



OFAC Prohibits Providing Accounting, Trust/Corporate Formation and Management Consulting Services for Russian Parties

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On May 8, 2022 the Office of Foreign Assets Control (OFAC) announced that the performance of accounting, trust and corporate formation and management consulting services for persons located in the Russian Federation would be prohibited under the U.S. sanctions laws. On the same day, the agency announced that persons performing such services for these parties would be subject to designation for sanctions by OFAC. These actions provide a sweeping set of prohibitions that affect accountants, attorneys, consultants and others involved in business activities with Russian parties. While this was adopted in May, many professionals are just now recognizing the importance of these requirements and it is worth reminding interested parties of this development.

Background and Legal Authorities. The restrictions on the performance of such services flow from two separate sets of legal authorities arising out of the Russia/Ukraine conflict. On April 15, 2021 President Biden issued E.O. 14024, which authorized the imposition of sanctions on any person determined by the U.S. to have engaged in *certain sectors of the Russian economy*. Separately, on April 6, 2022 the president issued EO 14071 which prohibited the *export of certain services* by U.S. persons to persons located in the Russian Federation. On May 8, 2022 OFAC issued two separate but coordinated determinations (the "OFAC Determinations") based upon these Executive Orders. The first, issued under E.O. 14071, stated that U.S. persons were prohibited from providing, directly or indirectly, certain accounting, trust and corporate formation and management consulting services to persons located in the Russian Federation.[1] The second, issued under E.O. 14024, authorized the imposition of sanctions on individuals and entities that operated in the accounting, trust and corporate formation and management consulting sectors of the Russian Federation economy[2] The OFAC Determinations were part of a concerted U.S. effort to apply pressure on the Russian economy and to prevent the evasion of U.S. sanctions. Secretary of the Treasury Janet Yellen was quoted in the Treasury Department press release issued along with the OFAC Determinations:

Today we are further constricting Russia's economy and access to services and technology it needs to conduct this unprovoked invasion? Preventing Russia from accessing the United States' valuable professional services increases the pressure on the Kremlin and cuts off its ability to evade sanctions imposed by the United States and our partners. We are also targeting Putin's ability to generate revenue that enables his aggression, as well as entities and their leaders who support his destructive actions.[3]

Definition of Accounting, Trust and Corporate Formation and Management Consulting Services OFAC has provided the following definitions of the services covered in its Determinations:

?Accounting services? ? includes services related to the measurement, processing, and evaluation of financial data about economic entities.

?Trust and corporate formation services? ? 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. Please note that all of these activities are common activities of trust and corporate service providers (TCSPs), although they may be provided by other persons.

?Management consulting services? ? 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. [4]

It should be noted that the term ?management services? includes a broad range of activities including the development of marketing programs, mergers and acquisitions, staff augmentation and human resources policies and practices and brand management ? far broader than many observers would initially consider for business or financial consulting. Consequently, many routine management tasks that are performed in business activities could fit within this definition

In addition, the definitions are very broadly worded ? stating that each of the services ?includes? certain activities but not limiting the definitions to these stated activities.

Significantly, the prohibitions apply not just to performing services as outside consultants or independent contractors but also to performing services as an employee in certain cases. OFAC addressed this specific issue in its guidance for its Determination under E.O. 14071:

Under the determination, U.S. persons are prohibited from exporting, reexporting, selling, or supplying, directly or indirectly, management consulting, trust and corporate formation services, and accounting services to persons located in the Russian Federation. Thus, U.S. persons are prohibited from providing these services to companies located in the Russian Federation (Russian companies) in their capacity as employees. However, the determination does not prohibit U.S. persons from providing other services

not covered by this determination as part of their employment by Russian companies. (Emphasis added.)[5]

Exclusions and General Licenses. The foregoing definitions included in the OFAC Determination under E.O. 14071 exclude the following: (1) any service to an entity located in the Russian Federation that is owned or controlled, directly or indirectly, by a United States person; and (2) any service in connection with the wind down or divestiture of an entity located in the Russian Federation that is not owned or controlled, directly or indirectly, by a Russian person.[6] (It should be noted that these exclusions are not included in the OFAC Determination issued under E.O. 14024.)

OFAC also issued two general licenses related to these requirements. General License 35 authorizes certain transactions that were otherwise prohibited under E.O. 14071 that are ordinarily incident and necessary to providing credit rating or auditing services to any person located in the Russian Federation through 12:01 a.m. eastern daylight time, August 20, 2022. General License 34 authorizes through 12:01 am ET July 7, 2022 the wind down of accounting, trust and corporate formation, and management consulting services that were otherwise prohibited under E.O. 14071.

Definition of "Person Located In the Russian Federation." The OFAC Determination under E.O. 14071 specifically prohibits providing the foregoing services to "any person located in the Russian Federation." OFAC has subsequently provided additional guidance on the definition of this term:

For the purposes of section 1(a)(ii) of E.O. 14071, OFAC interprets "person located in the Russian Federation" to include persons in the Russian Federation, individuals ordinarily resident in the Russian Federation, and entities incorporated or organized under the laws of the Russian Federation or any jurisdiction within the Russian Federation.

Please note that section 1(a)(ii) of E.O. 14071 prohibits the direct or indirect exportation, reexportation, sale, or supply from the United States, or by a United States person, wherever located, of such services determined pursuant to E.O. 14071. For the purposes of E.O. 14071, OFAC interprets the "indirect" provision of such services to include when the benefit of the services is ultimately received by a "person located in the Russian Federation." (Emphasis added.)[7]

In related guidance, OFAC stated the following regarding the definition of "Russian person": "For the purposes of the determination of May 8, 2022 made pursuant to E.O. 14071, OFAC anticipates publishing regulations defining the term "Russian person" to mean an individual who is a citizen or national of the Russian Federation, or an entity organized under the laws of the Russian Federation. [8]

This definition is slightly different than the definition in FAQ 1058 quoted above and may create some uncertainty in determining which Russian parties are covered under the OFAC Determinations, especially Russian citizens and nationals who are located outside of Russia. (See also OFAC FAQ 1059 related to providing services to persons located outside of the Russian Federation that are owned or controlled by persons located in the Russian Federation and/or when the benefits of services provided to persons outside the Russian Federation are ultimately received by persons located in the Russian Federation.)

It is important to note that these provisions are not limited to performing services only for Russian

parties who have been designated for sanctions previously, such as Russian oligarchs and government officials. Rather these restrict the performance of such services for the broader universe of persons or entities that fit within the foregoing of Russian parties regardless of whether they have been designated previously for sanctions.

Application of Provisions To U.S. and Foreign Parties. The restrictions in the OFAC Determination issued under E.O. 14071 apply to "U.S. persons." The term "U.S. person" is defined in E.O. 14071 (4)(c) as any United States citizen, lawful permanent resident, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.[9]

However, the provisions in the OFAC Determination issued under E.O. 14024 (designation for sanctions) are much broader – these apply to "any persons" – which arguably can include both U.S. persons and foreign persons. Thus, if non-U.S. persons or entities perform the foregoing services, they run the risk of being designated for sanctions by OFAC under E.O. 14024. This includes possible designation on the OFAC SDN List or other OFAC sanctions lists. Therefore, even non-U.S. persons and entities can be subject to significant legal and economic consequences for violations of the OFAC Determination under E.O. 14024.

Do Accounting Services Include Tax Preparation and Filing? OFAC addressed the issue of whether "accounting services" covered in its Determination under E.O. 14071 include tax preparation and filing services. OFAC's FAQ 1068 provides as follows in pertinent part:

For the purposes of the determination made pursuant to Executive Order (E.O.) 14071 on May 8, 2022, "Prohibitions Related to Certain Accounting, Trust and Corporate Formation, and Management Consulting Services" (the determination), do accounting services include tax preparation and filing?

Yes. U.S. persons, wherever located, are prohibited from exporting, reexporting, selling, or supplying, directly or indirectly, accounting services, which would include tax preparation and filing services, to any person located in the Russian Federation, unless otherwise exempt or authorized by OFAC. Please see FAQ 1059 for more information. Please note the determination excludes the provision by a U.S. person of any service to an entity located in the Russian Federation that is owned or controlled, directly or indirectly, by a United States person, and any service in connection with the wind down or divestiture of an entity located in the Russian Federation that is not owned or controlled, directly or indirectly, by a Russian person.

As noted in FAQ 1067, this determination does not prohibit the export, reexport, sale, or supply, directly or indirectly, of tax preparation-related software to the Russian Federation, as distinct from tax preparation and filing services?.

Additional Guidance. Additional guidance is available from OFAC on the application of these prohibitions under various factual circumstances including providing software related to accounting, trust/corporate formation and management consulting services, the provision of educational services such as online university courses on the subjects of such services, executive search and vetting services, serving as directors and/or voting trustees and services provided to a parent company located

in the Russian Federation by a U.S. subsidiary.

As the reader can see, the requirements, exemptions and other terms of the Determination under E.O. 14071 are different in many respects than those in the Determination under E.O. 14024, and parties should be mindful of this in applying these separate authorities.

There are additional terms, conditions and exemptions in the OFAC Determinations, related Executive Orders and OFAC guidance not discussed in this article that could apply to a company's proposed transaction. Parties are advised to review these carefully to evaluate specific issues that may apply to it. This article is for background educational purposes only and is not intended as legal advice. If a party seeks legal advice, it should retain an attorney who will focus on the specific business and factual terms in its transaction.

Due to the high level of importance of the Russia-Ukraine conflict to the U.S., these requirements are treated as a high priority within the Administration. As such, it is likely that OFAC will deal with these requirements at a serious level in its enforcement efforts as well.

[1] This Determination provides in pertinent part: ?? As a result, the following activities are prohibited, except to the extent provided by law, or unless licensed or otherwise authorized by the Office of Foreign Assets Control: the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of accounting, trust and corporate formation, or management consulting services to any person located in the Russian Federation.? Such Determination is available here.

[2] This Determination provides in pertinent part: ?Any person that the Secretary of the Treasury or the Secretary of the Treasury's designee, in consultation with the Secretary of State or the Secretary of State's designee, or [that] the Secretary of State or the Secretary of State's designee, in consultation with the Secretary of the Treasury or the Secretary of the Treasury's designee, subsequently determines operates or has operated in such sectors shall be subject to sanctions pursuant to section 1(a)(i).? Such Determination is available here.

[3] Available here.

[4] See OFAC FAQs 1034 and 1038, available on the OFAC website.

[5] See OFAC FAQ 1061, available on the OFAC website.

[6] See OFAC FAQ 1034, available on the OFAC website.

[7] See OFAC FAQ 1058, available on the OFAC website.

[8] See OFAC FAQ 1034, available on the OFAC website.

[9] See E.O. 14071, April 6, 2022, Section 4(c).

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