
New US and EU Russia Sanctions Legislation and Embargo Against Crimea

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On December 18, US President Barack Obama signed into law the Ukraine Freedom Support Act (UFSA),¹ which either imposes, or gives the President the authority to impose, a range of additional sanctions targeting the energy and defense sectors of the Russian Federation. Together with the European Union (EU), the United States also imposed new economic restrictions against the disputed Crimea region.

Although it is the first congressionally mandated Russia sanctions to be enacted by the United States during the Ukraine crisis (US sanctions so far had been implemented through action by the Executive Branch²), UFSA does not significantly alter the scope of restricted activity for US persons under current Russia sanctions law. However, it does provide the US President with a “menu” of sanctions that may be imposed at the President’s discretion, extending beyond the current sanctions regime.

The new legislation also extends the potential extraterritorial scope of US sanctions against Russia by authorizing sanctions against “foreign persons” engaged in complex Russian oil projects and “foreign financial institutions” engaged in significant transactions with designated Russian entities. In this respect, the legislation resembles recent Iran sanctions legislation, although UFSA is far less comprehensive than the US Iran Sanctions Act, as amended. At this point, the White House has indicated that it will not immediately impose additional sanctions under the law, although it will continue to have the ability to do so in the future.

Separate from UFSA, President Obama has utilized existing authority by imposing a near embargo against the Crimean region, effective December 19, 2014. The EU, for its part, also adopted additional sanctions against Crimea on December 18, 2014 which, by their own terms, have already taken effect. The EU’s Crimea sanctions are less comprehensive than the US sanctions in covering a narrower set of trade activities and offering exemptions for certain contracts concluded before December 20, 2014. At the same time, EU-Crimean (and EU-Russian) trade is overall more significant than US-Crimean trade.

Ukraine Freedom Support Act: A Menu-Based Sanctions Regime

Implementation of UFSA will be left to the Executive Branch, and reports indicate that the President may utilize certain waiver authorities for the few mandatory provisions. However, even with the exercise of such waivers, the President may issue further sanctions pursuant to UFSA in the future. In particular, UFSA lays out a menu of nine different sanctions that may be imposed against entities involved in the Russian defense and energy sectors:

1. Directing the Export-Import Bank to not approve the issuance of any guarantee, insurance, extension of credit, or participation in the extension of credit related to the sanctioned person.
2. Directing the head of any US agency to not enter into any procurement contract with the sanctioned person.
3. Prohibiting the export of defense articles or services to the sanctioned person.
4. Prohibiting the export of any dual use goods or technology to the sanctioned person.
5. Blocking the property in the United States of the sanctioned person.
6. Prohibiting the transfer of credit or payments under US jurisdiction to the sanctioned person.
7. Prohibiting investments in debt and/or equity issued by the sanctioned person.
8. Banning travel to the United States by the sanctioned person.
9. In the case of sanctioned entities, any of the above may be imposed against officers of the sanctioned entity.

Russian Defense and Energy Firms Further Targeted

Similar to recent sanctions against Russia issued by the US Department of the Treasury's Office of Foreign Assets Control (OFAC), UFSA specifically targets Russian defense and energy firms. However, the only automatic sanctions required by the law are against Russian arms exporter Rosoboronexport, against which a minimum of three types of sanctions from the menu must be applied.

UFSA also requires the President to impose a minimum of three types of sanctions against other Russian arms dealers engaged in transfers to Syria or other specified countries (e.g., Ukraine, Georgia, and Moldova) without the consent of their internationally recognized governments. However, the President has discretion as to which specific entities to target.

The President is also required to restrict US persons from dealing in new debt or equity issued by Gazprom (plus one additional sanction from the menu), but only if the President determines that it is "withholding significant natural gas supplies" from NATO member-states or countries such as Ukraine, Georgia, or Moldova. This "contingent" sanction broadly corresponds to the capital market restrictions imposed against energy firms, pursuant to Directive 2 under Executive Order 13662, but may also include restrictions on dealings in "equity," which are excluded from the scope of Directive 2.³

Finally, UFSA authorizes (but does not require) the President to impose three or more types of sanctions on non-US persons (e.g., foreign registered subsidiaries of US firms) that make significant investments in certain types of "special Russian crude oil projects" involving extraction

from deepwater, Arctic offshore, and shale locations in Russia. The President is also authorized to apply additional licensing requirements or other restrictions on the export of items used in Russia's energy sector.

Foreign Financial Institutions Involved with Sanctioned Russian Entities

The law also authorizes (but does not require) the President to prohibit or restrict foreign financial institutions' (FFIs)⁴ dealings with the US banking system, including prohibiting the opening of correspondent or payable-through accounts in the United States, if he determines that they have engaged in certain sanctionable conduct, such as engaging in "significant transactions"⁵ involving arms transfers to Syria or other countries; deepwater, Arctic offshore, and shale oil projects in Russia; activities relating to Gazprom; or on behalf of Russian specially designated nationals (SDNs).

US and EU Territorial Sanctions Against Crimea

The US and EU have also together imposed wide-ranging sanctions against the territory of Crimea. Under a new regulation, the EU has prohibited new investment in Crimea; the export of specifically listed goods and technology to Crimea for use in the energy, telecommunications, transport, and mineral resources sectors; and provision of services to Crimea relating to certain infrastructure and tourism.⁶

In the US, President Obama has also issued a new Executive Order imposing a broader embargo against Crimea, entailing more comprehensive trade restrictions and narrower exemptions than the EU measures. It prohibits new investment by US persons in Crimea; exports of goods, technology or services to Crimea; imports of the same from Crimea; and the facilitation of any of the foregoing.⁷ No exemptions or wind-down provisions have been included for contracts concluded before the Order's entry into force, and US persons will be required to promptly discontinue prohibited business. OFAC has also issued Ukraine General License 4, allowing the provision of certain humanitarian supplies, such as agricultural goods and medicine, to Crimea and has designated 24 additional Russian and Ukrainian separatist persons as SDNs.

¹ H.R. 5859.

² See, e.g., US and EU Escalate Russia Sanctions (September 15, 2014), *available at* <http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179874791>; US Targets Major Russian Financial and Energy Firms in Sector-Specific Sanctions (July 18, 2014), *available at* <http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179873718>.

³See OFAC Directive 2, as amended, issued pursuant to Executive Order 13662 (September 12, 2014).

⁴ The legislation uses the same definition of FFIs included in Iran sanctions regulations. It covers any foreign entity 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 and sellers thereof, as principal or agent.” It includes but is not limited to “depository institutions, banks, savings banks, money service businesses, 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, dealers in precious metals, stones, or jewels, and holding companies, affiliates, or subsidiaries of any of the foregoing.” 31 C.F.R. §561.308.

⁵ Although “significant investment” is not defined in the legislation, OFAC generally considers such factors as (1) the size, number, frequency, and nature of the transaction(s); (2) the level of awareness of management of the transaction(s) and whether or not the transaction(s) are a part of a pattern of conduct; (3) the nexus between the foreign financial institution involved in the transaction(s) and a sanctioned entity; (4) the impact of the transaction(s) on the goals of the legislation; (5) whether the transaction(s) involved any deceptive practices; and others. See OFAC Frequently Asked Question #154.

⁶See Council Regulation (EU) No 1351/2014 (December 18, 2014). Contracts

concluded before December 20, 2014 are generally exempted from the EU prohibitions, but certain types of contracts must be wound down by March 21, 2015.

⁷See Executive Order Blocking the Property of Certain Persons and Prohibiting Certain Transactions with Respect to the Crimea Region of Ukraine (December 19, 2014). The Order also authorizes future blocking actions against political leadership in Crimea.

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