

## **RAPID RESPONSE BRIEF**

### **CURRENT CONCERNS ABOUT SANCTIONS EVASION: SECONDARY SANCTIONS**

Secondary sanctions authorize the U.S. Treasury's Office of Foreign Assets Control (OFAC) or the State Department to specifically apply sanctions to non-US companies and individuals, even in scenarios where there is no contact whatsoever with the United States. Secondary sanctions therefore represent a powerful sanctions tool.

At present, the United States has not expanded the use of secondary sanctions against Russia, but appears to be developing secondary sanctions options that may include trading partners like China, India, and the United Arab Emirates. This rapid response brief provides context about secondary sanctions and practical compliance steps to prepare for any potential secondary sanctions.

#### **How does this relate to the Ukraine crisis?**

- Expansive and multilateral economic sanctions against Russia demonstrate how a large cross-section of major economies can coordinate to implement strategic economic measures against a target jurisdiction. However, several large trading partners to Russia do not currently implement sanctions against Russia, thereby creating a vulnerability for sanctions evasion that could undermine existing and future multilateral sanctions.
- Secondary sanctions may be used by the United States to curtail Russian access to international trading partners like China, India, and the United Arab Emirates. Secondary sanctions would impose economic costs and legal consequences on third parties in jurisdictions outside of Russia, for supporting sanctioned Russian entities and individuals.

## Context

1. Policymakers continue to message about the very real sanctions evasion risks from Russia and Russian entities. The US government, including through the Treasury Department’s Financial Crimes Enforcement Network (FinCEN), on March 7, 2022, provided detailed public guidance to financial institutions about its concerns regarding Russian efforts to evade sanctions.<sup>1</sup> FinCEN found that “sanctioned Russian and Belarusian actors may seek to evade sanctions through various means, including through non-sanctioned Russian and Belarusian financial institutions and financial institutions in third countries.”<sup>2</sup>
2. On March 24, 2022, the White House announced the creation of an initiative to address sanctions evasion between the G7 and European Union, which represents an important coordinating and information sharing effort.<sup>3</sup> This group also committed to engaging “other governments on adopting sanctions similar to those already imposed by the G7 and other partners.”<sup>4</sup>
3. As multilateral efforts increase economic pressure against Russia, sanctioned Russian entities will likely seek avenues to evade sanctions and obtain prohibited goods and services.

## Definition and scope of secondary sanctions

4. “Secondary sanctions” is a broad term that covers a wide array of restrictions on non-US companies and individuals. Unlike US primary sanctions, no US nexus – such as a connection to the US financial system, US economy, or a US person – is required to trigger US secondary sanctions restrictions. The legal implications of secondary sanctions are significant, as they impose US restrictions on non-US parties with absolutely no contacts with, or presence in, the US.<sup>5</sup>
5. Secondary sanctions lack a commonly agreed definition, but the US Congressional Research Service identifies them as: “Sanctions that target third parties – those not engaged in the objectionable activity subject to sanctions but engaged with the individuals or entities that

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<sup>1</sup> FIN-2022-Alert001, March 7, 2022, <https://www.fincen.gov/sites/default/files/2022-03/FinCEN%20Alert%20Russian%20Sanctions%20Evasion%20FINAL%20508.pdf>

<sup>2</sup> FIN-2022-Alert001, March 7, 2022, at 2, emphasis added, <https://www.fincen.gov/sites/default/files/2022-03/FinCEN%20Alert%20Russian%20Sanctions%20Evasion%20FINAL%20508.pdf>

<sup>3</sup> The White House, March 24, 2022, FACT SHEET: United States and Allies and Partners Impose Additional Costs on Russia, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/24/fact-sheet-united-states-and-allies-and-partners-impose-additional-costs-on-russia/>

<sup>4</sup> *Ibid.*

<sup>5</sup> For further background on secondary sanctions and their use see Samantha Sultoon & Justine Walker, Secondary Sanctions, Implications and the Transatlantic Relationship, Atlantic Council, September 2009, <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/secondary-sanctions-implications-and-the-transatlantic-relationship/>

are.... Secondary sanctions often are constructed to deter sanctions evasion, penalizing those that facilitate a means to avoid detection or that provide alternative access to finance.”<sup>6</sup>

6. The precise restrictions and scope of secondary sanctions can vary considerably between each individual program. Equally not all sanctions programs have secondary sanctions effects. Typically, secondary sanctions prohibit non-US companies from engaging in business activities that benefit a sanctioned country or entity. For instance, the potential application of secondary sanctions may occur in scenarios such as purchasing oil, engaging in pipeline development, sales of military equipment, or making funds available in contravention of US sanctions.

### **What is known about Russia-related secondary sanctions?**

7. Secondary sanctions capabilities exist under statutes and a number of other current U.S. Treasury Department sanctions authorities, including Executive Order (E.O.) 14024, which has been the legal basis for many of the US sanctions against Russia since its expanded invasion of Ukraine in February 2022.
8. E.O. 14024 offers an expanded list of “specified harmful foreign activities” and consequently expands the potential risk arising from US secondary sanctions. However, at present, the US government does not appear to have issued new secondary sanctions involving Russia or Russian entities under E.O. 14024.
9. Outside of the E.O. 14024 sanctions framework, the United States imposed secondary sanctions involving Russia through statute under the Countering America’s Adversaries Through Sanctions Act of 2017 (CAATSA) via its Russia-focused section, Countering Russian Influence in Europe and Eurasia Act of 2017 (CRIIEA). CRIIEA created mandatory secondary sanctions involving Russia for the first time (albeit with some discretion given to the Executive Branch for implementation).
10. Secondary sanctions can involve subjective determinations of potential violations, including the degree of “material” violation of sanctions and the “significance” of the transaction or transactions in question.
11. In deciding whether to impose secondary sanctions, US authorities will need to determine whether a non-US person has “knowingly” facilitated a “significant transaction” in violation of the relevant sanctions program.

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<sup>6</sup> Congressional Research Service, at 4, <https://crsreports.congress.gov/product/pdf/R/R45415/12>; See also, [https://www.atlanticcouncil.org/wp-content/uploads/2019/09/SecondarySanctions\\_Final.pdf](https://www.atlanticcouncil.org/wp-content/uploads/2019/09/SecondarySanctions_Final.pdf)

12. Whilst there is some variation between programs, OFAC and State Department guidance set out a list of factors that will be considered when making a determination on whether or not a transaction is significant. Non-exhaustive factors include:

- The size, number, and frequency of the transaction(s)
- The nature of the transaction(s)
- The level of awareness of management and whether the transaction(s) is/are part of a pattern of conduct
- The nexus between the transaction(s) and a blocked person
- The impact of the transaction(s) on statutory objectives
- Whether the transaction(s) involve/s deceptive practices
- Other factors that the Secretary of the Treasury deems relevant on a case-by-case basis, the value and number of goods, or value and frequency of services

13. The definition of “knowingly” is generally deemed to cover whether a person has actual knowledge or should have known of the conduct in question.

### **Further US secondary sanctions against Russia are possible, but may not be imminent**

14. US policymakers are developing secondary sanctions options to target third parties outside of Russia for transacting with sanctioned parts of the Russian economy.<sup>7</sup> However, as US National Security Advisor Jake Sullivan noted on March 25, 2022: “We have a number of tools to ensure compliance, and one of those tools is the designation of individuals or entities in third-party jurisdictions who are not complying with US sanctions or are undertaking systematic efforts to weaken or evade them.”<sup>8</sup>

15. While US officials continue to contemplate and prepare secondary sanctions, they do not appear to be imminent against China. On March 25, 2022, Treasury Secretary Janet Yellen said that secondary sanctions on China are not “necessary or appropriate at this point.”<sup>9</sup>

16. Companies around the world, including in China, are already taking measures to avoid secondary sanction designations by making

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<sup>7</sup> Washington Post, March 24, 2022, Biden aides explore rarely used sanctions weapon against Russia, <https://www.washingtonpost.com/us-policy/2022/03/24/russia-economy-sanctions/>

<sup>8</sup> Financial Times, US threatens to punish third parties helping Moscow evade sanctions, <https://www.ft.com/content/867dc0d2-fb7b-461e-9e54-0c545ccd8c47>

<sup>9</sup> Bloomberg, March 25, 2022, China Damps U.S. Concern on Russian Sanctions by Drilling Into Their Details, <https://www.bloomberg.com/news/articles/2022-03-25/china-damps-u-s-concern-on-sanctions-by-drilling-into-details>

“adjustments to internal compliance programs, changing suppliers, or terminating contracts”.<sup>10</sup>

### **Practical Steps for Compliance**

- Reaffirm management commitment to resource compliance modifications, such as systems upgrades and training, given the evolving risk environment.
- Proactively monitor for suspicious or anomalous activity in third countries with exposure to Russia.
- Ensure that capabilities exist to calibrate compliance systems for enhanced due diligence involving secondary sanctions should they expand.
- Review counterparty risk, including efforts by counterparties with prior exposure to Russia to modify their business activities.
- Review existing contract clauses to ascertain where sanction risks are explicitly addressed (see [ACAMS webinar on secondary sanctions and the impact for contract clauses](#)).
- Review and internalize the March 7, 2022, FinCEN Alert, FIN-2022-Alert001, for red flags on Russian sanctions evasion.
- Identify efforts for public-private and private-private information sharing to inform compliance programs.

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<sup>10</sup> [Bloomberg, op. cit.](#)

## About ACAMS

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