

U.S. strikes at Russian officials and entities, with potential impact on non-U.S persons

On 6 April 2018, a number of Russian entities and individuals were placed on the United States Specially Designated Nationals List ('SDN List'). Further detail regarding these designations, including the potential impact on US and non US persons, is provided in this article courtesy of Freehill Hogan and Mahar LLP.

Introduction

On April 6, 2018 the United States Office of Foreign Asset Affairs ("OFAC"), in conjunction with the State Department, designated to the U.S. Specially Designated Nationals List ("SDN List") seven of Russia's wealthiest oligarchs, 12 companies which they own and 17 senior Russian government officials. As a result, any property or interests in property of these individuals or entities, which are subject to U.S. jurisdiction, are now blocked. U.S. persons are prohibited from engaging in any transactions with the designated individuals and entities. Foreign individuals could be subject to U.S. sanctions if they facilitate significant transactions for or on behalf of the designated individuals and entities.

Background

To understand the implications of the April 6th designations, it is necessary to look back to the passage of the Countering America's Adversaries Through Sanctions Act ("CAATSA") on August 2, 2017. That act addressed Iran, North Korea and Russia and had several provisions which relate to the current designations to the SDN list. Section 241 of CAATSA required that within six months of the passage of the Act the Secretary of the Treasury, in consultation with the Director of National Intelligence and the Secretary of State, provide the U.S. Congress with a detailed report on senior political figures and oligarchs in the Russian Federation, as determined by their closeness to the Russian regime and their net worth. CAATSA also directed that the report discuss the potential impacts of imposing secondary sanctions on those identified.

Another key provision of CAATSA was Section 228, which amended the Support for the Sovereignty, Integrity, Democracy and Economic Stability of Ukraine Act of 2014 ("SSIDES") to require the mandatory imposition of sanctions on any foreign person who knowingly "facilitates a significant transaction or transactions ... for or on behalf of" any persons subject to sanctions imposed by the United States with respect to the Russian Federation, or any child, spouse, parent, or sibling of an individual subject to sanctions. On January 29, 2018, the Secretary of the Treasury delivered the Section 241 report to Congress listing 210 individuals

along with the additional analysis required by Section 241. While none of those individuals were added to the SDN List at that time, the April 6th designations include a number of individuals from that list.

Impact of the Designations

As mentioned above, all assets of the individuals and entities designated to the SDN list, which assets are within the jurisdiction of the United States, are now blocked. In addition, U.S. persons are generally prohibited from engaging in any transactions with parties on the SDN list. As a result, U.S. banks cannot process any payments to or from those individual/entities designated to the SDN List. The designated oligarch –owned companies are:

AGROHOLDING KUBAN	JSC EUROSIBENERGO
BASIC ELEMENT LIMITED	LADODA MENEDZHMENT, OOO
B-FINANCE LTD.	NPV ENGINEERING OPEN JOINT STOCK COMPANY
EN+ GROUP PLC	RENOVA GROUP
GAZ GROUP	RUSSIAN MACHINES
GAZPROM BURENIE, OOO	UNITED COMPANY RUSAL PLC

In addition, also designated were a Russian state-owned weapons trading company, Rosoboroneksport OAO and a Russian bank which it owns, Russian Financial Corporation. The full list of those designated on April 6th can be found [here](#).

While the U.S. SDN List typically does not have extraterritorial effect, in this instance foreign persons are potentially exposed to U.S. sanctions because of the amendment of Section 10 of SSIDES by Section 228 of CAATSA. Under amended Section 10, it is now mandatory that sanctions be imposed on any foreign person who is determined to have knowingly facilitated a significant transaction for or on behalf of any person subject to U.S. sanctions against Russia, which would include all of those individuals and entities designated on April 6th. OFAC FAQs advise that, as used in Section 10, “persons subject to sanctions imposed by the United States with respect to the Russian Federation”, includes persons listed on either the SDN List or the Sectoral Sanctions Identification List. Section 10 also extends to any child, spouse, parent or sibling of any designated individual. Obviously, of critical importance is what is meant by “facilitates” and “significant transaction.”

Key Definitions

OFAC FAQ 545 sets forth what OFAC anticipates will be the definitions of key terms to be included in forthcoming regulations implementing Section 10 of SSIDES. FAQ 545 addresses the key terms “facilitates” and “significant transaction” as follows:

“facilitation . . . for or on behalf of” – For purposes of section 10(a)(2) of SSIDES, facilitating a significant transaction for or on behalf of a person will be interpreted to mean providing assistance for a transaction from which the person in question derives a particular benefit of any

kind (as opposed to a generalized benefit conferred upon undifferentiated persons in aggregate). Assistance may include the provision or transmission of currency, financial instruments, securities, or any other value; purchasing, selling, transporting, swapping, brokering, financing, approving, or guaranteeing; the provision of other services of any kind; the provision of personnel; or the provision of software, technology, or goods of any kind.

“significant transaction” – For purposes of section 10(a)(2) of SSIDES, OFAC will consider the totality of the facts and circumstances when determining whether transactions are “significant.” OFAC will consider the following list of seven broad factors that can assist in the determination of whether a transaction is “significant”: (1) the size, number, and frequency of the transaction(s); (2) the nature of the transaction(s); (3) the level of awareness of management and whether the transaction(s) are part of a pattern of conduct; (4) the nexus between the transaction(s) and a blocked person; (5) the impact of the transaction(s) on statutory objectives; (6) whether the transaction(s) involve deceptive practices; and (7) such other factors that the Secretary of the Treasury deems relevant on a case-by-case basis.

One additional guideline provided by the FAQs is that a transaction is not “significant” if U.S. persons would not require specific licenses from OFAC to participate in it. However, note that facilitating can include “transporting,” which suggests that the transport of goods for one of the Russian entities named to the SDN List could conceivably be a sanctionable activity for a non-U.S. shipowner, if the carriage was determined to be a significant transaction. Reviewing the factors listed above which will be considered by OFAC to determine if a transaction is significant, it is difficult to predict how OFAC will evaluate cases of ocean transport. It would seem that a single carriage of goods, involving no deceptive practice, would perhaps not be considered “significant.” On the other hand, if a shipowner entered a long-term COA with one of the designated entities, that might be viewed as significant.

While it is, at this point, impossible to predict how OFAC will apply these criteria for significant transactions on a case by case basis, we do know that these targeted sanctions are designed to place maximum pressure on individuals and entities with close ties to the Russian regime, while at the same time avoiding “unintended consequences.” FAQ 545, relating to the activities of foreign persons, states in conclusion: “The intent of the designations on April 6, 2018 is to impose costs on Russia for its malign behavior. The United States remains committed to coordinating with our allies and partners in order to mitigate adverse and unintended consequences of these designations.” Therefore, it would not be surprising if OFAC took a broad view of these sanctions, but at the same time exercised careful judgment as to what constitutes sanctionable activity by a foreign person.

The 50% Rule

It should be noted that it is not sufficient to simply confirm that an entity with which you are transacting business is not on the U.S. SDN List, which can be searched by means of an OFAC online search tool found [here](#). That is because entities which are not listed on the SDN List can nonetheless be considered as Specially Designated Nationals if they are 50% or more owned by an entity on the SDN List. This so-called “50% Rule,” as implemented by OFAC, provides

that if an entity is 50% or more, individually or in the aggregate, directly or indirectly, owned by persons or entities on the SDN List, it is itself considered an SDN, even though not listed.

General License No. 13 applies to only three of the designated entities, namely, EN+ Group PLC, GAZ Group and United Company RUSAL PLC. General License No. 13 permits, until May 7, 2018, activities and transactions, otherwise prohibited by the Ukraine Related Sanctions Regulations, 31 CFR part 589, that are “ordinarily incident and necessary to divest or transfer debt, equity or other holdings” in the three named companies to a non-U.S. person, or to facilitate the transfer of debt, equity or other holdings in the three named companies by a non-U.S. person to another non-U.S. person.

The license specifically does not permit U.S. persons to sell to or purchase from the three companies or any other entity whose property is blocked under the Ukraine Related Sanctions Regulations any debt, equity or other holdings in such companies, or to facilitate such transactions with such entities. As with General License No. 12, a U.S. person who engages in transactions authorized by General License No. 13 is required, within 10 days after May 7, 2018, to file a comprehensive and detailed report of each transaction with OFAC. General Licenses Nos. 12 and 13 can be found [here](#).

Summary

Major Russian oligarchs and their companies were designated to the U.S. SDN list on April 6, 2018. U.S. persons can no longer engage in transactions with those designated individuals and entities, and all property of those individuals and entities, which is subject to the jurisdiction of the United States, is now blocked. Non-U.S. persons may be engaged in sanctionable activity under the U.S. sanctions against Russia if they engage in or facilitate a significant transaction with any individuals or entities who have been designated to the SDN list under the U.S. sanctions against the Russian Federation.

Disclaimer: This client alert provides only a general summary of the impact of the April 6, 2018 designation to the U.S. SDN List of various Russian individuals and entities and is not intended to constitute comprehensive legal advice. Specific legal advice should be taken with respect to each individual inquiry regarding the designations.