

Second Round of U.S. Sanctions on Russia Pursuant to the Chemical and Biological Weapons Control

August 14, 2019

Key Points

- The U.S. Department of State and the U.S. Department of the Treasury, Office of Foreign Assets Control (OFAC) have imposed three new sanctions on Russia:
 - Effective August 26, 2019, U.S. banks (as defined below) are prohibited from (1) participating in the primary market for non-ruble denominated bonds issued by the “Russian sovereign” (which does not include state-owned enterprises) and (2) lending non-ruble denominated funds to the Russian sovereign.
 - Effective on or around August 19, 2019, subject to certain exceptions, license requests for exports to Russia of dual-use chemical and biological items controlled by the Department of Commerce will be subject to a “presumption of denial” policy, meaning that there is a high likelihood that all such license applications will in most if not all cases denied.
 - Also effective from on or around August 19, 2019, the United States will oppose the extension of any loan or financial or technical assistance to Russia by international financial institutions, such as the World Bank and International Monetary Fund.
- These new limited sanctions targeting Russia are required by the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (CBW Act) after Russia failed to provide adequate assurances that it would stop using chemical weapons following the administration’s determination last year that Russia used a “Novichok” nerve agent in an attempt to assassinate United Kingdom citizen Sergei Skripal and his daughter Yulia Skripal in March 2018.
- Several bills proposing additional new sanctions on Russia are pending in the U.S. Congress, which call for additional sanctions on Russian sovereign debt, among other measures. It is too soon to predict how the Administration’s latest actions will affect the prospects in Congress for enactment of such additional sanctions measures.

Background

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Enacted in 1991, the CBW Act requires the President to determine, based on available information, “whether a country has used chemical or biological weapons in violation of international law or has used lethal chemical or biological weapons against its own nationals,”¹ and if such a determination is made, then two progressively restrictive rounds of sanctions on the offending country are required (subject to certain waiver authority).

In March 2018, Russia is alleged to have used a chemical agent in attempt to assassinate the Skripals in Salisbury, England. On August 6, 2018, the U.S. Department of State determined, pursuant to the CBW Act, that the Government of Russia had used chemical or biological weapons in violation of international law or had used lethal chemical or biological weapons against its own nationals and, on August 27, 2018, imposed, at least in part, four of the five initial sanctions provided under the CBW Act (including termination of certain arms sales and arms sales financing and certain prohibitions of exports to Russia of certain national security-sensitive goods and technology).²

A second tranche of sanctions was required under the CBW Act unless, by November 6, 2018, the President determined and certified in writing to Congress that Russia:

- I. was no longer using chemical or biological weapons in violation of international law or using lethal chemical or biological weapons against its own nationals,
- II. had committed to ceasing such practices in the future and
- III. was willing to allow inspections by the United Nations or other internationally-recognized, impartial observers or other reliable means exist to ensure that Russia was not using chemical or biological weapons in violation of international law and was not using lethal chemical or biological weapons against its own nationals.

In November 2018, the President informed Congress that he could not certify that Russia met the above conditions and, as a result, under the CBW Act, the President was required to impose on Russia, subject to waiver authority, **at least three** additional sanctions from the list provided in the CBW Act.³

The Trump Administration delayed the imposition of this second tranche of sanctions for nine months. Under increasing and bipartisan pressure from Congress, most recently seen by a late July letter from House Foreign Affairs Chairman Eliot Engel (D-NY) and Ranking Member Michael McCaul (R-TX) that urged the President “to immediately impose the legally-mandated additional sanctions against Russia to hold it responsible for such brazen behavior,” President Trump imposed this second round of sanctions in early August 2019.

Second Tranche of CBW Act Sanctions

On August 2, in furtherance of newly issued Executive Order 13883,⁴ the State Department selected the following three of the menu of options for the second round of CBW sanctions to be imposed on Russia following a required Congressional notification period:⁵

- I. **Russian Sovereign Debt:** Effective August 26, 2019, U.S. banks will be prohibited from (1) participating in the primary market for non-ruble

denominated bonds issued by the “Russian sovereign”⁶ and (2) lending non-ruble denominated funds to the “Russian sovereign.”⁷

The term “U.S. bank” is defined broadly to mean “any entity organized under the laws of the United States or any jurisdiction within the United States (including its foreign branches), or any entity in the United States, that is engaged in the business of accepting deposits, making, granting, transferring, holding, or brokering loans or credits, or purchasing or selling foreign exchange, securities, commodity futures, or options, or procuring purchasers and sellers thereof, as principal or agent.”

As a result, OFAC’s guidance explains that “U.S. bank” includes but is not limited to depository institutions, banks, savings banks, trust companies, securities brokers and dealers, commodity futures and options brokers and dealers, forward contract and foreign exchange merchants, securities and commodities exchanges, clearing corporations, investment companies, employee benefit plans and U.S. holding companies, U.S. affiliates, or U.S. subsidiaries of any of the foregoing. “U.S. Bank” also includes branches, offices and agencies of **foreign financial institutions** that are located in the United States and otherwise meet the definition of “U.S. bank,” but not such institutions’ foreign branches, offices, or agencies.⁸

The term “Russian sovereign” means “any ministry, agency, or sovereign fund of the Russian Federation, including the Central Bank of Russia, the National Wealth Fund and the Ministry of Finance of the Russian Federation.” Importantly, this term does not include state-owned enterprises of the Russian Federation.⁹

OFAC’s guidance explicitly provides that trading of Russian sovereign debt in the secondary market is not prohibited.¹⁰

- II. **Further Export Restrictions:** Effective on or around August 19, 2019, license requests for exports to Russia of dual-use chemical and biological items controlled by the Department of Commerce will be subject to a “presumption of denial” policy. However, the new export restrictions will only apply to items controlled for Chemical and Biological Weapons (CB) reasons.

As a general matter, if an item subject to the U.S. Export Administration Regulations (EAR) is described on the Commerce Control List and controlled for CB reasons, then a license is required for export, re-export, or transfer to Russia, unless a license exception would authorize the particular item and transaction.

Before the new sanctions were imposed, when applying for a license, the Commerce Department’s Bureau of Industry and Security (BIS) and other reviewing agencies would review such applications on a case-by-case basis to determine whether the item would: (a) make a material contribution to the design, development, production, stockpiling or use of chemical or biological weapons, or (b) make a direct and significant contribution to Russia’s military capabilities. If so, in either case, the application would be denied. Under the newly announced export restrictions, such applications

for Russia will now be reviewed under a general policy of denial, regardless of the item's impact on chemical or biological weapons or military capabilities. In particular, licenses for exports of CB items to state-owned or state-funded entities in Russia will be subject to a "presumption of denial" policy. Exceptions to BIS's export licensing requirements will continue to be available for U.S. firms fulfilling existing contracts with Russian customers and license requests for certain types of transactions will continue to be considered for approval on a case by case basis.¹¹

Companies should review whether they export any CB controlled items to Russia.

Even though most license applications for export of CB items to Russia will now be reviewed under a general policy of denial, the carve outs implemented by the U.S. government for certain transactions, including fulfillment of existing contracts, commercial end users/end uses in Russia, wholly-owned subsidiaries of U.S. and other foreign companies in Russia and deemed export licenses for Russian nationals, will mitigate the impact of this new policy of denial.

- III. **Multilateral Development Bank Assistance:** Effective on or around August 19, 2019, the United States will oppose the extension of any loan or financial or technical assistance to Russia by international financial institutions, such as the World Bank and International Monetary Fund. In practical terms, this is not intended to have a significant impact as Russia has not been seeking such loans or assistance from these international financial institutions.

Conditions for Removal of Second Tranche of CBW Sanctions Unlikely to be Met

The above sanctions will take effect on or around August 19, 2019 (with the exception of the **Russian Sovereign Debt** sanction, which takes effect on August 26, 2019) and will remain in place for a minimum of 12 months. Thereafter, lifting the sanctions requires a determination by the President that Russia has met several conditions described in the CBW Act, including providing reliable assurances that:

- I. Russia is not making preparations to use chemical weapons;
- II. Russia has provided assurances it will not use chemical weapons in the future;
- III. Russia has allowed international inspectors to verify those assurances; and
- IV. Russia has paid restitution to the victims of the Skripal incident in Salisbury, UK.

As these conditions are unlikely to be met, we would expect these sanctions to remain in effect for the foreseeable future.

Potential Further Restrictions on Russian Sovereign Debt

While this second tranche of CBW sanctions meets the requirements of the CBW Act, they are expected to have a limited practical impact.

Facing increasing calls for action against Russia, it is unclear at this time whether the U.S. Congress will take further action with respect to Russian sanctions and in

particular, with respect to Russian sovereign debt. Legislation has been pending in Congress for quite some time that would further target Russian sovereign debt. These bills include sanctions that would apply regardless of currency and to any U.S. person (not only U.S. Banks) dealing in Russian sovereign debt (whether on the primary or secondary market) issued a certain period (e.g., 90 or 180 days) **after** date of enactment of the specific legislation.

The following bills include provisions that would restrict dealing in Russian sovereign debt:

I. **Sherman/Waters Amendment to the National Defense Authorization Act (NDAA) for FY 2020**

- Provides that “[n]ot later than 90 days after the date of the enactment of the [NDAA], [t]he President shall issue regulations prohibiting United States persons from engaging in transactions with, providing financing for, or in any other way dealing in Russian sovereign debt that is issued on or after the date that is 180 days after such date of enactment,” but that the President shall suspend this prohibition if the Director of National Intelligence (DNI) determines that Russia has not knowingly engaged in interference in the most recent election for Federal office, and Congress has passed a joint resolution certifying this determination.
- **Status:** This provision was passed in the House version of the NDAA (not the Senate), but the two chambers will reconcile difference in conference committee in the coming months. Senators Marco Rubio (R-FL) and Chris Van Hollen (D-MD) have recently urged the senators leading the conference committee to “modify and strengthen” the final NDAA by “[m]ak[ing] the sovereign debt sanctions contingent on a finding of election interference by the DNI.”¹²

II. **Defending American Security from Kremlin Aggression Act of 2019 (DASKAA)**

- Provides that “[n]ot later than 60 days after the date of the enactment of [DASKAA], the President shall prescribe regulations prohibiting United States persons from engaging in transactions with, providing financing for, or otherwise dealing in, Russian sovereign debt issued on or after the date that is 90 days after such date of enactment.” There is no relationship between the provision and any finding of election interference by the DNI.
- **Status:** Referred to the Senate Foreign Relations Committee. Senate Foreign Relations Committee Chairman Jim Risch (R-ID) stated on July 31 the committee would consider DASKAA, although the timing is not yet clear.

III. **Defending Elections from Threats by Establishing Redlines Act of 2019** (the “DETER Act”)

- Provides that not later than 30 days **after a determination by the DNI** that Russia “knowingly engaged in interference in a United States election,” the Secretary of the Treasury “shall, pursuant to such regulations as the Secretary may prescribe, prohibit all transactions within the United States

or by a United States person, in (A) sovereign debt of the Government of the Russian Federation issued on or after the date of enactment of this Act, including governmental bonds; and (B) debt of any entity owned or controlled by the Russian Federation issued on or after such date of enactment, including bonds.”

- **Status.** Referred to the Senate Banking Committee. However, the bill’s sponsors, Sen. Rubio and Sen. Van Hollen, are attempting to include this provision in the final NDAA, as described in point (1) above.

While the DETER Act does not define “Russian sovereign debt,” the Sherman-Waters Amendment and DASKAA broadly define “Russian sovereign debt” to include:

- bonds issued by the Central Bank, the National Wealth Fund, or the Federal Treasury of the Russian Federation, or agents or affiliates of any of those entities, with a maturity of more than 14 days;
- foreign exchange swap agreements with the Central Bank, the National Wealth Fund, or the Federal Treasury of the Russian Federation with a duration of more than 14 days; and
- any other financial instrument, the duration or maturity of which is more than 14 days, that “(A) was issued by a Russian financial institution on behalf of the Government of the Russian Federation; or (B) the President determines otherwise represents the sovereign debt of the Government of the Russian Federation.”

¹ 22 U.S.C. § 5604(a).

² *Id.* § 5605(a).

³ *Id.* § 5605(b).

⁴ On Thursday August 1, President Trump issued [Executive Order 13883](#) (EO 13883), which amended existing authority delegating the implementation of two specific types of sanctions under the CBW Act to the Secretary of the Treasury, in consultation with the Secretary of State. While EO 13883 refers to two sanctions, the CBW Act mandates the President to impose at least three sanctions from a menu of six options.

⁵ Fact Sheet, U.S. Dep’t of State, Second Round of Chemical and Biological Weapons Control and Warfare Elimination Act Sanctions on Russia, (Aug. 2, 2019), <https://www.state.gov/second-round-of-chemical-and-biological-weapons-control-and-warfare-elimination-act-sanctions-on-russia/>.

⁶ New OFAC [FAQ #675](#) makes clear that the sanctions above “do not apply to bonds or loans denominated in rubles” (e.g., Russia’s OFZ treasury bonds).

⁷ To implement these sanctions, OFAC issued a Directive (“the CBW Act Directive”) pursuant to EO 13883. U.S. Dep’t of Treasury, Russia-Related Directive Under Executive Order of August 1, 2019, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/20190803_cbw_directive.pdf.

⁸ See CBW Act Directive; [FAQ #676](#).

⁹ *Id.*

¹⁰ [FAQ #678](#) clarifies that the CBW Act Directive “does not prohibit U.S. banks from participating in the secondary market for Russian sovereign debt.”

¹¹ Licenses will continue to be considered for approval on a case-by-case basis for: (1) Exports needed for space flight activities, including those involving government space cooperation and commercial space launch; (2) Exports needed to ensure the safe operation of commercial passenger aviation; (3) Exports to commercial end-users in Russia for civil end-uses; (4) Exports to wholly-owned subsidiaries of U.S. and other foreign companies in Russia; and (5) Deemed export licenses for Russian nationals working in the United States.

¹² Press Release, Office of Sen. Chris Van Hollen, Van Hollen, Rubio Push for DETER Act in NDAA Conference Negotiations, (July 29, 2019), <https://www.vanhollen.senate.gov/news/press-releases/van-hollen-rubio-push-for-deter-act-in-ndaa-conference-negotiations>.

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