

## Russia Sanctions Update: OFAC Issues Guidance on “New Investment” and Management Consulting Bans

***OFAC has also extended certain general licenses, while BIS has continued to restrict exports to Russia.***

This Client Alert is published in the context of ongoing developments and should be read in conjunction with the Latham & Watkins Client Alerts published on [June 15](#), [June 10](#), [May 13](#), [April 12](#), [March 11](#), [March 8](#), [March 1](#), and [February 25](#).

This Client Alert summarizes the latest sanctions and trade restrictions that the US has imposed, and the guidance OFAC has issued in support of those restrictions. Different jurisdictions are introducing new sanctions, export restrictions, and other legal and regulatory measures on a regular basis. Companies exposed to sanctions-related developments in Russia should obtain up-to-date legal advice before taking any steps that may have legal effects.

### Guidance on “New Investment” Bans

On June 6, 2022, OFAC issued a series of FAQs that provide guidance on three recent Executive Orders, which are described in greater detail in the Client Alerts dated [April 12](#) and [March 11](#), each of which imposed bans on certain “new investment” in Russia:

- [Executive Order 14071](#), which on April 6, 2022, banned new investment in Russia by a US person;
- [Executive Order 14066](#), which on March 8, 2022, banned new investment in the Russian energy sector by a US person; and
- [Executive Order 14068](#), which on March 11, 2022, banned new investment in any sector of the Russian economy determined by the Secretary of the Treasury, in connection with the Secretary of State (Treasury has yet to make any such determination).

Key aspects of the FAQs — described further below — include a definition for “new investment” in this context ([FAQ 1049](#)); a description of the types of activities in which US persons can engage to “maintain” ([FAQs 1050 and 1052](#)) and divest from ([FAQ 1053](#)) an existing investment in Russia; and clarification that the purchase of shares in a US fund that contains debt or equity securities issued by entities in Russia “generally would not be considered a prohibited ‘new investment’” provided that the holdings

account for less than a “predominant share by value of debt or equity securities issued by entities in” Russia ([FAQ 1054](#)). OFAC also confirmed that a US person does not engage in a prohibited “new investment” in Russia by lending funds to, or purchasing an equity interest in, entities located outside of Russia assuming the investment is not closely linked to Russia, as described in more detail below.

- **Definition of “new investment”:** [FAQ 1049](#) defines “investment” for the purpose of Executive Orders 14071, 14066, and 14068 as “the commitment of capital or other assets for the purpose of generating returns or appreciation.” It further clarifies that a “new” investment is one “made on or after the effective date of the respective [Executive Order] prohibitions.” FAQ 1049 also provides a series of examples of investments that qualify as a prohibited “new investment” and others that fall outside the scope of “new investment.” Notably, in applying the June 6 guidance, OFAC amended FAQ 1019, which had previously defined “new investment” in the context of the March 8 energy sector new investment ban.
- **Lending funds to or purchasing equity in entities located outside of Russia:** [FAQ 1055](#) provides that the bans on “new investment” do not prevent US persons from lending funds to, or purchasing an equity interest in, entities located outside of Russia assuming two conditions are met: (1) the funds are not “specifically intended for new projects or operations” in Russia and (2) the entity located outside of Russia generates revenue that is “not predominantly derived from its investments” in Russia. OFAC explains that US persons may rely on information available in the ordinary course of business to make these two assessments. This FAQ generally confirms the permissibility of engaging in large M&A transactions that may include a small Russian operation within the deal perimeter.
- **Maintenance of existing investments and operations:** [FAQ 1050](#) clarifies that the three Executive Orders banning “new investment” in Russia exclude from the scope of prohibited new investment “the maintenance of investments in the Russian Federation that were made prior to the effective dates of the respective [ ] prohibitions (‘pre-existing projects or operations’).” The FAQ explains that “maintenance,” as a general matter, includes all transactions “ordinarily incident” to performing under an existing agreement, including transactions that ensure continuity of pre-existing projects or operations in Russia, including paying employees, suppliers, landlords, lenders, and partners; preserving and providing for the upkeep of pre-existing tangible property in Russia; and “activities associated with” maintaining pre-existing capital investments or equity investments. [FAQ 1052](#) explains that US persons can continue to fund their subsidiaries and affiliates with respect to projects or operations located in Russia, so long as those activities are consistent with “maintenance” and do not expand pre-existing projects or operations.
- **“New investment” prohibitions are not trade bans:** [FAQ 1051](#) confirms that the prohibitions on “new investment” do not prohibit the export or import of goods, services, or technology, or related sales or purchases, to or from Russia, so long as those arrangements are made “pursuant to ordinary commercial sales terms.” Note that US export control requirements relating to exports or reexports of US-regulated items also need to be considered.
- **Divestment-related transactions and related facilitation:** [FAQ 1053](#) provides that the bans on “new investment” do not prohibit the divestment or facilitation of divestment of a pre-existing investment. The FAQ clarifies that each of the three Executive Orders’ respective bans on facilitation of prohibited activity “do not prohibit U.S. persons from facilitating the wind down or divestment of an existing investment in the Russian Federation, provided that such facilitation is on behalf of the selling party only.” The FAQ does not address whether the bans on “new investment” prohibit deferred payment in connection with a divestment.

- **Prohibition of purchase of debt or equity securities issued by a Russian entity:** [FAQ 1054](#) provides that Executive Orders 14071, 14066, and 14068 prohibit the purchase of both new and existing debt and equity securities issued by an entity in Russia. This interpretation, as a general matter, prohibits US persons from engaging in secondary market trading in pre-existing bonds and debt issued by Russian companies.

According to FAQ 1054, the three Executive Orders do not prohibit the sale or divestment of — or facilitating the sale or divestment of — debt or equity securities issued by an entity in Russia to a non-US person. The FAQ also states that a US person may continue to hold such previously acquired securities, and to convert depositary receipts to underlying local shares non-sanctioned Russian issuers consistent with Executive Orders 14071, 14066, and 14068.

Finally, FAQ 1054 clarifies that the purchase of shares in a US fund that contains debt or equity securities issued by entities in Russia “generally would not be considered a prohibited ‘new investment,’” provided that “these holdings represent less than a predominant share by value of debt or equity securities issued by entities in” Russia. FAQ 1054 does not define what a “predominant share” means in this context, but common readings in other sanctions programs include treating “predominance” as a majority share or as the single largest share.

## Guidance on Ban on Management Consulting and Related Services

As noted in our [May 13](#) Client Alert, OFAC on May 8, 2022, issued a [determination](#) pursuant to [Executive Order 14071](#) (the Determination) that prohibits the export, reexport, sale, or supply, directly or indirectly, from the United States or by a US person, wherever located, of accounting, trust, and corporate formation and management consulting services to any “person located in the Russian Federation.” The Determination came into effect on June 7, 2022.

On June 9, 2022, OFAC issued several FAQs clarifying the scope of this prohibition:

- **Definition of “person located in the Russian Federation”:** [FAQ 1058](#) defines “person located in the Russian Federation” for purposes of the Determination to include “persons in the Russian Federation, individuals ordinarily resident in the Russian Federation, and entities incorporated or organized under the laws of the Russian Federation or any jurisdiction within the Russian Federation.” OFAC has not defined the term “ordinarily resident” in the context of this or other US sanctions programs.
- **Persons outside the Russian Federation:** [FAQ 1059](#) explains that the Determination does not prohibit US persons from providing services to persons located outside Russia that are owned or controlled by a “person located in the Russian Federation,” provided the provision of services does not constitute an “indirect export” to a “person located in the Russian Federation” (including when the benefit of the services is ultimately received by such person).
- **Serving as director in a Russian company:** [FAQ 1060](#) notes that the Determination does not, in itself, prohibit US persons from serving as directors of companies located in Russia, although it does prohibit US persons from providing nominee officer or director services in which a US person is contracted to serve as a nominee officer, director, shareholder, or signatory of a legal person on behalf of a person located in Russia.
- **Employment by Russian entities:** [FAQ 1061](#) provides that the Determination does not prohibit US persons from working as employees of entities located in the Russian Federation, although it does

prohibit US persons from exporting, reexporting, selling, or supplying, directly or indirectly, management consulting, trust and corporate formation services, and accounting services to persons located in the Russian Federation in their capacity as employees.

- **Providing services to Russian parent companies:** [FAQ 1062](#) confirms that the prohibitions imposed by the Determination apply to services provided to a parent company located in the Russian Federation by a US subsidiary.
- **New and existing trusts and companies:** [FAQ 1063](#) notes that the prohibitions imposed by the Determination do not distinguish between new and existing trusts and companies, meaning that US persons are prohibited from providing trust and corporate formation services to persons located in the Russian Federation, “regardless of whether the services are performed as part of the formation of a new trust or company, or as part of the administration or maintenance of an existing trust or company.”
- **Executive search and vetting services:** [FAQ 1064](#) states that, for purposes of the Determination, OFAC interprets “management consulting services” to include executive search and vetting services.
- **Voting trustee services:** [FAQ 1065](#) provides that the Determination prohibits US persons from serving as voting trustees on behalf of, or for shares of, persons located in the Russian Federation, unless exempt or authorized by OFAC.
- **Educational services:** [FAQ 1066](#) notes that the Determination does not prohibit the provision of educational services, such as online university courses, on the subjects of accounting, management consulting, or trust and corporate formation to persons located in the Russian Federation, provided such services do not serve to evade or avoid the primary prohibitions.
- **Software and related services:** [FAQ 1067](#) confirms that the Determination does not prohibit US persons from exporting, reexporting, selling, or supplying, directly or indirectly, software to the Russian Federation, nor does it prohibit US persons from providing services associated with the export of such software, such as software design and engineering, provided that such associated services do not fall within the categories of management consulting, accounting, or trust and corporate formation. Note that US export controls further regulate the export or reexport of certain software to Russia.
- **Tax services:** [FAQ 1068](#) clarifies that, for purposes of the Determination, “accounting services” include tax preparation and filing services.

## Extension of OFAC General Licenses 8 and 13

On June 14, 2022, OFAC issued [General License No. 8C](#), which extends until December 5, 2022, the previous authorization for transactions “related to energy” involving certain sanctioned Russian financial institutions (which was set to expire on June 24, 2022). This general license authorizes energy-related dealings involving the following entities: VEB; Otkritie; Sovcombank; Sberbank; VTB Bank; Alfa-Bank; any entity in which the foregoing own a 50% or greater interest; and the Central Bank of the Russian Federation.

As noted in OFAC [FAQ 977](#), the term “related to energy” means 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.

On May 25, OFAC issued [General License No. 13A](#), which continues until September 30, 2022, the ability of US persons to “pay taxes, fees, or import duties, and purchase or receive permits, licenses, registrations, or certifications,” to the extent such activities would be prohibited by Directive 4 issued pursuant to Executive Order 14024, provided such transactions are “ordinarily incident and necessary to the day-to-day operations in the Russian Federation of such U.S. persons or entities.” This authorization was previously set to expire on June 24, 2022.

## SDN Designations

On June 2, 2022, OFAC [added](#) several individuals, entities, and vessels to its Specially Designated Nationals and Blocked Persons List, a list of persons that are virtually off-limits to US persons, absent OFAC authorization. These designations include investment firm Severgroup, steel producer Severstal, mining company Nord Gold, and Alexey Mordashov.

In connection with these SDN designations, OFAC issued [General License No. 36](#) and [General License No. 37](#), which authorize certain transactions ordinarily incident and necessary to the wind down of transactions involving Severstal and Nord Gold, respectively.

## Export Controls Developments

On June 6, 2022, the US Commerce Department’s Bureau of Industry and Security (BIS) issued a new [rule](#) that, among other things, revises, corrects, and clarifies certain provisions of the Export Administration Regulations (EAR) relevant to the increasingly restrictive export controls on Russia and Belarus.

- Export of EAR99 food and medicine for “military end uses” and “military end users”:** BIS amended the EAR to require prior licensing for exports of EAR99 food and medicine destined to Russian and Belarusian “military end uses” and “military end users.” BIS explained that it was taking this action because food and medicine “may significantly contribute to the sustainment and reconstitution of Russian military forces engaged in combat in Ukraine.” While license applications for all other US-regulated items destined for Russian and Belarusian “military end uses” and “military end users” are subject to a license review policy of denial, BIS will review applications for the export of food and non-sensitive medicines under a case-by-case license review policy. The new license requirement does not capture exports of EAR99 food and medicine to the people of Russia (that are not military end users) or to the areas in Ukraine targeted by a comprehensive US embargo (currently, the Crimea region, the so-called Donetsk People’s Republic, and the so-called Luhansk People’s Republic).
- New Entity List designations:** BIS [added](#) 71 entities to the Entity List under the destinations of Belarus and Russia. The End-User Review Committee determined that 66 of these entities are Russian or Belarusian “military end users” and will be subject to the Russia/Belarus foreign direct product (FDP) rule.
- Publication of charging letters:** BIS revised Section 766.20 of the EAR, which governs the public availability of documents in administrative enforcement proceedings. Enforcement case charging

letters filed with an Administrative Law Judge on or after June 2, 2022, can be made available to the public prior to the final administrative disposition of the case. BIS explained that the change “will enhance BIS’s transparency efforts, including with respect to actions related to Russia and Belarus export controls,” and “BIS will be able to inform interested parties of ongoing enforcement efforts in a more timely way and educate the exporting community, particularly with respect to recent amendments to the EAR that could result in new bases for enforcement action,” allowing the exporting community to enhance their compliance programs. Since this rule took effect, BIS has released [two charging letters](#), [one of which](#) relates to the unauthorized reexport of items to Russia.

## What’s Next?

Latham & Watkins is tracking developments across all regions closely and expects that the US, the EU, the UK, and other governments around the world may impose additional rounds of sanctions as events unfold. The firm is well positioned to advise clients on the legal and practical impacts of these measures.

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