When It Comes to Russia and Ukraine-Related Sanctions, OFAC Isn’t the Only Game in Town

Since March of this year, the United States has imposed an ever-expanding web of sanctions on Russian companies and individuals in response to alleged Russian interference in Ukraine. While most think of the Treasury Department’s Office of Foreign Assets Control (“OFAC”) as the primary agency enforcing U.S. sanctions policy, it isn’t the only agency with Russia in its crosshairs. Both the Commerce Department’s Bureau of Industry and Security (“BIS”) and the State Department’s Directorate of Defense Trade Controls (“DDTC”) have also been busy imposing export restrictions under the Export Administration Regulations (“EAR”) and International Traffic in Arms Regulations (“ITAR”), respectively, that complement the broader sanctions imposed by OFAC.

It is important to note that the scope of these restrictions are fundamentally different from those imposed by OFAC. OFAC sanctions apply only to foreign companies and persons in the United States and U.S. persons and companies anywhere in the world. The restrictions under the EAR and ITAR, however, apply to the items themselves, meaning that a foreign person who comes into possession of items subject to the EAR or controlled under the ITAR outside the United States is required to comply with these export restrictions when re-exporting a covered U.S.-origin item from a third country to Russia.

A summary of BIS and DDTC actions follows:

1) Restriction on Goods Exported to Military End-Users or for Military End-Uses in Russia: In September, BIS published a Final Rule extending the so-called “China Rule” in EAR §744.21 to transactions destined for Russia. This rule now imposes a license requirement for the export, re-export, or transfer of listed items when the exporter knows that the item is intended, entirely or in part, for a military end use or military end user in Russia.

2) Restrictions on Exports of “High Technology”: In April, BIS announced that it would deny pending applications for licenses to export or re-export any “high technology” item subject to the EAR to Russia or occupied Crimea that contributes to Russia’s military capabilities. DDTC similarly announced that it would deny licenses for export or re-export of “high technology” defense articles or services regulated under the U.S. Munitions List to Russia or occupied Crimea. Both agencies also stated that they were taking steps to revoke existing licenses for these items, although it is unknown how many licenses have been affected. As neither BIS nor DDTC provided additional guidance defining “high technology” or “contributing to Russia’s military capabilities” the criteria remain unknown and an exporter may only learn that they meet these criteria when their existing license is revoked or a pending license is rejected.
3) **Entity List Additions:** Since April, BIS has placed 28 Russian defense-related companies on its Entity List, imposing a license requirement for the export, re-export or in-country transfer of all items subject to the EAR to the listed entity, with a presumption of denial for such licenses. All 28 entities are also listed on OFAC’s Specially Designated Nationals and Blocked Parties ("SDN") List, which bars all transactions by U.S. persons with the listed persons.

A separate rule also placed 5 Russian oil companies on the Entity List, but with fewer restrictions than the 28 listed Russian defense companies. Specifically, a license is now required (with a presumption of denial) for export, re-export or in-country transfer of all items subject to the EAR to these five companies when for use directly or indirectly for exploration or production from certain Russian oil projects.

4) **Restrictions on Oil Production and Exploration Equipment:** An August 1 BIS Final Rule imposed a license requirement, with a presumption of denial, for listed items and data related to oil exploration and production when the exporter knows that the item will be used in exploration for, or production of, oil or gas in certain new Russian petroleum projects. A license requirement is also created for these items when the exporter is unable to determine whether the item will be used in such projects, regardless of actual destination.\(^1\)

These actions impose significant restrictions. OFAC press releases regarding new Russia sanctions have not mentioned actions taken by BIS on the same day against the same Russian entities and vice-versa. Adding to the confusion, BIS actions cover some, but not all, of the entities covered by OFAC and each agency maintains entirely separate regulations. As the tangled web of U.S. sanctions grows, so do the complications for those who must comply with them.

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1 These changes also revoked Russia’s enhanced favorable license review status under EAR §742.4(b)(2) for items controlled for National Security reasons. However, licenses for these items will still be subject to the general policy of approval accorded to most other nations in the absence of a high risk of diversion. Only Mongolia and Kazakhstan will now receive enhanced favorable licensing treatment for these items.
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