

New BIS Rule Imposes Stringent Export Control Restrictions Targeting Large Number of OFAC-Sanctioned Parties

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On March 21, 2024, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) published a final rule amending the Export Administration Regulations (EAR) by imposing "end user" export control restrictions against individuals and entities designated under 11 sanctions programs administered by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC). According to BIS, the rule "allows for the EAR controls to act as a backstop for activities over which OFAC does not exercise jurisdiction" with respect to parties on the Specially Designated Nationals and Blocked Persons List (SDN List). The March 21 BIS rule (New Rule) is the most recent in a series of regulatory actions primarily devised to increase economic pressure on Russia and Belarus in response to Russia's continued invasion of Ukraine.¹

Under OFAC sanctions regulations, virtually all transactions in the United States or by any U.S. person involving parties on the SDN List and other blocked parties are prohibited, and property or interest in property of such parties in the United States or within the possession or control of a U.S. person are subject to blocking.

For transactions taking place outside the United States, OFAC construes these prohibitions broadly by, among other things, covering conduct involving U.S. persons or that may "cause" a U.S. person to violate sanctions. In most sanctions programs, however, OFAC's regulations are not explicit on whether they apply to transactions taking place entirely outside the United States based solely on the fact that the transaction involves an item subject to U.S. export controls.

The EAR, on the other hand, expressly regulate all transfers of items subject to U.S. export controls wherever in the world the transfer takes place, and regardless of whether any U.S. persons are involved in the transaction. Among other things, the EAR impose licensing requirements based on the "end user" of the item to be transferred. With limited exception, however, the EAR have not imposed specific end user restrictions targeting persons blocked under OFAC sanctions programs.

Under the New Rule, BIS has newly implemented EAR end user license requirements for all persons added to the SDN List under 11 OFAC-administered sanctions programs, including seven executive orders targeting Russia and Belarus, and certain authorities targeting criminal organizations and narcotics traffickers.² The imposition of these EAR license requirements for exports, reexports and transfers (in-country) of all items subject to the EAR acts as a backstop for activities over which OFAC may not always exercise jurisdiction, including deemed exports and deemed reexports, and for reexports and transfers (in-country) not involving U.S. persons.

To avoid duplication, the New Rule's licensing requirements do not apply where an OFAC general or specific license authorizes the transaction involving the SDN(s), or where such transaction is exempt from OFAC regulations. However, where the EAR

¹ This client alert is for informational purposes only and does not constitute legal advice. Complex assessments often have to be made as to which sanctions regime applies in any given instance, given the multinational touch points of many entities and individuals. In that regard, given the complex and dynamic nature of these sanctions regimes, there may be developments not captured in this summary. Moreover, while the summary was accurate when written, it may become inaccurate over time given developments. For all of these reasons, you should consult with a qualified attorney before making any judgments relating to sanctions, as there are potentially severe consequences of failing to adhere fully to sanctions restrictions.

² BIS already had similar rules in place with respect to OFAC sanctions programs targeting terrorism and weapons of mass destruction.

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impose a licensing requirement separate and apart from the New Rule, a license from BIS would still be required. For example, if a company is designated on the SDN List under one of the seven Russia/Belarus-related executive orders, but also appears on the BIS Entity List, a BIS license would generally be required for the export, reexport or transfer (in country) of items to that company even if the relevant transaction is authorized by OFAC.

BIS describes the New Rule as “a force multiplier” complementing OFAC’s sanctions and expanding the U.S. government’s enforcement toolkit in the context of activities or transactions involving SDNs targeted by the New Rule. These changes are in line with the March 6, 2024, joint notice of BIS, OFAC and the U.S. Department of Justice, which highlighted the obligations of foreign persons to comply with U.S. sanctions and export controls, and signaled further regulatory action was forthcoming.