

Biden Administration Adds Sanctions Against Foreign Financial Institutions Supporting Russia's Military-Industrial Base

by Lawrence Ward, Justin T. Huff, Dave Townsend, and T. Augustine Lo

As the February 2022 Russian invasion of neighboring Ukraine approaches its second anniversary and as Russia has increasingly turned to covert relationships with third country providers to avoid U.S., European Union and other global sanctions, the Biden Administration recently added new secondary sanctions to target foreign financial institutions ("FFI") in third countries that participate in one or more "significant transactions" supporting Russia's military-industrial sector. These new FFI sanctions seek to hobble Russia's ability to wage war and expand the previous primary economic sanctions directed against Russian banks that have been in effect since 2021. The new rules resemble the secondary sanctions the United States had previously imposed on FFIs in third countries that choose to deal with Iran. The Office of Foreign Assets Control ("OFAC") in the U.S. Department of the Treasury administers these new FFI sanctions.

President Biden issued Executive Order 14114 ("EO 14114") on December 22, 2023^[1] to expand previous Russian sanctions, particularly those issued under Executive Order 14024 ("EO 14024").^[2] Under EO 14114, the Secretary of the Treasury, in consultation with the Secretary of State, may designate any FFI to prohibit its use of U.S. correspondent banking and payable-through accounts ("CAPTA") and to block any designated FFI's assets in the United States if it has engaged in one or more "significant transactions" or provided services to persons who are subject to EO 14024 sanctions or who have supplied certain items to the Russian military-industrial base. EO 14114's key operative language is laid out in Section 11(a), which states an FFI may be so designated if the Secretary of the Treasury and the Secretary of State conclude that it has:

(i) conducted or facilitated any significant transaction or transactions for or on behalf of any person designated pursuant to section 1(a)(i) of this order for operating or having operated in the technology, defense and related materiel, construction, aerospace, or manufacturing sectors of the Russian Federation economy, or other such sectors as may be determined to support Russia's military-industrial base by the Secretary of the Treasury, in consultation with the Secretary of State; or

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(ii) conducted or facilitated any significant transaction or transactions, or provided any service, involving Russia's military-industrial base, including the sale, supply, or transfer, directly or indirectly, to the Russian Federation of any item or class of items as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Commerce.

To implement this new FFI sanctions regime, the U.S. Treasury Department also issued concurrently on December 22, 2023 a new annex ("Annex") listing specific goods that are deemed to support the Russian military-industrial complex and that thus will provide the basis for imposition of the new FFI sanctions.^[3] These listed goods in the Annex include certain machine tools and manufacturing equipment; manufacturing materials for semiconductors and electronics; electronic test equipment; propellants and explosives; lubricants and additives; bearings; advanced optical systems; and navigation instruments.

The new FFI sanctions will have a broad scope as to entities that could become subject to an OFAC designation. EO 14114 defines FFIs to include "depository institutions; banks; savings banks; money services businesses; operators of credit card systems; trust companies; insurance companies; securities brokers and dealers; futures and options brokers and dealers; forward contract and foreign exchange merchants; securities and commodities exchanges; clearing corporations; investment companies; employee benefit plans; dealers in precious metals, stones, or jewels; and holding companies" and their affiliates and subsidiaries." At the same time, EO 14114 expressly excludes the International Fund for Agricultural Development, the North American Development Bank and certain other intergovernmental organizations from the FFI definition.

EO 14114 also amends the existing ban under EO 14068 against U.S. imports of Russian-origin fish, seafood, alcoholic beverages, and non-industrial diamonds. We previously reported on [this ban](#), which the Biden Administration issued in March 2022 in the wake of the Russian invasion of Ukraine. Now, under EO 14114, the U.S. Government may expand the EO 14068 import prohibition to reach products of third countries that use or incorporate such Russian-origin materials in their production. Significantly, this new EO 14114 ban would apply "notwithstanding whether such products have been incorporated or substantially transformed into other products outside of the Russian Federation." The U.S. Treasury Department concurrently issued a determination to implement this expanded scope with respect to any fish, seafood, and preparations, regardless of origin, that were made from salmon, cod, pollock or crab that are wholly or in part from the Russian Federation, or that was harvested in Russian waters or by Russian-flagged vessels.

OFAC also concurrently issued two transitional general licenses ("GLs") that allow for limited continuation of transactions that would otherwise be prohibited under EO 14114:

- GL 83 authorizes transactions that are ordinarily incident to the import of seafood preparations with respect to products that are subject to the new ban against goods made from Russian origin salmon, cod, pollock or crab. GL 83 will remain in effect

only until 12:01 am EST on February 21, 2024; and

- GL 84 authorizes U.S. financial institutions to engage in transactions to close correspondent and payable-through accounts for FFIs that are designated under the new CAPTA sanctions. However, a U.S. financial institution will have only 10 days to complete such closing transactions after such a designation has been made.

OFAC has also issued interpretive guidance for these expanded sanctions. OFAC FAQ 1148 explains that a FFI could become designated for sanctions by engaging in any of the following activities:

- Processing any “significant transaction” for persons that have been designated for EO 14024 sanctions because of their role in Russia’s military-industrial base;
- Processing any “significant transaction” or providing any service involving Russia’s military-industrial base, including
 - “maintaining accounts, transferring funds, or providing other financial services to persons, either inside or outside Russia, that operate in the specified sectors of the Russian Federation economy”; and
 - “facilitating the sale, supply, or transfer, directly or indirectly, to the Russian Federation of certain items critical to Russia’s war effort identified in the determination of December 22, 2023.”

OFAC also issued a “Guidance for Foreign Financial Institutions on OFAC Sanctions Authorities Targeting Support to Russia’s Military-Industrial Base” (“OFAC Guidance”).^[4] The OFAC Guidance specifically urges FFIs to refer to the Treasury Department’s Annex in conducting their due diligence efforts when transacting business that may be linked to Russia’s military-industrial base. The OFAC Guidance also provides examples of FFI due diligence practices that OFAC endorses.

Implications for FFIs and U.S. Importers

The new FFI sanctions under EO 14114 resemble other OFAC secondary sanctions such as the Iranian sanctions, which seek to dissuade persons in third countries from assisting persons already subject to OFAC’s primary sanctions. By calling out FFIs in third countries specifically, EO 14114 puts all such foreign banks on notice that they could lose access to the U.S. banking system and potentially even their ability to conduct any transactions in U.S. dollars if they provide banking or other financial services that support or assist Russia’s war-making capacity. OFAC has assisted FFIs’ compliance by publishing its OFAC Guidance and its Annex of listed goods that the U.S. Government considers to be critical to the Russian military-industrial base, which a FFI could consult as part of its due diligence into financial transactions with any parties that may have a nexus to Russia and its targeted industrial sectors.

It is striking that EO 14114 appears to have a potentially low threshold to trigger a secondary sanctions designation because, by the terms of Section 11(a), even a single “significant transaction” could lead to an FFI’s designation by the Secretary of the Treasury and the Secretary of State. Presumably, if even one such transaction could be enough to lead to such an FFI designation, then *a fortiori* engaging in a series of such transactions in support of the Russian military-industrial base would be even more

consequential under EO 14114.

In addition, U.S. importers should note that EO 14114's expanded import ban on certain Russian-origin goods differs from ordinary practice under U.S. customs law. The EO 14114 ban against derivative products means that U.S. importers cannot claim the benefit of "substantial transformation" of affected Russian-origin goods in a third country to avoid the new import ban. Since the 1930s, "country of origin" determinations for customs purposes generally have been governed by the "substantial transformation" rule, and U.S. importers have relied on that legal standard to determine the "country of origin" and applicable prohibitions for imported goods. Now, under EO 14114, U.S. importers may need to conduct more diligence to detect whether imported goods may incorporate any Russian-origin inputs even when the country of origin is outside Russia. EO 14114 also clarifies that its import ban applies to Foreign Trade Zones near U.S. ports, which are normally outside U.S. customs territory, but which cannot receive prohibited goods.

Fortunately, at least thus far, the range of goods affected by the EO 14114 import ban is quite narrow and limited to certain kinds of fish, seafood, and preparations. Nonetheless, perhaps anticipating the difficulty this new prohibition could have on certain customs operations for U.S. importers and for the federal law enforcement officers who must screen such imported goods, EO 14114 requires the Secretary of Homeland Security, with the concurrence of the Secretary of the Treasury, to prescribe new rules and regulations to collect data that would enhance the enforcement of the new regime.

If you have any questions regarding this eUpdate, please contact the attorneys profiled below. Dorsey's attorneys in its National Security Group regularly counsel clients to address and mitigate the impact of U.S. economic sanctions, trade embargoes, export controls, CFIUS reviews or other national security measures that may affect cross-border transactions.

[1] Taking Additional Steps with Respect to the Russian Federation's Harmful Activities

[2] EO 14024, issued on April 15, 2021, sought to deal with national security threats posed by specific Russian activities, including Russian efforts to undermine free and fair democratic elections and democratic institutions in the United States or in other allied nations; conducting or facilitating malicious cyber-related activities against the United States and its allies; encouraging and using transnational corruption to affect foreign governments; engaging in extraterritorial activities to target dissidents and journalists; weakening the security of countries or regions important to U.S. national security; and breaching established norms of international law, including respect for national territorial integrity.

[3] Determination Pursuant to Section 11(a)(ii) of Executive Order

[4] Guidance for Foreign Financial Institutions on OFAC Sanctions Authorities Targeting Support to Russia's Military-Industrial Base