

Locke Lord QuickStudy: OFAC Russia Related Sanctions Update: ??March 30, 2023?

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On February 24, 2022, the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") issued a series of new export controls related to restrictions on trade with Russia and Belarus. The Russia / Belarus final rule expands the Export Administration Regulation ("EAR") (i) industry sector and (ii) luxury goods sanctions against Russia and Belarus due to Belarus' support of Russia's illegal hostilities against Ukraine.

BIS also designated over 85 additional entities to the BIS Entity List for acting contrary to U.S. interests. BIS determined that the recently designated entities assisted Russia's aggression against Ukraine by one or more of the following acts: (i) providing biometric technology used to suppress Ukrainian resistance and enforce loyalty among the Ukrainian population in occupied areas, (ii) acquiring and attempting to acquire U.S.-origin items in violation of the EAR, to support Russia's war efforts, or (iii) making significant contributions to Russia's military and/or defense industrial base.

BIS states that its measures are intended to align U.S. controls with those imposed by U.S. allies and demonstrate the Biden Administration's commitment to use economic and trade sanctions to limit Russian access to U.S. technology and goods that Russia has used against Ukraine. We believe based on these actions that the U.S. and its allies will continue to target countries and non-Russian companies that assist Russia's aggression against Ukraine. To date, however, neither the U.S. Office of Foreign Asset Control ("OFAC") nor BIS have been authorized to impose secondary sanctions against third parties that do business with Russia, similar to those secondary sanctions authorized under the Iran sanctions program.

Russia-Belarus Amendments to the EAR

The Russia / Belarus rule amends the EAR by expanding the scope of the items that are subject to the Russian and Belarusian Industry Sector sanctions and luxury goods restrictions. The Russia / Belarus rule also adds a license includes "components," "parts," "accessories," and "attachments" of listed items.

To implement the new rule, BIS:

- revised supplement no. 2 to part 746 of the EAR, whereby BIS clarified that Belarus is subject to the same export controls under the industry sector sanctions as Russia;
- revised supplement no. 4 to part 746 by adding 322 additional six-digit HTS codes corresponding to 322 industrial items that require a license for export or re-export to or transfer within Russia or Belarus. In order to align EAR controls with those of our allies, the Russia Belarus rule removes references to "Schedule B numbers and descriptions" and instead utilizes 6-digit Harmonized Tariff Schedule codes. The Harmonized

System (HS) Codes are commonly used throughout the export process for goods and are more readily recognized by exporters. Schedule B codes, which are administered by the United States Census Bureau, are used to track the amount of trade goods that are being exported from the U.S.;

- in supplement no. 6 to part 746, the rule expands the list of chemical and biological and related EAR99 items that require a license for export or re-export to Russian or Belarus;
- amended supplement no. 5 to part 746 of the EAR (luxury goods) by adding 276 additional entries that require a license for export or re-export to or transfers within Russia or Belarus and for designated Russian and Belarusian oligarchs and malign actors globally; and
- to assist companies with the exit from Belarus and Russia, the Russia Belarus rule adds a new case-by-case license review policy for applications for the disposition of items by companies not headquartered in Country Group D:1, D:5, E:1 or E:2 that are curtailing or closing all operations in Russia or Belarus.

Since Taiwan implemented similar sanctions against Russia, the BIS added Taiwan to supplement no. 3 to part 746 of the EAR, which identifies countries that are excluded from certain export controls on Russia and Belarus, including the Russia/Belarus Foreign Direct Products rules and Russia/Belarus de minimis rules.

We note that (i) BIS states that any application for a specific license to export listed products to Russia or Belarus will be met with a policy of denial, subject to certain limited exceptions, and (ii) EAR99 items are those goods and technologies that not specified on the BIS Commerce Control List.

Additions to the BIS Entity List

Through two separate actions (“Additions of Entities to the Entity List” (February 24, 2023) and “Additions of Entities to the Entity List; Revisions of Entities on the Entity List” (February 27, 2023), BIS added 86 entities operating in Canada, France, China, Russia, Luxembourg and the Netherlands to the Entity List for their activities in support of Russia’s defense-industrial sector and war effort. Exports to these entities are subject to licensing requirements under the EAR. Seventy-six of these entities are also being designated as “Russian/Belarusian Military End Users,” which imposes severe export restrictions, essentially prohibiting these entities from obtaining items subject to the EAR, including certain items made outside the U.S. (*i.e.*, foreign-produced items); even when these entities are located in allied countries.

Joint BIS/DOJ/OFAC Compliance Note

On March 2, 2023, the BIS, the U.S. Department of Justice (“DOJ”), and OFAC jointly issued a compliance note (“Compliance Note”) on the use of third-party intermediaries or transshipment points to evade Russian- and Belarusian-related sanctions and export controls. The Compliance Note is intended as warning to those who would try to circumvent U.S. sanctions and export controls and also provides guidance to the business community on how to compliance with U.S. sanctions and export laws.

The Compliance Note urges businesses to implement and routinely update a risk-based compliance program to address sanctions and export controls compliance based on the organization’s size, involvement of third-party intermediaries, products and services it offers, counterparties it transacts with and geographic locations involved in the business. An effective compliance program includes risk assessments, internal controls, testing, auditing and training and encourage personnel to identify and report potential violations of U.S. sanctions and export controls to relevant compliance personnel.

Business should be on the alert for “red flags” that could indicate that their customers or intermediaries may be engaging in efforts to evade U.S. sanctions or export controls. These red flags include:

- the customer’s reluctance to share information about the end use of a product, including reluctance to complete an end-user form;
- use of corporate vehicles (*i.e.*, legal entities such as shell companies, and legal arrangements) to obscure ownership, source of funds, or countries involved, particularly sanctioned jurisdictions;
- IP addresses that do not correspond to a customer’s reported location data;
- payment for products coming from a third-party country or business not listed on the End-User Statement or other applicable end-user form;
- use of personal email accounts instead of company email addresses;
- declining customary installation, training, maintenance of the purchased item(s);
- transactions involving a change to shipments or payments that were previously scheduled for Russia or Belarus;
- changes to standard letters of engagement that obscure the ultimate customer;
- routing purchases through certain transshipment points commonly used to illegally redirect restricted items to Russia or Belarus, such as China, Hong Kong, Armenia, Turkey and Uzbekistan;
- partitioning of shipments of controlled items into multiple, smaller shipments to try to avoid law enforcement detection;
- use of aliases to obscure the identities of the intermediaries and end users; and
- transfers of funds from shell companies in foreign jurisdictions into U.S. bank accounts and quickly transferring those funds to obfuscate the audit trail or the foreign source of money.

Conclusion

This paper is intended as a guide only and is not a substitute for specific legal or tax advice. Please reach out to the authors for any specific questions. We expect to continue to monitor the topics addressed in this paper and provide future client updates when useful.

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