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New U.S. Sanctions and Export Controls Aim to Impose "Devastating Costs" on Russia

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Key point: On February 24, 2022, the United States imposed a combination of extensive and complex trade sanctions and export controls against the Russian Federation (Russia) in response to its invasion of Ukraine. These sanctions and export controls do not impose a full embargo on trade with Russia; however, U.S. companies doing business with Russia will be subject to extensive restrictions going forward, and many of those companies will need to terminate their transactions or activities immediately. These restrictions will be especially onerous for companies that produce U.S. export-controlled items. Even if your company's transactions with Russia continue to be permissible, these new sanctions that target the Russian economy and financial system may make it difficult (or, in some instances, impossible) to make or receive payments associated with those transactions.

What should my company be doing to respond to these new requirements?

Companies doing business in or with Russia should carefully screen their counter-parties, the financial institutions involved in those transactions, and their ultimate beneficial owners against all applicable U.S. sanctions lists and should also carefully consider whether those transactions might involve "Military End Users" (as discussed in further detail below).

If your company has any letters of credit, performance guarantees or other financial instruments issued through any Russian financial institution, then you should determine whether those arrangements will violate these new sanctions.

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It will be especially important to ensure that any products exported, reexported or transferred (in-country) to Russia are properly classified under the U.S. Export Administration Regulations. Depending on your products' Export Control Classification Numbers (ECCNs), your transactions may be prohibited or may require export licensing.

In some instances, General Licenses may be available for you to continue or wind down specific transactions, but many of those General Licenses will expire within 30 days from February 24, 2022.

Also remember that these requirements are rapidly evolving and remain subject to change, so continue to closely monitor further Russia-related developments in U.S. sanctions and export controls policy.

Background information

Although tensions between the U.S. and Russia have been running high for several months, the conflict intensified on February 21, 2022 when Russian President Vladimir Putin formally recognized the Donetsk People's Republic (DNR) and Luhansk People's Republic (LNR) regions of Ukraine as "independent states". Over the following days, the Biden Administration responded to this declaration with the following trade sanctions measures:

Issuing Executive Order 14065 (EO 14065) on February 21, 2022 to impose a comprehensive sanctions embargo on the DNR and LNR regions of Ukraine (which we previously described in this blog post);

Imposing a "first tranche" of Russian sanctions on February 22, 2022, which imposed new restrictions on secondary market transactions involving Russian sovereign debt, and imposed blocking sanctions on Russia's Vnesheconombank (VEB) and Promsvyazbank Public Joint Stock Company (PSB) banks as well as several Russian oligarchs and their immediate family members (which we previously described in this blog post); and

Imposing sanctions on Russia's Nord Stream 2 pipeline on February 23, 2022 by adding Nord Stream 2 AG and its CEO Matthias Warning to the Specially Designated Nationals and Blocked Persons List (the SDN List) maintained by the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) (further discussed in this Press Statement issued by the U.S. State Department).

Conditions reached their boiling point on Thursday, February 24, 2022, when Russia proceeded to invade Ukraine. The U.S. responded by imposing a combination of extensive export controls and

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trade sanctions in alignment with its allies. In a Fact Sheet, the White House stated that these measures were intended to impose "severe and immediate economic costs on Russia." These measures are described in further detail below and consist of: (i) a variety of sanctions targeted at the Russian financial sector, and (ii) highly technical export controls intended to "cut off more than half of Russia's high-tech imports."

Russia sanctions measures imposed on February 24, 2022

The U.S. Treasury Department issued a Press Release which stated, "These actions are specifically designed to impose immediate costs and disrupt and degrade future economic activity, isolate Russia from international finance and commerce, and degrade the Kremlin's future ability to project power." OFAC has provided a complete list of the individuals, entities and financial institutions subject to the below-described sanctions at this link. Additionally, OFAC has published many new FAQs to accompany these new sanctions and also updated several of its existing FAQs. A discussion of these new sanctions follows below.

Correspondent and payable-through account sanctions imposed on Sberbank

According to the U.S. Treasury Department, Sberbank is Russia's largest financial institution and holds "about a third of all bank assets in Russia" and the "largest market share of savings deposits in the country." In order to "restrict Sberbank's access to transactions made in the dollar," OFAC has named Sberbank and 25 of its worldwide subsidiaries to a List of Foreign Financial Institutions Subject to Correspondent Account or Payable-Through Account Sanctions (the CAPTA List). OFAC has also issued a new Directive 2 which, beginning March 26, 2022, will prohibit U.S. financial institutions from: (i) opening or maintaining correspondent account or payable-through accounts for or on behalf of any foreign financial institution named on the CAPTA List, and (ii) processing any transaction involving any foreign financial institution named on the CAPTA List.

This new Directive 2 will require U.S. financial institutions to reject any transactions involving Sberbank or any other CAPTA List foreign financial institution after its prohibitions take full effect. These Directive 2 restrictions also apply to any subsidiary foreign financial institutions in which Sberbank directly or indirectly holds an ownership interest of 50% or more, even if those subsidiary foreign financial institutions are not expressly identified on the CAPTA List. OFAC has indicated that it will consider adding more Russian financial institutions to the CAPTA List going forward.

Blocking sanctions imposed on VTB Bank and other major Russian financial institutions

OFAC has also imposed comprehensive blocking sanctions on VTB Bank, Public Joint Stock Company Bank Financial Corporation Otkritie (Otkritie), Open Joint Stock Company

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Sovcombank (Sovcombank), Joint Stock Commercial Bank Novikombank (Novikombank), and 54 of their subsidiaries by adding them to the SDN List. OFAC described VTB Bank as "Russia's second largest financial institution, which holds nearly 20% of banking assets in Russia" and also noted that Otkritie, Sovcombank and Novikombank "play significant roles in the Russian economy, holding combined assets worth $80 billion." These blocking sanctions also apply to any subsidiaries in which VTB Bank, Otkritie, Sovcombank or Novikombank directly or indirectly hold an ownership interest of 50% or more, even if those subsidiaries are not specifically identified on the SDN List. OFAC's FAQ No. 982 also clarifies that these blocking sanctions also prohibit U.S. persons from buying or selling debt or equity of these Russian institutions (subject to General License No. 9, discussed in a later sub-section).

The blocking sanctions that apply to VTB Bank, Otkritie, Sovcombank and Novikombank are distinguishable from the CAPTA List sanctions which apply to Sberbank because the blocking sanctions **take effect immediately** and require U.S. financial institutions to freeze any funds belonging to VTB Bank, Otkritie, Sovcombank and Novikombank which are held in or which transit through the U.S. financial system (subject to General License No. 12, discussed below), whereas the Sberbank CAPTA List sanctions do not take effect until March 26, 2022 and permit U.S. financial institutions to reject (rather than freeze) funds transfers involving persons subject to the CAPTA List sanctions. However, OFAC has issued a General License No. 12 which allows U.S. financial institutions to reject (rather than freeze) transactions involving Otkritie, Sovcombank, VTB Bank or subsidiaries in which they hold an ownership interest of 50% or more, through March 26, 2022. OFAC has also issued a General License No. 11, which authorizes transactions ordinarily incident and necessary to the wind down of transactions involving Otkritie, Sovcombank, VTB Bank or subsidiaries in which they hold an ownership interest of 50% or more, through March 26, 2022. However, General Licenses Nos. 12 and 11 are not available for transactions that involve SDNs other than Otkritie, Sovcombank, VTB Bank or their blocked subsidiaries. Additionally, anyone seeking to rely on the authorizations provided under General Licenses Nos. 12 and 11 should consult OFAC FAQ No. 975, which discusses key limitations which apply to those General Licenses.

Restrictions on transactions in new debt and new equity

OFAC has named 13 major Russian companies in Annex 1 to a newly issued Directive 3, which will prohibit U.S. persons from transacting in, providing financing for or otherwise dealing in new debt with a tenure of longer than 14 days or new equity issued by these companies on or after March 26, 2022. According to the Treasury Department, these sanctions are intended to prohibit these companies from using U.S. markets "to support the further invasion of Ukraine". The companies subject to these Directive 3 sanctions are a mix of financial services companies and other companies which the Biden Administration described as being "critical to the Russian economy." Companies subject to these new Directive 3 sanctions include Gazprom (the world's largest natural gas company),

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Rostelecom (Russia's largest telecommunications company), RusHydro (a hydroelectricity company and one of Russia's largest power companies), Alrosa (the world's largest diamond mining company), Sovcomflot (Russia's largest maritime and freight shipping company) and OJSC Russian Railways. It is worth noting, however, that some of these companies were already subject to similar restrictions under different Directives associated with OFAC's existing Sectoral Sanctions Identifications List (the SSI List). OFAC has also confirmed that these new Directive 3 sanctions apply to any subsidiaries in which Directive 3 designees hold an ownership interest of 50% or more, even if those subsidiaries are not specifically identified in Directive 3's Annex 1.

Sanctions on additional oligarchs and their family members

The Biden Administration continued its recent emphasis of targeting "influential Russians in Putin's inner circle and in elite positions of power within the Russian state" and their immediate family members. As part of the day's sanctions designations, OFAC imposed SDN List designations on three adult children of existing SDNs, three high-ranking Russian banking executives and the spouse of one of those sanctioned executives.

Sanctions on Belarusian defense sector and financial institutions

In another Press Release, OFAC added a total of 24 Belarusian individuals and entities to the SDN List due to "Belarus's support for, and facilitation of the invasion." These new designees include Belarussian Bank of Development and Reconstruction Belinvestbank, Bank Dabrabyt, multiple companies operating in the Belarusian defense sector, executives of those companies, and two high ranking officials in the Belarusian military. OFAC also issued a General License No. 6, which authorizes U.S. Government personnel to conduct transactions with Belarusian SDNs for the conduct of official U.S. Government business, and a General License No. 7, which authorizes the United Nations and other specific international organizations to conduct transactions related to their official business with Belarusian SDNs.

Additional OFAC general licenses

In addition to the General Licenses specifically discussed above, OFAC also issued the following General Licenses in order to authorize transactions that would otherwise be prohibited pursuant to these recent sanctions designations:

General License No. 5, which authorizes certain international organizations such as the Red Cross and certain global development banks to continue the conduct of their official business;

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General License No. 6, which authorizes certain transactions ordinarily incident and necessary to: (1) exportation or reexportation of agricultural commodities, medicine and medical devices to, from or transiting the Russian Federation, and (2) the prevention, diagnosis or treatment of COVID-19;

General License No. 7, which authorizes certain transactions associated with overflights of the Russian Federation, emergency landings in the Russian Federation and the provision of air ambulance and related medical services to individuals in the Russian Federation;

General License No. 8, which authorizes transactions involving VEB Bank, Otkritie, Sovcombank, Sberbank, VTB Bank and subsidiaries which they directly or indirectly hold an ownership interest of 50% or more, provided that the transactions are "related to energy" and are concluded prior to June 24, 2022 (with General License No. 8 defining the phrase "related to energy" to mean "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");

General License No. 9, which authorizes transactions involving debt or equity issued prior to February 24, 2022 by VEB Bank, Otkritie, Sovcombank, Sberbank, VTB Bank and subsidiaries in which they directly or indirectly hold an ownership interest of 50% or more, provided that any such transactions must be concluded by May 25, 2022 and any divestment or transfer of such debt or equity may only be made to non-U.S. persons; and

General License No. 10, which authorizes transactions ordinarily incident and necessary to the wind down of certain derivative contracts entered into prior to February 24, 2022 which involve VEB Bank, Otkritie, Sovcombank, Sberbank, VTB Bank or subsidiaries in which they directly or indirectly hold an ownership interest of 50% or more, provided that such transactions must be concluded before May 25, 2022.

Anyone seeking to rely on any of these General Licenses should review them closely and ensure that they are in compliance with all associated conditions and requirements. Specifically, several of these General Licenses impose restrictions that will continue to prohibit the opening or maintaining of

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correspondent accounts or payable-through accounts in connection with the underlying transactions. Also, OFAC FAQ No. 978 requires that any funds transfers made in connection with General Licenses Nos. 6, 7 or 8 must be " processed indirectly through a non-sanctioned, non-U.S. financial institution."

Russia export controls measures imposed on February 24, 2022

The U.S. Department of Commerce's Bureau of Industry and Security (BIS) imposed new Russia-focused export controls in a Final Rule posted online on Thursday, February 24, 2022. These new rules will vastly change the U.S. posture towards Russia with respect to export activities. Among other things, the Final Rule significantly increases the number of transactions with Russia that will require BIS licensing while also requiring BIS to impose a policy of denial when considering most of those applications. The Final Rule is **effective immediately as of Thursday, February 24, 2022**, subject to a limited savings clause which: (i) excludes certain shipments that would otherwise be covered under the Russia-related FDR Rules (discussed below) if they are en route as of March 26, 2022 pursuant to actual orders, and (ii) excludes all other shipments that would otherwise be subject to the Final Rule if they were en route pursuant to actual orders as of the date BIS filed the Final Rule for public inspection.

BIS administers the Export Administration Regulations (EAR), which regulate all exports, reexports and transfers within one country abroad (collectively, "export activities") of "items subject to the EAR." Such items include U.S.-origin items (which continue to be "subject to the EAR" after they leave the U.S.), foreign-origin items located in the U.S., and, increasingly, items produced abroad but that become "subject to the EAR" under either its *de minimis* content rule or one of several Foreign-Produced Direct Product Rules. A small number of other U.S. agencies also control export activities, but it is currently unclear whether those agencies will also be making Russia-specific updates to their regulations and operating procedures. Notably, the U.S. Department of State Directorate of Defense Trade Controls (DDTC) has maintained a full arms embargo against Russia since March 18, 2021 (and before that a more limited license denial policy for certain high technology defense items since April 28, 2014).

The initial Background section of the Final Rule notes that it will be "implemented in parallel with similarly stringent measures by partner and allied countries [to] cover a broad scope of items that Russia seeks to advance its strategic ambitions and consequently impair [Russia's] industrial sectors." So far, public reporting indicates that Japan and the EU will also implement export controls on dual use goods such as semiconductors.

BIS policy of denial for Russia export license applications and limits on license exceptions availability

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The Final Rule will generally require BIS to apply a policy of denial when reviewing applications associated with those transactions that will now require BIS licensing under the Final Rule. However, in certain limited circumstances the Final Rule authorizes BIS to apply a case-by-case review policy when reviewing Russia-related license applications. The limited transactions which are eligible for a case-by-case review policy include transactions involving export activities that:

Ensure flight safety;

Ensure maritime safety;

Meet humanitarian needs;

Support government space cooperation;

Support wholly-owned U.S. subsidiaries, foreign subsidiaries of U.S. companies that are joint ventures with other U.S. companies, joint ventures of U.S. companies headquartered in countries from Country Groups A:5 and A:6 (allies and partners), the wholly-owned subsidiaries of companies headquartered in Country Groups A:5 and A:6, and joint ventures of companies headquartered in Country Groups A:5 and A:6

Support civil telecommunications infrastructure by companies headquartered in Country Groups A:5 and A:6; and

Enable government-to-government activities.

When a transaction is eligible for the case-by-case review policy, the Final Rule requires BIS to primarily evaluate whether the transaction would benefit the Russian government or defense sector.

The Final Rule also significantly curtails the availability of License Exceptions for export activities to Russia. For example, License Exception ENC, which permits most export activities involving items designed or modified to use encryption, cannot be used to export/reexport/transfer to Russian “government end users” or state-owned enterprises (SOEs).

Expansion of commerce control list destination-based controls against Russia

The Final Rule creates a new EAR Russia export controls policy establishing that all export activities (except deemed exports and deemed reexports) to Russia involving items described in Categories 3 through 9 of the Commerce Control List (CCL) are now subject to a license requirement. This requirement will capture items under many Export Control Classification Numbers (ECCNs) that are often considered relatively innocuous because of their many civil uses, such as, but not limited to:

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ECCN 3A991 – Integrated circuits and semiconductors meeting relatively low parameters.

ECCN 4A994.b – Personal computers and laptops meeting relatively low parameters.

ECCN 5A991 – Telecommunications devices such as modems, gateways and Internet of Things connected civil industry devices.

ECCN 9A991.d – Parts and components used in civil aircraft.

According to BIS, "Although these items are generally controlled at a lower level under the EAR, they are still necessary for the functioning of aircraft, vessels and electronic items. As such, restrictions on these items can significantly limit Russia's ability to obtain items it is not able to produce".

New Russia Military End-user / End-use Rule special treatment (the "Russia MEU Rule")

Russia is included in a small list of countries subject to the EAR's Military End-User / End-Use (MEU) Rule. The list also includes Burma, Cambodia, China and Venezuela. This conventional MEU Rule aims to prevent public and private military end-users from those five countries from receiving certain specified items contained in a list in Supplement No. 2 to Part 744 of the EAR. Now, effective February 24, 2022, under the "Russia MEU Rule," Russia is subject to a more restrictive control where export activities involving **all** "items subject to the EAR" are prohibited for export/reexport/transfer to Russian MEUs, with the exception of (i) food and medicine designated as EAR99 and (ii) mass market hardware and software designed or modified to use encryption (ECCNs 5A992.c and 5D992.c) so long as those mass market items are not for Russian "government end users" or Russian SOEs. For purposes of the Russia MEU Rule, the EAR's definition of MEU is extremely broad and can potentially capture any entity that is engaged in any operation, installation, maintenance, repair, overhaul, refurbishing, development or production of military items or other controlled aerospace items. For example, in certain circumstances, MEUs can even include hospitals and universities with military affiliations. There is also no exhaustive list of MEUs who are subject to the Russia MEU Rule, so persons engaging in transactions subject to the EAR with customers in Russia will carry the burden of analyzing whether their transactions involve Russian MEUs, even when exporting, reexporting or transferring EAR99 items conventionally thought of as "dual use" or "civil."

Russian MEU-designated entities transferred to BIS entity list and two additional entities added

The End-User Review Committee (ERC) is a BIS-led interagency committee that determines which persons and entities should be specifically designated on any of BIS' several lists. Simultaneous with BIS' publication of the Final Rule, the ERC identified 45 Russian entities who were previously

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expressly listed on the BIS's MEU List and moved them to the BIS Entity List with designations which generally require BIS licensing for "all items subject to the EAR," subject to limited exceptions. In addition to transferring those 45 entities, the ERC also added two additional entities to the Entity List – the International Center for Quantum Optics and Quantum Technologies LLC, and SP Kvant – for a total of 47 designations. Persons who wish to engage in export activities to the newly listed entities on the BIS Entity List will likely be required to obtain a license, but should first review the License Requirement column because for some of those entities BIS will not require prior review for (i) food or medicine designated EAR99 and (ii) mass market hardware or software designed or modified to use encryption (ECCN 5A992.c or 5D992.c items).

Two novel versions of the EAR's foreign-Produced Direct Product Rule

The Final Rule imposes two new versions of the Foreign-Produced Direct Product (FDP) Rule calibrated to deny Russia, and particularly Russia's public and private defense sectors, the ability to obtain any items that are either (i) the direct product of certain types of U.S.-origin software or technology or (ii) produced by a complete plant or major component of a plant that is itself a direct product of certain types of U.S.-origin software or technology.

The first new rule, the "Russia FDP Rule," establishes a license requirement for all such export activities involving foreign-produced direct products destined for Russia or that will be incorporated or used to produce or develop any part, component or equipment destined for Russia. The Russia FDP Rule applies to foreign-produced items that are the direct product of U.S.-origin technology or software classified in an ECCN provided in Categories 3 through 9 of the CCL. However, the Russia FDP Rule does ultimately exclude any foreign-produced items that would be designated EAR99.

The second new rule, the "Russia-MEU FDP Rule," is much more restrictive and establishes the same license requirement as the Russia FDP Rule with two important differences: (i) it applies to foreign-produced items that are the direct product of U.S.-origin software or technology classified in any ECCN in **any** Category of the CCL, and (ii) if the Russia-MEU FDP Rule does capture a foreign-produced item, then it will still cause that item to be "subject to the EAR" even if it is designated as EAR99. However, although the Russia MEU FDP Rule is much more restrictive than the general Russia FDP Rule, the Russia MEU FDP Rule only applies to transactions involving parties listed on the Entity List and designated with a "footnote 3" designation (which generally applies to all of the previously-discussed Russian entities that the ERC moved from the MEU List to the Entity List).

Both the Russia FDP Rule and the Russia-MEU FDP Rule provide licensing exceptions for items that are exported or reexported from or transferred within certain allied countries that are listed in a new Supplement No. 3 to Part 746 added via the Final Rule. BIS has determined that these countries have adopted or agreed to adopt Russia-specific export control measures deemed substantially similar to those imposed under the Final Rule. According to BIS, the U.S. has already secured 32 countries'

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commitments to implement export controls consistent with the Final Rule. Presumably BIS believes the allied countries' export control regimes will be sufficient to prevent harmful exports/reexports/transfers to Russian MEUs.

As discussed above, the Russia FDP Rule and MEU-FDP Rule have a savings clause that allows for any items "en route aboard a carrier to a port of export, reexport or transfer (in-country) on March 26, 2022, pursuant to actual orders for reexport or transfer (in-country) to or within a foreign destination" to proceed to their destination without the specific licensing that would otherwise be required under the Russia FDP Rule or Russia MEU-FDP Rule. For shipments that qualify for this savings clause, the two novel FDP rules therefore do not become effective until March 27, 2022.

BIS embargo on annexed Crimea expanded to include the DNR and LNR regions of Ukraine

BIS maintains a general prohibition of all export activities involving "items subject to the EAR" to the Crimea region of Ukraine except for (i) food and medicine designated EAR99 and (ii) software necessary to enable the exchange of personal communications over the Internet. The policy now extends to the "Covered Regions of Ukraine," which the Final Rule describes as the DNR and LNR regions. Notably, the Final Rule also adds definitions subparagraphs that define the "Crimea region of Ukraine," the "Donetsk People's Republic (DNR) region," the "Luhansk People's Republic (LNR) region," and "software necessary to enable the exchange of personal communications over the Internet." Although OFAC has provided General Licenses which authorize certain transactions with the DNR and LNR regions of Ukraine, anyone seeking to provide items "subject to the EAR" to either region in any export activity must ensure that their transactions comply with both the OFAC General Licenses and the Final Rule's licensing requirements. While the BIS license review policy for such transactions remains a presumption of denial, the Final Rule expands the limited availability of case-by-case reviews to all OFAC Ukraine-Related General Licenses, whereas that policy was previously limited to OFAC Ukraine-Related General License No. 4 covering the exportation or reexportation of agricultural commodities, medicine, medical supplies and replacement parts.

What measures were *not* implemented?

Despite speculation amongst the export compliance community, these sanctions did not go so far as to completely exclude Russia from accessing the Society for Worldwide Interbank Financial Telecommunication (SWIFT) system. However, the sanctions imposed on Sberbank, VEB, VTB and other Russian financial institutions will certainly make it much more difficult for Russia to perform day to day transactions in the global marketplace. The U.S. also has not moved to target the Russian energy sector and has instead provided an exception (discussed above) which will permit the U.S. financial system to conduct certain continuing transactions "related to energy" with the newly sanctioned Russian banks through at least June 24, 2022. When asked during a press conference

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whether the U.S. would impose additional sanctions, President Biden stated, “The sanctions we imposed [today] exceed anything that’s ever been done. The sanctions we imposed have generated two-thirds of the world joining us. They are profound sanctions. Let’s have a conversation in another month or so to see if they’re working.” There have also been recent reports that OFAC may soon levy sanctions against Russian President Vladimir Putin and Foreign Minister Sergei Lavrov following comments by President Biden on Thursday that such an option was “on the table.”

Contact us

Husch Blackwell’s Export Controls and Trade Sanctions Team is closely monitoring all export controls and trade sanctions developments pertaining to Russia and Ukraine. Please subscribe to our blog, International Trade Insights, for more updates. Should you have any questions or concerns, please contact Cortney Morgan, Grant Leach or Tony Busch.

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