

THE US IMPOSES ADDITIONAL SANCTIONS ON RUSSIA IN RESPONSE TO THE UK "*NOVICHOK*" INCIDENT

On August 2, 2019, the US announced that new sanctions will be imposed on Russia as required under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (the "CBW Act") in response to the March 2018 "*novichok*" nerve agent incident against Sergei and Yulia Skripal in the UK. The additional sanctions relate to US bank loans to the Russian government, US opposition to multilateral development bank assistance, and further US Commerce Department licensing restrictions on exports to Russia.

Additional sanctions against Russia under the CBW Act have been expected since late 2018, but the Trump Administration has delayed their roll-out. The sanctions arise from an August 6, 2018, determination by the US State Department that the Russian government had violated the CBW Act, citing the "*novichok*" incident in the UK. This determination triggered the imposition of a first round of sanctions against Russia and created the possibility of a second round of sanctions. The first round of sanctions took effect on August 27, 2018. They largely duplicated existing US government restrictions on Russia-related business and, therefore, served primarily a symbolic purpose. However, on November 6, 2018, the State Department notified the US Congress that it also might implement a second round of sanctions.

Members of the US Congress have been pressuring the Trump Administration to impose the second round of sanctions. On August 1, 2019, the White House issued an "Executive Order on the Administration of Proliferation Sanctions and Amendment of Executive Order 12851" authorizing the imposition of additional sanctions, and on August 2, 2019 the State Department issued a Fact Sheet announcing the sanctions.¹

The CBW Act requires that at least three, from a menu of six, sanctions be imposed as a second round of sanctions, but allows the President to issue certain

Key issues

- US banks, broker-dealers and investment companies are prohibited from participating in the primary market (but not the secondary market) for non-ruble Russian sovereign bonds on or after August 26, 2019.
- US banks are prohibited from lending non-ruble denominated funds to the Russian government (excluding state-owned entities) on or after August 26, 2019.
- Further Commerce Department export licensing restrictions apply to exports of controlled chemical and biological items to Russia, but with case-by-case consideration of license applications in a number of areas, including commercial end-users in Russia for civil end-uses.

¹ The State Department's Fact Sheet is available at: <https://www.state.gov/second-round-of-chemical-and-biological-weapons-control-and-warfare-elimination-act-sanctions-on-russia/>.

US national security waivers. The State Department has selected three sanctions related to multilateral development bank assistance, US bank loans, and further export licensing restrictions to impose on Russia.

Multilateral Development Bank Assistance

The new sanctions will require the United States to oppose the extension of any loan or financial or technical assistance to Russia by international financial institutions, such as the World Bank or International Monetary Fund.

US Bank Loans

As a result of the President issuing a national security waiver, the potential CBW Act sanctions related to US bank loans will be reduced.² Specifically, according to a CBW Act Directive issued by the Treasury Department³, this sanction will prohibit:

- US banks participating in the *primary market* for non-ruble denominated Russian government bonds on or after August 26, 2019 (but not the secondary market for such bonds); and
- US banks lending non-ruble denominated funds to the Russian government on or after August 26, 2019.

The CBW Act Directive defines the Russian government to include "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," but to exclude Russian state-owned enterprises. The sanctions therefore will not apply to US bank loans to Russian state-owned banks or energy companies.

While the CBW Act Directive broadly defines the term "US banks"⁴, neither the CBW Act Directive nor the Treasury Department's Frequently Asked Questions⁵ regarding the new sanctions indicate that the prohibitions will apply to US persons, who are not US banks or acting for US banks, from facilitating the activity prohibited by the CBW Act Directive. Nor has the Treasury Department indicated that it will oppose non-US banks that "backfill" to provide loans to the Russian government.

² The sanction on bank loans in the CBW Act Section 307(b)(2)(B) requires that "The United States Government shall prohibit any United States bank from making any loan or providing any credit to the government of that country, except for loans or credits for the purpose of purchasing food or other agricultural commodities or products." Section 307(d) of the CBW Act authorizes the President to waive certain of the sanctions, including the bank loan and further export restriction sanctions, if "the President determines and certifies to the Congress that such waiver is essential to the national security of the United States" and notifies Congress "at least 15 days before the waiver takes effect." The State Department's Fact Sheet explains that "The United States government has determined that it is essential to U.S. national security interests to partially waive the restrictions on bank loans and exports."

³ The Treasury Department's "Russia-related Directive Under Executive Order of August 1, 2019" (the "CBW Act Directive" is available at: https://www.treasury.gov/resource-center/sanctions/Programs/Documents/20190803_cbw_directive.pdf).

⁴ The CBW Act Directive defines a US bank to mean any US domiciled entity or its foreign branches and any entity located 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 or sellers thereof, as principal or agent." It includes "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 the foregoing."

⁵ The Treasury Department's Frequently Asked Questions are available at: https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#673.

Further Export Licensing Restrictions

The CBW Act describes the second round further export restriction sanction as "The authorities of section 6 of the Export Administration Act of 1979 shall be used to prohibit exports to that country of all other goods and technology (excluding food and other agricultural commodities and products)." However, according to the State Department Fact Sheet, as a result of the President's national security waiver the sanctions will instead require the US Commerce Department to impose a "presumption of denial" policy on license applications for exports of controlled dual-use chemical and biological items to Russia. Similar to the restrictions imposed in the first round of sanctions, the Commerce Department will be able to make exceptions to allow US firms to fulfill existing contracts to Russian customers. In addition, the Commerce Department will consider license applications related to the following areas on a case-by-case basis:

- exports needed for space flight activities, including those involving government space cooperation and commercial space launch;
- exports needed to ensure the safe operation of commercial passenger aviation;
- exports to commercial end-users in Russia for civil end-uses;
- exports to wholly-owned subsidiaries of US and other foreign companies in Russia; and
- deemed export licenses for Russian nationals working in the United States.

Effective Date

Following a 15-day Congressional notification period, the new sanctions will take effect upon publication in the Federal Register on or around August 19, 2019. However, as noted above, the US bank loan prohibitions are effective on August 26, 2019.

Duration

The sanctions will remain in place for a minimum of 12 months and can only be lifted subsequently if the Administration certifies to Congress that the Russian government has met certain conditions related to its use of chemical weapons and has paid restitution to the victims of the March 2018 "*novichok*" incident.

Sanctions-related Legislation

Members of Congress also have introduced legislation that would, if enacted, impose additional Russia-related sanctions. For example, on July 31, 2019, the Senate Foreign Relations Committee passed S. 1441 the "Protecting Europe's Energy Security Act of 2019" that would authorize the imposition of sanctions related to the provision of pipe-laying vessels for Russian energy export pipelines after enactment (*i.e.*, targeting the Nord Stream 2 pipeline). In addition, the House of Representatives version of the National Defense Authorization Act for Fiscal Year 2020 contains sanctions that would prohibit transactions related to Russian sovereign debt unless there is a finding that Russia has not interfered in the most recent US federal election. Whether the imposition of the CBW Act second round

of sanctions will reduce Congress' appetite for the imposition of further Russia-related sanctions remains to be seen.

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