restrictions are yet to be finalized, and we will be following closely for more announcements.

The next steps are now dependent on Russia’s next moves. In a matter of just one week, the U.S. Government has issued a new Executive Order, several directives, designations, and general licenses under three different sanctions programs, as well as new export controls regulations. These measures were an outcome of significant multilateral coordination, by what President Biden called “a coalition of partners representing well more than half of the global economy.” As Russia continues its military incursion further into Ukraine, more Western sanctions are on the horizon. Russia, in turn, will begin considering its counteractions to respond to Western financial pressure. Following the Western sanctions in 2014, Russia responded with restrictions on agricultural imports and gas flows to Europe—this time, more could be in store, including the criminalization of compliance with foreign sanctions. As industry strives to understand these wide-ranging and complex new sanctions and export controls, we are likely to see more guidance from the U.S. Government to help foreign investors and multinational companies navigate the changing—and challenging—regulatory landscape.

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