

U.S. issues guidance on the bans on new investments in and provision of certain services to Russia

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The U.S. Treasury issued guidance broadly interpreting the bans on new investment (including secondary market securities purchases) and provision of certain services to Russia.

On June 6, 2022, the United States Department of the Treasury's Office of Foreign Assets Control (OFAC) issued a series of frequently asked questions (FAQs) that provide guidance on Executive Orders 14066, 14068, and 14071, which, among other things, ban certain "new investments" in Russia (collectively, the Investment Ban EOs).¹ On June 9, 2022, OFAC also issued FAQs to provide guidance on its May 8, 2022 determination that U.S. persons would be prohibited from providing certain accounting, trust and corporate formation, and management consulting services to any person located in Russia (the Services Determination).² The eighteen new FAQs provide useful initial guidance on the application of the Investment Ban EOs and the Services Determination, particularly to entities outside Russia, and their scope, specifically in extending the ban on "new investment" to secondary trading in securities of Russian issuers. However, a number of ambiguities remain.

As noted in our previous client updates, the situation in Ukraine continues to evolve, with both additional sanctions measures and further guidance and licensing activity likely to continue in the coming weeks.

Guidance on sanctions prohibiting new investments

In Spring 2022, the Biden Administration issued the Investment Ban EOs, which, among other things, prohibit the following:

1. New investments in Russia's energy sector;³
2. New investments in any sector of the Russian economy designated by the Treasury Department;⁴ and
3. New investments in Russia by US persons, wherever located.⁵

When the Biden Administration issued the Investment Ban EOs, it did not concurrently release formal guidance to define "new investment," nor did it clarify the scope of prohibitions within the EOs. On June 6, 2022, OFAC published a series of "Frequently Asked Questions," providing additional guidance on the activities prohibited.⁶

Scope of "new investment"

OFAC provided a broad definition of new investment, which includes:

- The acquisition of debt or equity securities of any Russian company, surprisingly including secondary market transactions in which no funds flow to the issuer;

- The purchase or acquisition of real estate in Russia, other than for noncommercial, personal use;
- Entry into an agreement requiring the commitment of capital or other assets for the establishment or expansion of projects or operations in Russia, including the formation of joint ventures or other corporate entities in Russia;
- Entry into an agreement providing for the participation in royalties or ongoing profits in Russia;
- The lending of funds to persons located in Russia for commercial purposes, including when such funds are intended to be used to fund a new or expanded project or operation in Russia; and
- The purchase or acquisition of rights to natural resources or exploitation thereof in Russia.

These restrictions apply to transactions after the effective date of the relevant Investment Ban, including the exercise of rights under agreements entered into prior to the effective date. OFAC staff have informally recognized, however, that the guidance prohibiting secondary market transactions is new, and we do not expect enforcement action against parties that engaged in secondary market trades between April 6, 2022, the effective date of EO 14071, and the publication of the FAQs.

Activities that are not “new investment”

OFAC identified two broad categories of transactions that would not be considered “new investment.” First, the sale and financing of goods and services on ordinary commercial terms will not be considered “new investment.” Second, the “maintenance” of existing investments in Russia is not considered “new investment,” and the funding of existing subsidiaries and affiliates for maintenance activities is permissible. OFAC provided guidance and examples in [FAQ 1050](#), stating generally that “‘maintenance’ includes all transactions ordinarily incident to performing under an agreement in effect prior to the effective date of the respective E.O. prohibitions...provided that such transactions are consistent with previously established practices and support pre-existing projects or operations.” However the guidance goes on to state that “‘maintenance’ does not include ‘the expansion of pre-existing projects or operations beyond those in effect prior to the effective dates of the respective E.O. prohibitions, even if pursuant to a pre-existing agreement,’ nor does it permit ‘commitments pursuant to the exercise of rights under a pre-existing agreement where such commitment is made on or after the effective dates of the respective E.O. prohibitions.’” Distinguishing when performance under a pre-existing agreement constitutes permissible maintenance or impermissible “expansion” or “new commitments” may be quite difficult in practice.

OFAC also provided guidance on the scope of permitted divestment and wind-down activities, but this guidance raises additional ambiguities. OFAC clearly states in [FAQ 1054](#) that U.S. persons are permitted to sell or divest, or facilitate the sale or divestment of, Russian securities to a non-U.S. person (even though the transaction necessarily involves a “new investment” by the non-U.S. person acquiring the securities). However, [FAQ 1053](#)—which [FAQ 1054](#) cross-references—confusingly states that the new investment prohibitions “do not prohibit U.S. persons from facilitating the wind down or divestment of an existing investment in the Russian Federation, *provided that such facilitation is on behalf of the selling party only*....[A] U.S. person is prohibited from providing any approval, financing, *facilitation*, or guarantee to a non-U.S. person that seeks to acquire an equity interest in an entity located in the Russia Federation (i.e., the buyer in such a transaction).” (Emphasis added.) These FAQs appear to be in conflict, as intermediaries performing services such as payment and securities settlement—which ordinarily would be viewed as facilitating the underlying transaction—necessarily provide these services to both parties. It appears that [FAQ 1053](#) may have contemplated the divestment of operating businesses rather than the sale of securities contemplated in [FAQ 1054](#). Further, interpreting [FAQ 1053](#) to prohibit U.S. persons from intermediating securities transactions would render the divestment authorization in [FAQ 1054](#) largely illusory. Accordingly, the tension remains and the precise contours of permissible participation by U.S. persons (and, perhaps more importantly, the U.S. financial and market systems) in divestment activities is unclear.

Investments considered as “in Russia”

In general, OFAC’s guidance refers to investments, operations, or projects “located in” Russia. “Located in” is not defined, but a conservative view would include legal entities organized under Russian law as well as entities and activities physically located in Russia (consistent with the guidance provided on the Services Determination, discussed below). There are, however, some circumstances in which new investment in entities outside of Russia may be prohibited. Consistent with OFAC’s general approach to investments in non-sanctioned parties engaged in limited sanctioned activities, [FAQ 1055](#) provides that any such investment in an entity outside Russia is permissible so long as “(1) such funds are not specifically intended for new projects or operations in Russia; and (2) the revenues of the entity located outside Russia are not predominantly derived from its investments in Russia” (which an institution may assess using the information available to it in the ordinary course of business). Similarly, [FAQ 1054](#) provides that investing in funds that hold debt or equity securities issued by entities in Russia is permissible, so long as such holdings “represent less than a predominant share by value of debt or equity securities issued by entities in Russia.” OFAC does not,

however, define “predominant,” and in informal comments OFAC staff have indicated that shares less than 50% could still be considered “predominant.”

Guidance on ban on accounting, trust and corporate formation, and management consulting services

On June 9, 2022, OFAC issued a series of FAQs relating to the Services Determination, clarifying the services and entities covered by the Determination.⁷

Service recipients considered as “in Russia”

The Services Determination prohibits providing the specified services to “any person located in the Russian Federation,” “directly or indirectly.” [FAQ 1058](#) defines the term “person located in the Russian Federation” to include persons in Russia, individuals ordinarily resident in Russia, and entities incorporated or organized under the laws of Russia or any jurisdiction within Russia. More interesting was the guidance on when providing services to an entity outside Russia will be considered as providing services “indirectly” to Russia. [FAQ 1059](#) clarifies that providing services to a non-Russian entity that is owned or controlled by persons located in Russia is not prohibited, so long as (1) the services are not then re-exported to Russia (for example, one cannot simply provide the services to Russia through an offshore intermediary); and (2) the entity has a physical presence and operations (other than simply holding assets) outside Russia.

Covered services

In a previous [FAQ](#), OFAC defined the services that a U.S. person may not provide (or facilitate) as follows:⁸

- “Accounting services,” which includes services related to the measurement, processing, and evaluation of financial data about economic entities.
- “Trust and corporate formation services,” which includes services related to assisting persons in forming or structuring legal persons, such as trusts and corporations; acting or arranging for other persons to act as directors, secretaries, administrative trustees, trust fiduciaries, registered agents, or nominee shareholders of legal persons; providing a registered office, business address, correspondence address, or administrative address for legal persons; and providing administrative services for trusts.
- “Management consulting services,” which includes services related to strategic business advice; organizational and systems planning, evaluation, and selection; development or evaluation of marketing programs or implementation; mergers, acquisitions, and organizational structure; staff augmentation and human resources policies and practices; and brand management.

Three FAQs ([1060](#), [1061](#), and [1062](#)) clarify how the prohibitions of the Services Determination apply to employees and affiliates of Russian companies (if they are U.S. persons or otherwise acting within U.S. jurisdiction). The Services Determination does not prohibit serving as a director or employee of a Russian company altogether (other than serving as a nominee director, officer, shareholder, or signatory on behalf of a person in the Russian Federation), but the services provided may not include any of the prohibited categories. Similarly, non-Russian subsidiaries of Russian companies may not provide any of the proscribed services to their Russian parent when acting within U.S. jurisdiction. The guidance does not explicitly address, however, the issue of U.S. persons’ providing services to non-Russian multinationals with operations in Russia. While the Services Determination exempts entities ultimately owned or controlled by a U.S. person, OFAC’s guidance does not address, for example, whether U.S. persons employed by a European multinational must recuse themselves from the relevant matters relating to the multinational’s subsidiaries or operations in Russia or the extent to which the auditors of a non-Russian company with a Russian subsidiary must exclude U.S. persons from the audit.

A number of other FAQs identify specific services that are prohibited:

- Administration and maintenance of existing trusts and companies on behalf of Russian persons. ([FAQ 1063](#))
- Executive search and vetting services ([FAQ 1064](#))
- Serving as voting trustees on behalf of Russian persons or for shares in Russian companies ([FAQ 1065](#))
- Tax preparation and filing ([FAQ 1068](#))

FAQs [1066](#) and [1067](#), on the other hand, state that there is no prohibition on providing educational services to persons in the Russian Federation (such as online university courses) relating to the prohibited services, nor is there any prohibition on providing or even creating software (such as accounting software) related to those services for customers in the Russian Federation (though evaluating and selecting software would be a “management consulting service”).

While this guidance is helpful, the definitions remain broad and vague. This is particularly true of “management consulting services,” but it is true of the others as well. The guidance with respect to the provision of educational services and software that relate to the prohibited services also raises questions as to how the facilitation prohibitions of Executive Order 14071 apply to the Services Determination. As with the Investment Ban EOs, uncertainties remain to be clarified over time.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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- ¹ We discuss EOs 14066 and 14068 in the following [client update](#), and discuss EO 14071 in the following [client update](#).
- ² See U.S. Department of the Treasury, Determination Pursuant to Section 1(A)(ii) of Executive Order 14071 (May 8, 2022), available at https://home.treasury.gov/system/files/126/determination_05082022_eo14071.pdf.
- ³ Executive Order 14066, 87 Fed. Reg. 13625 (Mar. 10, 2022).
- ⁴ Executive Order 14068, 87 Fed. Reg. 14381 (Mar. 15, 2022).
- ⁵ Executive Order 14071, 87 Fed. Reg. 20999 (Apr. 8, 2022).
- ⁶ OFAC, FAQ 1049 (June 6, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1049>; OFAC, FAQ 1050 (June 6, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1050>; OFAC, FAQ 1051 (June 6, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1051>; OFAC, FAQ 1052 (June 6, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1052>; OFAC, FAQ 1053 (June 6, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1053>; OFAC, FAQ 1054 (June 6, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1054>; OFAC, FAQ 1055 (June 6, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1055>.
- ⁷ OFAC, FAQ 1058 (June 9, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1058>; OFAC, FAQ 1059 (June 9, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1059>; OFAC, FAQ 1060 (June 9, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1060>; OFAC, FAQ 1061 (June 9, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1061>; OFAC, FAQ 1062 (June 9, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1062>; OFAC, FAQ 1063 (June 9, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1063>; OFAC, FAQ 1064 (June 9, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1064>; OFAC, FAQ 1065 (June 9, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1065>; OFAC, FAQ 1066 (June 9, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1066>; OFAC, FAQ 1067 (June 9, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1067>; OFAC, FAQ 1068 (June 9, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1068>.
- ⁸ OFAC, FAQ 1034 (May 8, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1034>.