

# Russia Tightens Control Over Transactions Involving Foreign Investors

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Amendments in July 2017 to Russian foreign investment laws have resulted in a significant tightening of control over transactions involving (including investments in) Russian companies by foreign investors. Highlights include:

- **General Authority of Russian Government to Review Any Transaction by a Foreign Investor.** The most significant of the changes is a new regulatory regime that can require governmental approval for any transaction that is entered into by a foreign investor with respect to any Russian legal entity, potentially even after the transaction has been completed. Further details are set out below.
- **Tighter Restrictions Under Strategic Enterprises Law for Investors Registered in Off-Shore Jurisdictions.** Existing rules prohibited foreign states and intergovernmental organizations from acquiring control of so-called strategic enterprises and required governmental approval for acquisitions of smaller stakes. Those rules have been extended to private investors that are controlled through an entity in an off-shore jurisdiction, as outlined further below.
- **Prohibition of Off-Shore Investors From Participation in Privatizations.** Investing groups that include a company in an off-shore jurisdiction (not merely those controlled by an off-shore company) are prohibited from acquiring state and municipal property in a privatization. This effectively bans such investors from participation in any privatization of state and municipal property unless there is a special governmental decree exempting a specific transaction.

## General Authority of Russian Government to Review Any Transaction by a Foreign Investor

Under a new regime that is coming into effect on July 30, 2017,<sup>1</sup> if the Russian prime minister so determines “with the view of securing national defense and security of the state,” the governmental Strategic Investments Commission — which the prime minister heads — can decide to review any transaction entered into by a foreign investor with respect to any Russian legal entity. A foreign person can include a Russian citizen holding citizenship of another country as well as Russian entities controlled by non-Russian entities. That review could result in the commission prohibiting the transaction.

There are no other requirements for this review regime, whether as to the size of the transaction, type of business or nature of the Russian legal entity in question. It also is not limited to transactions involving shares or equity interests, and can potentially cover any type of transaction and subject matter.

If approval is required, the transaction cannot close until the commission grants its consent.

The new review regime does not provide for a process that would allow parties to seek the commission’s approval prior to closing a transaction. There are no explicit provisions in the new law that would prevent the commission from reviewing a transaction and potentially blocking it even after it had closed.

This regime represents a significant new legal risk for the validity of Russian transactions involving foreign investors. The extent to which this new authority will be used in practice, and any clarifications that are made in its interpretation and application, remain to be seen.

<sup>1</sup> The new provisions were introduced to Federal Law No. 160-FZ “On Foreign Investments in the Russian Federation,” dated July 9, 1999, as amended.

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## Investment in Strategic Enterprises by Off-Shore Companies

Since July 1, 2017, the rules relating to investments in strategic enterprises<sup>2</sup> under the Strategic Enterprises Law have been made even stricter for investors that are incorporated in an off-shore jurisdiction or are controlled through off-shore companies (including, potentially, those that have off-shore companies anywhere within their group structure):<sup>3</sup>

- The acquisition of “control” of a strategic enterprise (being, generally, more than 50 percent of the voting rights or 25 percent or more with respect to any enterprise that is a subsoil user):<sup>4</sup>

<sup>2</sup> As defined and regulated by Federal Law No. 57-FZ “On the Procedure for Implementing Foreign Investment in Commercial Enterprises Having Strategic Importance for Securing the National Defense and Security of the State,” dated April 29, 2008, as amended.

<sup>3</sup> The definition of an “off-shore” company for the purposes the Strategic Enterprises Law is not entirely clear, but it would comprise a number of “tax-haven” jurisdictions, assuming that the same definition used in relation to Russian tax law applies. However, the scope of such companies could be extended to include those that are incorporated in the jurisdictions that are not merely tax havens.

<sup>4</sup> In certain cases, however, an acquisition of 50 percent or less of votes could also amount to an acquisition of “control” under the Strategic Enterprises Law.

- is prohibited if the investor is either directly or indirectly a foreign state or international organization (subject to certain exceptions), or (as of July 2017) a company incorporated in, or controlled directly or indirectly by a company in, an off-shore jurisdiction; or
  - requires prior governmental approval in other cases (*e.g.*, the investor is a foreign investor that is not, and is not controlled through, a company in an off-shore jurisdiction).
- Prior governmental approval is required for the acquisition of more than 25 percent of a strategic enterprise (or more than 5 percent in the case of a subsoil user) but less than “control,” directly or indirectly, by a foreign state or international organization (subject to certain exceptions) and (as of July 2017) a company incorporated in, or controlled directly or indirectly by a company in, an off-shore jurisdiction.

Detailed analysis would need to be done of any investor group structure to determine if the regime applying to “off-shore” companies could apply.

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