

U.S. Imposes Chemical Weapons-Related Sanctions Against Russia

August 30, 2018

International Trade Controls

On August 27, 2018, the Department of State [imposed](#) sanctions against Russia pursuant to the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (CBW Act) in response to Russia's use of a chemical nerve agent against a UK citizen.

The measures imposed on August 27 include the termination of foreign assistance, sales of defense articles, foreign military financing, exports of national security-sensitive goods and technology, and the denial of U.S. government credit or other financial assistance to Russia. Several measures, however, have been waived in certain key respects. Importantly, for example, sanctions were waived with respect to the provision of foreign assistance, space flight activities, deemed exports to Russian nationals, exports and reexports to wholly-owned U.S. subsidiaries in Russia, and exports and reexports for commercial end-users and civil end-uses. Such activities may continue subject to licensing, which will be examined on a case-by-case basis under the licensing policy previously in effect.

Under the CBW Act, additional sanctions are required to be imposed unless, within three months, the President is able to determine that Russia has satisfied a set of criteria intended to ensure that it will no longer utilize chemical weapons in contravention of international law or against its own people. These criteria are unlikely to be satisfied, as they effectively would require Russia to acknowledge responsibility for using a chemical nerve agent in the UK and to submit to on-site international inspections aimed at preventing any future use of chemical weapons by Russia. It therefore is likely that additional sanctions will be imposed on Russia pursuant to the CBW Act after three months. Specifically, the President will be required to impose at least three of six additional sanctions set forth on a list provided in the CBW Act. Depending on which of the six sanctions the President chooses to impose, and whether application of those sanctions is waived in whole or in part, these additional sanctions could potentially have much greater impact on Russia than the sanctions imposed on August 27.

Background

The CBW Act

The CBW Act requires the President to impose sanctions against a foreign country that he determines has used chemical or biological weapons in violation of international law or used lethal chemical or biological weapons against its own nationals. When the President (or an

official to whom he has delegated this authority) makes such a determination,¹ he is required to impose the following five sanctions:

1. Termination of foreign assistance, except for urgent humanitarian assistance and food or other agricultural products;
2. Termination of sales of defense articles;
3. Termination of foreign military financing;
4. Denial of U.S. government credit or other financial assistance; and
5. Termination of exports of national security-sensitive goods and technology.

The CBW Act also requires the President to impose additional sanctions unless, within three months of making the above determination, the President determines that (i) the foreign government is no longer using chemical or biological weapons in violation of international law or using lethal chemical or biological weapons against its own nationals; (ii) the foreign government has provided reliable assurances that it will not in the future engage in any such activities; and (iii) the foreign government is willing to allow on-site inspections by the United Nations or other international observers.

In the event that the President is unable to make such a determination, he must impose at least three from a menu of six sanctions measures. The six potential measures are:

1. Opposition by the United States to the extension of any loan or financial or technical assistance to the sanctioned country by international financial institutions;
2. Prohibition on any U.S. bank making any loan or providing any credit to the government of that country, except for loans or credits for the purpose of purchasing food or other agricultural commodities or products;
3. Prohibition on the export of all other goods and technology (excluding food, other agricultural commodities and products, and medicine and medical supplies);
4. Restrictions on the importation into the United States of articles (which may include petroleum or any petroleum product) that are the growth, product, or manufacture of the sanctioned country;
5. Downgrading or suspension of diplomatic relations between the United States and the government of the sanctioned country; and
6. Certain presidential actions with respect to aviation involving the sanctioned country.

Under Section 307(d) of the CBW Act (22 U.S.C. § 5605(d)), the President may waive the application of any sanction, except for the downgrading or suspension of diplomatic relations, if

¹ Presidential authorities under the CBW Act were delegated to the Secretary of State by Executive Order 12851 (June 11, 1993).

he determines and certifies to Congress that such a waiver is essential to the national security interests of the United States, and notifies Congress of his determination and certification 15 days before the waiver takes effect.

The President shall remove any sanctions if, at the end of a 12-month period beginning on the date of the initial imposition of sanctions, he determines and certifies to Congress that (i) the foreign government has provided reliable assurances that it will not use chemical or biological weapons in violation of international law and will not use lethal chemical and biological weapons against its own nationals; (ii) the foreign government is not making preparations to use such weapons in those ways; (iii) the foreign government is willing to allow on-site inspections by the United Nations or other international observers; and (iv) the foreign government is making restitution to those affected by any use of chemical or biological weapons in violation of international law or by any use of lethal chemical or biological weapons against its own nationals.

The State Department has imposed sanctions under the CBW Act on only two prior occasions: against Syria in 2013 and North Korea in 2018. With respect to Syria, both initial sanctions and additional sanctions were imposed, subject to certain waivers. With respect to North Korea, only an initial round of sanctions has been imposed, consisting of the five mandatory sanctions measures noted above. Though more than three months have passed since the initial sanctions were imposed on March 5, 2018, the Trump Administration has not made the supplemental determination that additional sanctions need not be imposed, nor has the United States imposed the mandatory additional sanctions.

CBW Act Sanctions Against Russia

On August 8, the State Department [announced](#) its determination that Russia had used chemical or biological weapons in violation of international law or used lethal chemical or biological weapons against its own nationals. The determination was based on the Administration's conclusion that Russia was responsible for the use of a "Novichok" nerve agent in an assassination attempt against UK citizen Sergei Skripal and his daughter Yulia Skripal in March 2018.

Consistent with the statutory obligation, on August 27 the State Department imposed the five mandatory sanctions described above. Importantly, however, in determining and certifying that such sanctions were warranted under the CBW Act, the State Department also determined that it is essential to the national security interests of the United States to partially waive the application of sanctions in several key areas. Specifically, the sanctions imposed on August 27 were partially waived with respect to foreign assistance, the licensing of defense articles and services, and the licensing of national security-sensitive goods and technology.

Foreign Assistance

When the required statutory determination regarding the use of chemical weapons has been made, the CBW Act mandates the termination of assistance, except for urgent humanitarian assistance and food or other agricultural commodities or products.

With respect to Russia, however, the State Department determined and certified to Congress that the waiver of this restriction is essential to the national security interests of the United States. This sanctions measure, therefore, has been waived completely.

Sale of Defense Articles

Among the sanctions measures imposed on August 27, the United States also terminated (i) sales to Russia of any defense articles, defense services, or design and construction services, and (ii) licenses for the export to Russia of any item on the U.S. Munitions List, subject to a partial waiver.

In particular, the State Department determined that it is essential to the national security interests of the United States to waive the application of this restriction with respect to the issuance of licenses in support of government space cooperation and commercial space launches. Licenses will be issued on a case-by-case basis, consistent with the export licensing policy in effect for Russia prior to the application of CBW Act sanctions.

Exports of National Security-Sensitive Goods and Technology

The CBW Act mandates a prohibition on exports to the sanctioned country of any goods or technology listed on the Commerce Control List (CCL) maintained by the Department of Commerce's Bureau of Industry and Security (BIS) and controlled for national security (NS) reasons. The State Department again certified that a partial waiver of this measure was essential to the national security interests of the United States.

First, the prohibition on exports of listed goods or technologies to Russia was waived for exports or reexports of goods or technology eligible for the following license exemptions under the BIS-administered Export Administration Regulations:

- GOV – Authorizing exports and reexports for international nuclear safeguards; U.S. government agencies or personnel; agencies of cooperating governments; international inspections under the Chemical Weapons Convention; and the International Space Station;
- ENC – Authorizing the export, reexport, and transfer (in-country) of qualifying encryption systems, equipment, commodities, and components;
- RPL – Authorizing exports and reexports for one-for-one replacement of parts, components, accessories, and attachments;
- BAG – Authorizing individuals leaving the United States to carry personal baggage;
- TMP – Authorizing various temporary exports and reexports; exports and reexports of items temporarily in the United States; and exports and reexports of beta test software;
- TSU – Authorizing exports and reexports of operation technology and software; sales technology and software; software updates (bug fixes); non-encryption “mass market” software subject to the General Software Note²; and release of technology and source

² The General Software Note relates to publicly available software and software that is the minimum necessary “object code” for the installation, operation, maintenance, or repair of items whose export is authorized.

code in the United States by U.S. universities to their bona fide and full-time regular employees;

- APR – Authorizing various “permissive reexports,” including reexports of qualifying items between and among certain favored countries; reexports to the extent that direct export from the United States is authorized by specific license; and reexports of spare parts together with authorized items;
- CIV – Authorizing certain exports and reexports of items controlled for national security reasons for civil end-users and civil end-uses in certain countries; and
- AVS – Authorizing certain aircraft, vessel, and spacecraft related exports.

Furthermore, the export and reexport prohibition was waived for the categories of goods or technology summarized below. In particular, BIS will continue to consider license requests and issue new licenses on a case-by-case basis, consistent with its pre-existing export licensing policy for Russia, for the following:

- Safety of flight: exports and reexports of goods or technology necessary for the safety of flight of civil fixed-wing passenger aviation;
- Deemed exports/reexports: the release of technology for deemed exports and reexports to Russian nationals;
- Wholly-owned U.S. subsidiaries: exports and reexports of goods or technology to wholly-owned U.S. subsidiaries in Russia;
- Space flight: exports and reexports of goods or technology in support of government space cooperation and commercial space launches; and
- Commercial end-users: exports and reexports of goods or technology for commercial end-users or civil end-uses in Russia.

The State Department’s notice also states, however, that exports and reexports of goods or technology pursuant to new licenses for Russian state-owned or state-funded enterprises will be reviewed on a case-by-case basis, but subject to a presumption of denial.

Other Sanctions Measures

The other two sanctions measures mandated by the statute – termination of all foreign military financing for Russia and denial to Russia of any credit, credit guarantees, or other financial assistance by the United States – were applied in full.

The measures announced on August 27 will remain in place for at least one year and until further notice.

Potential for Additional Sanctions Against Russia

As noted above, unless Russia satisfies certain conditions within three months of the application of initial sanctions under the CBW Act, the Administration is required to impose at least three

additional sanctions measures from the menu of six potential measures outlined above. It is unlikely that Russia will satisfy the conditions necessary to avoid the imposition of the additional sanctions. However, the Administration will have flexibility to select options that will have marginal impact (e.g., opposition to lending by international financial institutions), and also to waive these sanctions to the degree it wishes to do so. Of course, it also will have flexibility to adopt much harsher sanctions (such as import or export prohibitions) should it choose to go in that direction.

In addition to the likelihood of additional sanctions within three months pursuant to the CBW Act, several bills are pending in Congress that would impose harsher sanctions on Russia. These include S. 3336, the “Defending American Security from Kremlin Aggression Act,” S. 2313, the “Defending Elections from Threats by Establishing Redlines Act,” and H.R. 6437, the “Secure America from Russian Interference Act.” At the moment, none of these bills appears likely to be enacted this year. However, should the political dynamic on Russia change due to some action by President Trump or President Putin, new Russia sanctions legislation could potentially move through Congress very quickly. Such legislation would likely emerge first from the Senate, and would likely include some combination of the provisions of S. 3336 and S. 2313.

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Covington has deep experience advising clients on the legal, policy, and practical dimensions of U.S. and EU sanctions. We will continue to monitor developments in this area, including the potential application of additional sanctions against Russia at the conclusion of the three-month period, and we are well-positioned to assist clients in understanding how these developments may affect their business operations.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our International Trade Controls practice:

<u>Peter Flanagan</u>	+1 202 662 5163	pflanagan@cov.com
<u>Corinne Goldstein</u>	+1 202 662 5534	cgoldstein@cov.com
<u>Peter Lichtenbaum</u>	+1 202 662 5557	plichtenbaum@cov.com
<u>Kimberly Strosnider</u>	+1 202 662 5816	kstrosnider@cov.com
<u>David Addis</u>	+1 202 662 5182	daddis@cov.com
<u>Alan Larson</u>	+1 202 662 5756	al Larson@cov.com
<u>Stephen Rademaker</u>	+1 202 662 5140	srademaker@cov.com
<u>Molly Doggett</u>	+1 202 662 5354	mdoggett@cov.com

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