

# Executive Order Creates New Secondary Sanctions Risks for Non-U.S. Financial Institutions

January 10, 2024

On December 22, 2023, President Biden issued Executive Order (“EO”) 14114, which, among other things, subjects foreign (non-U.S.) financial institutions (“FFIs”) that engage in certain activities involving Russia’s military-industrial base to secondary sanctions risks and expands restrictions on certain Russian goods imports.<sup>1</sup> The EO was accompanied by two new determinations of the U.S. Treasury Department’s Office of Foreign Assets Control (“OFAC”), three general licenses (“GL”), several new and amended Frequently Asked Questions (“FAQs”)<sup>2</sup> and related guidance for FFIs (the “Sanctions Advisory”).<sup>3</sup>

Since U.S. sanctions authorities have already imposed blocking sanctions on more than 50 of Russia’s largest banks,<sup>4</sup> this order is clearly aimed at targeting non-U.S. financial institutions located outside of Russia. The new EO does not impose affirmative compliance obligations on FFIs; rather, such institutions risk becoming the targets of U.S. sanctions themselves if determined by U.S. authorities to have engaged in a targeted activity, as described in greater detail below. FFIs should carefully evaluate whether their existing compliance programs capture the recommendations outlined in the Sanctions Advisory and evaluate their overall exposure to clients that trade with Russia in light of OFAC’s signaling that certain of Russia-related activities will implicate greater U.S. sanctions risks.

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<sup>1</sup> Executive Order 14114, “Taking Additional Steps With Respect to the Russian Federation’s Harmful Activities” (Dec. 22, 2023), [available here](#); see also Office of Foreign Assets Control, “Issuance of new Russia-related Executive Order and related Determinations; Issuance of Russia-related General Licenses and Frequently Asked Questions; Publication of Russia-related Compliance Advisory” (Dec. 22, 2023), [available here](#).

<sup>2</sup> New OFAC FAQs 1146 through 1157 (Dec. 22, 2023), [available here](#); Amended OFAC FAQs 973, 1070 and 1126 (Dec. 22, 2023), [available here](#).

<sup>3</sup> OFAC Sanctions Advisory, “Guidance for Foreign Financial Institutions on OFAC Sanctions Authorities Targeting Support to Russia’s Military-Industrial Base” (Dec. 22, 2023), [available here](#).

<sup>4</sup> For the full list of sanctioned Russian banks, see our client alert, “A Guide to US, UK and EU Sanctions and Export Controls on Russia and Belarus” (Dec. 22, 2023), [available here](#).

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## Secondary Sanctions on FFIs

### Scope of EO 14114

Under the new authorities, an FFI may be targeted by secondary sanctions if U.S. authorities determine that the FFI has:

- Conducted or facilitated a “significant” transaction for or on behalf of a person already targeted by U.S. blocking sanctions for operating or having operated in the technology, defense and related materiel, construction, aerospace or manufacturing sectors of the Russian Federation economy (or other sectors determined in the future to support Russia’s military-industrial base) (the “Specific Sectors”); or
- (i) Conducted or facilitated a “significant” transaction or (ii) provided any service involving Russia’s military-industrial base, including the sale to Russia of items specified in a new related determination.<sup>5</sup>

While the transactions covered in the first prong were already targeted by the provisions of the existing EOs aimed at preventing transactions with designated parties, the second prong is new and particularly broad because it exposes FFIs to sanctions risks based on facilitation of transactions with unsanctioned parties. Such transactions may not be identified through screening for transactions involving entities included on OFAC’s Specially Designated Nationals and Blocked Persons List.

Neither prong of these sanctions requires any nexus to the United States. The sanctions are intended to target conduct that occurs wholly outside the United States (and outside the scope of affirmative U.S. sanctions compliance obligations, which generally apply to U.S. persons only). Moreover, sanctions may be imposed on an FFI not only for direct support to Russia’s military-industrial base and dealings with Russian clients, but also for indirect touchpoints, such as facilitating a non-Russian customer’s dealings or providing services to a non-Russian customer in furtherance of a transaction related to Russia’s military-industrial base, and for transactions in currencies other than U.S. dollars.

If an FFI is determined by U.S. authorities to have engaged in a targeted activity, the FFI may be subject to correspondent account or payable-through account (so-called “CAPTA”) sanctions, which would prohibit U.S. banks from providing correspondent

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<sup>5</sup> OFAC Determination Pursuant to Section 11(a)(ii) of Executive Order 14024 (Dec. 22, 2023), *available [here](#)* (listing certain machine tools and manufacturing equipment; manufacturing materials for semiconductors and related electronics; electronic test equipment; propellants, chemical precursors for propellants and explosives; lubricants and lubricant additives; bearings; advanced optical systems; and navigation instruments (the “Specific Items”).

account services to the targeted FFI, effectively cutting that FFI out of participation (as originator, beneficiary or intermediary) of any USD funds transfers. Alternatively, an FFI may be subject to full blocking sanctions, in which case U.S. persons generally would be required to freeze any property or interests in property of the FFI in their possession or control and refrain from any further dealings that involve any interest of the FFI.

In GL 84, OFAC has provided authorization to wind down transactions during a 10-day period beginning on the effective date in the case of new CAPTA sanctions against an FFI.<sup>6</sup> OFAC has not issued a GL for wind-down transactions for any FFIs targeted by blocking sanctions (but such a license may be issued concurrently with such sanctions).

### Related Definitions and FAQ Guidance

OFAC provides guidance for several of the key terms used in the new EO, generally following definitions used for earlier Russia-focused secondary sanctions (e.g., Section 228 of the Countering America's Adversaries Through Sanctions Act).

- As in other OFAC contexts, “**foreign financial institution**” is defined broadly to mean “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, futures or options, or procuring purchasers and sellers thereof, as principal or agent” and includes “depository institutions, banks, savings banks, money services businesses, operators of credit card systems, trust companies, insurance companies, securities brokers and dealers, 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.”
- “**Russia’s military-industrial base**” includes (but is not limited to) “the technology, defense and related materiel, construction, aerospace, and manufacturing sectors of the Russian Federation economy (and other sectors as may be determined pursuant to E.O. 14024)” and may also include “individuals and entities that support the sale, supply, or transfer of critical items identified in determinations pursuant to subsection 11(a)(ii) of E.O. 14024.”
- A “**significant transaction or transactions**” will, in general, be considered in light of “(a) the size, number, and frequency of the transaction(s); (b) the nature of the transaction(s); (c) the level of awareness of management and whether the

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<sup>6</sup> General License 84, “Authorizing Transactions Related to Closing a Correspondent or Payable-Through Account” (Dec. 22, 2023), available [here](#).

transactions are part of a pattern of conduct; (d) the nexus of the transaction(s) to persons sanctioned pursuant to E.O. 14024, or to persons operating in Russia's military-industrial base; (e) whether the transaction(s) involve deceptive practices; (f) the impact of the transaction(s) on U.S. national security objectives; and (g) such other relevant factors that OFAC deems relevant."

### Sanctions Advisory for FFIs

A new Sanctions Advisory for FFIs provides examples of activities that could expose FFIs to sanctions risk, as well as recommendations for developing and maintaining a risk-based sanctions compliance program. Examples of activities identified by OFAC as posing sanctions risks include:

- Maintaining accounts, transferring funds or providing other financial services (*i.e.*, payment processing, trade finance, insurance) for any persons designated for operating in the Specific Sectors;
- Maintaining accounts, transferring funds or providing other financial services (*i.e.*, payment processing, trade finance, insurance) for any persons, either inside or outside Russia, that support Russia's military-industrial base, including those that operate in the Specific Sectors;
- Facilitating the sale, supply or transfer, directly or indirectly, of the specified items to Russian importers or companies shipping the items to Russia; and
- Helping companies or individuals evade U.S. sanctions on Russia's military-industrial base, including by offering to set up alternative or non-transparent payment mechanisms, changing or removing customer names or other relevant information from payment fields, obfuscating the true purpose of or parties involved in payments or otherwise taking steps to hide the ultimate purpose of transactions to evade sanctions.

Importantly, risks are not limited to those FFIs that "knowingly" engage in the significant transactions covered by the EO. To this end, the Sanctions Advisory also outlines several recommendations that FFIs should follow to identify their exposure to activity involving Russia's military-industrial base and to mitigate related risk, including:

- Reviewing their customer base to determine exposure to customers who may be involved in the Specific Sectors or in the sale, supply or transfer of the Specific Items;

- Communicating compliance expectations to customers, including advising them of the sanctions restrictions, particularly as they relate to import-export activity, manufacturing or any other relevant business lines;
- Taking appropriate mitigation measures for customers or counterparties engaged in high-risk activity, including restricting accounts, limiting permissible activity, exiting relationships and placing customers on watchlists;
- Incorporating risks related to Russia's military-industrial base into sanctions risk assessments and customer risk rating criteria; and
- Implementing enhanced trade finance controls related to the Specific Items.

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## Ban on the Import of Russian-Origin Fish, Seafood, Alcoholic Beverages and Non-Industrial Diamonds

EO 14114 also amends and expands earlier trade sanctions against Russia under EO 14068 that target the import of Russian-origin fish, seafood, alcoholic beverages and non-industrial diamonds into the United States. Specifically, products that were “mined, extracted, produced, or manufactured wholly or in part in Russia, or harvested in Russian waters or by Russia-flagged vessels, notwithstanding whether such products have been incorporated or substantially transformed into other products outside of the Russia Federation” may now be targeted by the restriction.

On that point, OFAC issued a new determination identifying salmon, cod, pollock or crab produced wholly or in part in Russia or harvested in waters under the jurisdiction of the Russian Federation or by Russia-flagged vessels as subject to this broader restriction.<sup>7</sup> OFAC concurrently issued GL 83 to allow certain transactions pursuant to written contracts or agreements entered into prior to December 22, 2023 and that are related to the importation into the United States of seafood-derivative products until February 21, 2024.<sup>8</sup> After that date, any products that contain any amount of the targeted seafood, even if constituting a separate product after “substantial transformation” of the targeted seafood, may not be imported into the United States.

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<sup>7</sup> OFAC Determination Pursuant to Section 1(a)(i)(B) of Executive Order 14068 (Dec. 22, 2023), available [here](#).

<sup>8</sup> GL 83, “Authorizing Certain Transactions Related to Imports of Certain Categories of Fish, Seafood and Preparations Thereof Prohibited by Executive Order 14068” (Dec. 22, 2023), available [here](#).

OFAC has indicated that it intends to issue a determination related to the importation of certain Russian diamonds processed in third countries pursuant to amended EO 14068 and associated guidance in the near term.

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## Recommendations and What We're Watching

How aggressively U.S. authorities intend to deploy these new authorities remains a question. At the least, the EO and related OFAC guidance should be taken as a clear signal that U.S. sanctions authorities view continued access to U.S. dollar financial services, including basic U.S. dollar clearing services, as conditional upon FFIs' refusal to directly or indirectly support Russia's military-industrial base.

For FFIs, the compliance challenges posed by the EO may vary depending on the nature of their business and their customer base. Seeking to mitigate risks by identifying customers with a nexus to counterparties that are already sanctioned for operating in one of the designated sectors of Russia's economy (*e.g.*, an existing customer that makes payments to an OFAC-sanctioned person under these sanctions) and adopting related controls to avoid facilitating "significant" transactions involving that customer or counterparty's dealings may not raise significant challenges.

However, identifying transactions or services that "involve" Russia's military-industrial base may raise a more significant challenge, not least of which is the lack of any apparent threshold for the services that may implicate related sanctions risks for an FFI (*i.e.*, while a transaction by, or facilitated by, an FFI must be "significant" to warrant sanctions, there is no similar requirement for services). FFIs may wish to implement enhanced trade finance controls related to the Specific Items, as recommended in the Sanctions Advisory, and evaluate transactions involving payments to Russia to ensure that such payments are not related to the Specific Items.

Accordingly, for FFIs dependent on continued access to the global financial system and U.S. dollar payments, formulating an appropriate risk assessment and adopting risk-based controls to mitigate potential involvement in targeted activities should be a priority.

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We are continuing to consider the implications of the new secondary sanctions authority. Please do not hesitate to contact us with any questions.



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