

U.S. Imposes Sanctions on Russian Federation Pursuant to Chemical and Biological Weapons Control and Warfare Elimination Act of 1991

Background

On August 8, 2018, the U.S. Department of State announced the forthcoming imposition of sanctions on the Russian Federation pursuant to the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (the “Act”).¹ The press release stated that the sanctions would take effect on or about August 22, 2018, following a 15-day Congressional notification period.

As explained in the press release, “the Government of the Russian Federation has used chemical or biological weapons in violation of international law or has used lethal chemical or biological weapons against its own nationals.” The underlying incident was the use (attributed to Russian agents) of a “Novichok” nerve agent in an attempt to assassinate U.K. citizen Sergei Skripal and his daughter Yulia in Salisbury, U.K.

On August 24, 2018, the U.S. Department of State announced that the sanctions will take effect on August 27, 2018.² The sanctions will remain in place for at least one year. The sanctions generally prohibit U.S. arms sales to, and military financing for, the Russian Federation; deny U.S. government credit and other financial assistance to the Russian Federation; and limit the export of national security-sensitive goods and technology to the Russian Federation.

The Act

Under Section 5605(a) of the Act,³ once the President of the United States has determined that a country has used chemical or biological weapons,⁴ the President shall

¹ Press Release, U.S. DEPARTMENT OF STATE, *Imposition of Chemical and Biological Weapons Control and Warfare Elimination Act Sanctions on Russia* (Aug. 8, 2018), <https://www.state.gov/r/pa/prs/ps/2018/08/285043.htm>.

² FR Doc 2018-18503, filed 8-24-18.

³ The Act is codified at 22 U.S.C. §§ 5601-5605.

⁴ Section 5604(a) of the Act requires the President to determine whether a foreign government “has used chemical or biological weapons in violation of international law or has used lethal chemical or biological weapons against its own nationals,” provided “persuasive information becomes available to the executive branch indicating the substantial possibility” that “the

“forthwith” impose five sanctions on the offending country. Each of these sanctions impacts (i) U.S. government assistance to the offending country, or (ii) transactions involving goods, technology, or information subject to the jurisdiction of the United States, or exported by a person subject to the jurisdiction of the United States. The sanctions, as set forth in Section 5605(a) of the Act, are as follows:

A. Initial sanctions under the Act

1. Foreign assistance

The United States Government shall terminate assistance to that country under the Foreign Assistance Act of 1961 [22 U.S.C. 2151 et seq.], except for urgent humanitarian assistance and food or other agricultural commodities or products.

2. Arms sales

The United States Government shall terminate—

- a.** sales to that country under the Arms Export Control Act [22 U.S.C. 2751 et seq.] of any defense articles, defense services, or design and construction services, and
- b.** licenses for the export to that country of any item on the United States Munitions List.

3. Arms sales financing

The United States Government shall terminate all foreign military financing for that country under the Arms Export Control Act.

4. Denial of United States Government credit or other financial assistance

The United States Government shall deny to that country any credit, credit guarantees, or other financial assistance by any department, agency, or instrumentality of the United States Government, including the Export-Import Bank of the United States.

government of a foreign country has made substantial preparation to use or has used chemical or biological weapons[.]”

5. Exports of national security-sensitive goods and technology

The authorities of section 4605 of title 50 shall be used to prohibit the export to that country of any goods or technology on that part of the control list established under section 4604(c)(1) of title 50.⁵

As set forth in Section 5605(b) of the Act, depending on the facts and circumstances, the President shall impose further sanctions:

B. Additional sanctions if certain conditions not met

1. Presidential determination

Unless, within 3 months after making a determination pursuant to section 5604(a)(1) of this title with respect to a foreign government, the President determines and certifies in writing to the Congress that—

- a.** that government is no longer using chemical or biological weapons in violation of international law or using lethal chemical or biological weapons against its own nationals,
- b.** that government has provided reliable assurances that it will not in the future engage in any such activities, and
- c.** that government is willing to allow on-site inspections by United Nations observers or other internationally recognized, impartial observers, or other reliable means exist, to ensure that that government is not using chemical or biological weapons in violation of international law and is not using lethal chemical or biological weapons against its own nationals, then the President, after consultation with the Congress, shall impose on that country the sanctions set forth in at least 3 of subparagraphs (A) through (F) of paragraph (2).

⁵ 50 U.S.C. § 4605 authorizes the President to “prohibit or curtail the exportation of goods, technology, or other information subject to the jurisdiction of the United States, or exported by any person subject to the jurisdiction of the United States, to the extent necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations.” See <https://www.gpo.gov/fdsys/pkg/USCODE-2015-title50/html/USCODE-2015-title50-chap56-sec4605.htm>

2. Sanctions

The sanctions referred to in paragraph (1) are the following:

a. Multilateral development bank assistance

The United States Government shall oppose, in accordance with section 262d of this title, the extension of any loan or financial or technical assistance to that country by international financial institutions.⁶

b. Bank loans

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.

c. Further export restrictions

The authorities of section 4605 of title 50 shall be used to prohibit exports to that country of all other goods and technology (excluding food and other agricultural commodities and products).

d. Import restrictions

Restrictions shall be imposed on the importation into the United States of articles (which may include petroleum or any petroleum product) that are the growth, product, or manufacture of that country.

e. Diplomatic relations

The President shall use his constitutional authorities to downgrade or suspend diplomatic relations between the United States and the government of that country.

⁶ 22 U.S.C. § 262d, titled “Human rights and United States assistance policies with international financial institutions,” requires the U.S. government to exercise its “voice and vote” in various international financial institutions to “advance the cause of human rights,” including “by seeking to channel assistance” away from countries that engage in a pattern of gross violations of human rights. See <https://www.gpo.gov/fdsys/pkg/USCODE-2009-title22/html/USCODE-2009-title22-chap7-sec262d.htm>

f. Presidential action regarding aviation

- I. i.** The President is authorized to notify the government of a country with respect to which the President has made a determination pursuant to section 5604(a)(1) of this title of his intention to suspend the authority of foreign air carriers owned or controlled by the government of that country to engage in foreign air transportation to or from the United States.
 - ii.** Within 10 days after the date of notification of a government under subclause (I), the Secretary of Transportation shall take all steps necessary to suspend at the earliest possible date the authority of any foreign air carrier owned or controlled, directly or indirectly, by that government to engage in foreign air transportation to or from the United States, notwithstanding any agreement relating to air services.
- II. iii.** The President may direct the Secretary of State to terminate any air service agreement between the United States and a country with respect to which the President has made a determination pursuant to section 5604(a)(1) of this title, in accordance with the provisions of that agreement.
 - iv.** Upon termination of an agreement under this clause, the Secretary of Transportation shall take such steps as may be necessary to revoke at the earliest possible date the right of any foreign air carrier owned, or controlled, directly or indirectly, by the government of that country to engage in foreign air transportation to or from the United States.
 - v.** The Secretary of Transportation may provide for such exceptions from clauses (i) and (ii) as the Secretary considers necessary to provide for emergencies in which the safety of an aircraft or its crew or passengers is threatened.
 - vi.** For purposes of this subparagraph, the terms "air transportation", "air carrier", "foreign air carrier", and "foreign air transportation" have the meanings such terms have under section 40102(a) of title 49.

Section 5605(c) of the Act provides for the removal of sanctions under the following conditions:

C. Removal of sanctions

The President shall remove the sanctions imposed with respect to a country pursuant to this section if the President determines and so certifies to the

Congress, after the end of the 12-month period beginning on the date on which sanctions were initially imposed on that country pursuant to subsection (a), that—

1. the government of that country has provided reliable assurances that it will not use chemical or biological weapons in violation of international law and will not use lethal chemical or biological weapons against its own nationals;
2. that government is not making preparations to use chemical or biological weapons in violation of international law or to use lethal chemical or biological weapons against its own nationals;
3. that government is willing to allow on-site inspections by United Nations observers or other internationally recognized, impartial observers to verify that it is not making preparations to use chemical or biological weapons in violation of international law or to use lethal chemical or biological weapons against its own nationals, or other reliable means exist to verify that it is not making such preparations; and
4. that government is making restitution to those affected by any use of chemical or biological weapons in violation of international law or by any use of lethal chemical or biological weapons against its own nationals.

Section 5605(d) of the Act authorizes the President to waive application of certain sanctions under the following conditions:

D. Waiver of sanctions

1. Criteria for waiver

The President may waive the application of any sanction imposed with respect to a country pursuant to this section—

a. if—

- I.** in the case of any sanction other than a sanction specified in subsection (b)(2)(D) (relating to import restrictions) or (b)(2)(E) (relating to the downgrading or suspension of diplomatic relations), the President determines and certifies to the Congress that such waiver is essential to the national security interests of the United States, and if the President notifies the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives of his determination and certification at least 15 days before the waiver takes effect, in accordance with the procedures applicable to reprogramming

notifications under section 634A of the Foreign Assistance Act of 1961 [22 U.S.C. 2394–1], or

- II.** in the case of any sanction specified in subsection (b)(2)(D) (relating to import restrictions), the President determines and certifies to the Congress that such waiver is essential to the national security interest of the United States, and if the President notifies the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives of his determination and certification at least 15 days before the waiver takes effect; or
- b.** if the President determines and certifies to the Congress that there has been a fundamental change in the leadership and policies of the government of that country, and if the President notifies the Congress at least 20 days before the waiver takes effect.

2. Report

In the event that the President decides to exercise the waiver authority provided in paragraph (1) with respect to a country, the President's notification to the Congress under such paragraph shall include a report fully articulating the rationale and circumstances which led the President to exercise that waiver authority, including a description of the steps which the government of that country has taken to satisfy the conditions set forth in paragraphs (1) through (4) of subsection (c).

Finally, under Section 5605(e) of the Act, some of the listed sanctions will apply to existing contracts, while others will not:

E. Contract sanctity

1. Sanctions not applied to existing contracts

- a.** A sanction described in paragraph (4) or (5) of subsection (a) or in any of subparagraphs (A) through (D) of subsection (b)(2) shall not apply to any activity pursuant to any contract or international agreement entered into before the date of the presidential determination under section 5604(a)(1) of this title unless the President determines, on a case-by-case basis, that to apply such sanction to that activity would prevent the performance of a contract or agreement that would have the effect of assisting a country in using chemical or biological weapons in violation of international law or in using lethal chemical or biological weapons against its own nationals.

- b.** The same restrictions of subsection (p) of section 4605 of title 50, as that subsection is so redesignated by section 304(b) of this title, which are applicable to exports prohibited under section 4605 of title 50, shall apply to exports prohibited under subsection (a)(5) or (b)(2)(C) of this section. For purposes of this subparagraph, any contract or agreement the performance of which (as determined by the President) would have the effect of assisting a foreign government in using chemical or biological weapons in violation of international law or in using lethal chemical or biological weapons against its own nationals shall be treated as constituting a breach of the peace that poses a serious and direct threat to the strategic interest of the United States, within the meaning of subparagraph (A) of section 4605(p) of title 50.

2. Sanctions applied to existing contracts

The sanctions described in paragraphs (1), (2), and (3) of subsection (a) shall apply to contracts, agreements, and licenses without regard to the date the contract or agreement was entered into or the license was issued (as the case may be), except that such sanctions shall not apply to any contract or agreement entered into or license issued before the date of the presidential determination under section 5604(a)(1) of this title if the President determines that the application of such sanction would be detrimental to the national security interests of the United States.

U.S. Sanctions Imposed as of August 27, 2018

Pursuant to Section 5605(a) of the Act, the United States has now imposed the following sanctions on the Russian Federation:⁷

- A. Foreign assistance:** The Department of State has determined that it is essential to the national security interests of the United States to waive application of this restriction. Accordingly, this category of sanctions is not being imposed, at least at the present time.
- B. Arms sales:** The United States is terminating (a) sales to Russia under the Arms Export Control Act of any defense articles, defense services, or design and construction services, and (b) licenses for the export to Russia of any item on the United States Munitions List. *However*, the Department of State has determined that it is essential to the national security interests of the United States to waive application of this sanction with respect to the issuance of licenses in support of government space cooperation and commercial space launches, provided that such

⁷ FR Doc 2018-18503, filed 8-24-18.

licenses shall be issued on a case-by-case basis and consistent with export licensing policy for Russia prior to the enactment of these sanctions.

C. Arms sales financing: The United States is terminating all foreign military financing for Russia under the Arms Export Control Act.

D. Denial of United States Government credit or other financial assistance: The United States is denying Russia any credit, credit guarantees, or other financial assistance by any department, agency, or instrumentality of the United States Government, including the Export-Import Bank of the United States.

E. Exports of national security-sensitive goods and technology: The United States is prohibiting the export to Russia of any goods or technology on that part of the control list established under section 2404(c)(1) of the Appendix to Title 50.⁸ *However*, the Department of State has determined that it is essential to the national security interests of the United States to waive the application of this sanction with respect to the following:

- 1. license exceptions:** exports and reexports of good or technology eligible under license exceptions GOV (government and international organizations), ENC (encrypted software and hardware for financial institutions), RPL (servicing and repair), BAG (baggage), TMP (temporary imports, exports, and reexports), TSU (technology and software), APR (additional permissive reexports), CIV (civil end users), and AVS (aircraft and vessels);
- 2. safety of flight:** exports and reexports of goods or technology pursuant to new licenses necessary for the safety of flight of civil fixed-wing passenger aviation, provided that such licenses shall be issued on a case-by-case basis, consistent with export licensing policy for Russia prior to enactment of these sanctions;
- 3. deemed exports and reexports:** exports and reexports of goods or technology pursuant to new licenses for deemed exports and reexports to Russian nationals, provided that such licenses shall be issued on a case-by-case basis, consistent with export licensing policy for Russia prior to enactment of these sanctions;

⁸ Section 2404(c)(1)(c), titled “Control list,” provides: “(1) The Secretary shall establish and maintain, as part of the control list, a list of all goods and technology subject to export controls under this section. Such goods and technology shall be clearly identified as being subject to controls under this section.” This is a reference to the Commerce Control List (“CCL”): See <https://www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl>.

4. **wholly-owned U.S. subsidiaries:** exports and reexports of good or technology pursuant to new licenses for exports and reexports to wholly-owned U.S. subsidiaries in Russia, provided that such licenses shall be issued on a case-by-case basis, consistent with export licensing policy for Russia prior to enactment of these sanctions;
5. **space flight:** exports and reexports of goods or technology pursuant to new licenses in support of government space cooperation and commercial space launches, provided that such licenses shall be issued on a case-by-case basis, consistent with export licensing policy for Russia prior to enactment of these sanctions;
6. **commercial end users:** exports and reexports of goods or technology pursuant to new licenses for commercial end-users and civil end-users in Russia, provided that such licenses shall be issued on a case-by-case basis, consistent with export licensing policy for Russia prior to enactment of these sanctions;
7. **state-owned or state-funded enterprises:** exports and reexports of goods or technology pursuant to new licenses for Russian state-owned or state-funded enterprises will be reviewed on a case-by-case basis, subject to a “presumption of denial” policy.

As noted above, the Department of State has announced that the sanctions will remain in place for at least one year, and until further notice.

Conclusion

This latest imposition of sanctions on the Russian Federation is probably not the last word on the issue. Entities engaged in business with the Russian Federation should carefully monitor further pronouncements by the Department of State and Department of Treasury, Office of Foreign Assets Control.

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