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NAVIGATING THE INTERNATIONAL TRADE & NATIONAL SECURITY LANDSCAPE

A Review of Recent Developments and What to Expect Going Forward

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KEY TAKEAWAYS:

- Russia, China, and Iran will continue to be the focus of country-specific sanctions and export controls, but other hotspots around the world persist.
- The Biden administration will continue to focus on human rights, multi-lateral sanctions, and export controls coordinated with allies.
- Enforcement of sanctions and export control laws is expected to ramp up in 2023.

The centrality of international trade laws in the development and execution of U.S. foreign policy has never been more evident than in 2022. Companies that have not invested in international trade compliance programs are behind the curve and should do so with urgency as compliance and enforcement risks are set to materially increase in 2023.

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Russian Federation & Belarus

Russia's invasion of Ukraine resulted in an unprecedented and rapid roll-out of new sanctions and export controls aiming to impose harsh economic costs on the Kremlin and its allies. Immediate, coordinated action from the United States, European Union and allies has been supplemented by a steady escalation of sanctions and export controls restricting Russia's access to the global economy. These steps have involved almost every familiar policy in the sanctions toolkit, as well as some novel strategies developed and deployed for the first time.

Comprehensive Regional Sanctions

Some of the earliest steps taken by the U.S. in response to Russia's aggressive posturing towards Ukraine were to impose sanctions on regions of Ukraine that Russia recognized as independent. On February 21, 2022, prior to the military invasion, President Biden issued Executive Order (E.O.) 14065 imposing comprehensive sanctions on the so-called Donetsk and Luhansk People's Republic regions of Ukraine. These sanctions resemble those imposed by the Obama administration on the Crimea region of Ukraine during Russia's 2014 invasion.

These comprehensive regional sanctions were later supplemented by individual sanctions on members of the governing councils of these purportedly independent states, as well as controls restricting export of nearly all items subject to U.S. export controls to the regions.

Sanctions Targeting Individuals and Entities

New additions by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) to the list of Specially Designated Nationals and Blocked Persons list ("SDN List") have been a core tool deployed by the U.S. government in response to the invasion. New designations began immediately upon the commencement of Russia's invasion in February 2022, and proceeded at a steady pace throughout 2022. Previous client alerts have covered in detail each of these new rounds of designations. Clear patterns emerge targeting certain categories of individuals and entities.

First, sanctions have specifically targeted political and economic elites (so-called oligarchs) with close ties to President Vladimir Putin. On February 24, 2022, OFAC designated 15 Russian individuals who are "financial sector elites" with senior positions at state-owned banks, government officials, or members of families close to President Putin. The following day, OFAC designated President Putin and Foreign Minister Sergey Lavrov, along with the Russian Minister of Defense and Chief of General Staff of the Russian Armed Forces. Subsequent to this first round of designations, individual sanctions were extended to apply to other political elites and their families, as well as individuals comprising the management boards of financial institutions and members of the State Duma. Further rounds of sanctions have targeted senior Russian defense officials, as well as business leaders in the defense and aerospace industries.

Second, additions to the SDN List have targeted the Russian financial sector. Several of the largest Russian banks and their numerous subsidiaries were promptly added to the SDN List following the invasion. In April, these full blocking sanctions were extended to Sberbank and its subsidiaries, the largest financial institution in Russia (which is also state owned). Alfa-Bank, Russia's largest privately owned financial institution was also designated at this time. Over the course of the year, numerous additional Russian financial institutions—both state and privately- owned—have been designated.

Third, SDN designations have targeted individuals and entities associated with the Russian defense sector, including within the aerospace industry. For example, on March 24, OFAC added to the SDN List Tactical Missiles Corporation JSC (a state-owned defense conglomerate), JSC NPO High Precision Systems (a state-owned defense manufacturer), NPK Tekhmash OAO (a state-owned ammunition producer), JSC Russian Helicopters (a state-owned helicopter production company), and JSC Kronshtadt (a private Russian defense contractor).

Restrictions on Investment in Russia

In addition to adding certain Russian entities and financial institutions to the SDN List, the Biden administration released a series of executive orders that had the effect of prohibiting any new investment in the Russian Federation. On 8 March 2022, President Biden issued E.O. 14066 which prohibited any new investment in the Russian energy sector. The prohibition was quickly broadened by E.O 14068, issued on 11 March 2022, which not only prohibited importation of certain Russian exports including fish and alcoholic beverages, but also broadened the investment restrictions to any "new investment in any sector of the Russian Federation economy as may be determined by the Secretary of the Treasury." Finally, on April 6, 2022, the Biden administration issued E.O 14071, more broadly prohibiting new investment in the Russian Federation.

Restrictions on Providing Services to Russia

In June 2022, the U.S. and EU banned the direct or indirect provision of certain business services to Russia. This prohibition includes accounting, trust and corporate formation, and business and management consulting. The UK had previously prohibited, in May 2022, providing accountancy, management consultancy, and public relations services to Russia.

On September 15, 2022, pursuant to Executive Order 14071, OFAC prohibited the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person (wherever located), of quantum computing services to any person located in the Russian Federation. Limited exceptions are provided for (a) quantum computing services to an entity located in the Russian Federation that is owned or controlled, directly or indirectly, by a United States person; and (b) quantum computing services in connection with the wind down or divestiture of an entity located in Russia that is not owned or controlled, directly or indirectly, by a Russian person.

Financial Sector Sanctions

In addition to adding several major Russian banks and their subsidiaries to the SDN List, OFAC also issued new directives related to financial transactions including:

- Directive 2, issued on February 24, 2022, pursuant to E.O. 14024, prohibiting U.S. financial institutions from (1) opening or maintaining a correspondent account or payable-through account for or on behalf of certain Russian financial institutions; and (2) processing transactions involving those foreign financial institutions.

- Directive 3, also issued on February 24, 2022, pursuant to E.O. 14024, prohibiting U.S. persons from engaging in all transactions or dealings involving new debt of longer than 14 days maturity or new equity of Russian entities determined to be subject to the directive.

- Directive 4, issued on March 1, 2022, pursuant to E.O. 13662, prohibiting U.S. persons from engaging in any transactions involving the Russian Federation's Central Bank, National Wealth Fund, or Ministry of Finance.

As these various directives were deployed, OFAC simultaneously issued several general licenses permitting the winding down of transactions with specified entities or exempting certain transactions. Many of these general licenses have since expired.

Access to the SWIFT Network

In the early days of the Russian invasion, there was considerable speculation that Russian financial institutions may be cut-off from the SWIFT messaging system, considered at the time to be one of the more drastic options to impose costs on Russia for the invasion. SWIFT, the "Society for Worldwide Interbank Financial Telecommunication," is a secure messaging system used by banks and other financial institutions to exchange information, such as details regarding money transfers. Without access to SWIFT, a financial institution is effectively denied access to the global economy, supplementing other sanctions imposed on the Russian financial sector.

In February 2022, the European Commission, France, Germany, Italy, the UK, and Canada announced that "select" Russian banks would be removed from the SWIFT messaging system—eventually targeting four large Russian Banks: Otkritie, Novikombank, Sovcombank, and VTB. Shortly thereafter, VEB and Bank Rossiya were added to the list. By June, Russia's largest bank—Sberbank—was added, alongside, Credit Bank of Moscow, Russian Agricultural Bank, and the Belarusian Bank for Development and Reconstruction. The SWIFT bans now block the vast majority of Russia's financial sector from participating in the system, forcing Russian banks to seek alternatives.

Export Controls

In addition to new sanctions, the United States has implemented new export controls targeting Russia and Belarus. As with the sanctions regime, the new export restrictions have targeted the defense, aerospace, and maritime sectors.

The initial round of controls saw the expansion of license requirements for exports of any items classified under an Export Control Classification Number ("ECCN") in Categories 3 through 9 of the Commerce Control List. The U.S. Department of Commerce's Bureau of Industry and Security ("BIS") also implemented a new Russian Foreign Direct Product Rule restricting the export of a wide range of foreign-produced items. Additional restrictions were targeted at Russian military-end users, including a new Russian Military End-Users Foreign Direct Product Rule and an expansion of Military End User restrictions for nearly all items subject to the EAR. Additional details on these restrictions can be found in previous Client Alerts.

BIS then implemented a licensing requirement for all items on the Commerce Control List ("CCL"), which are destined for, reexported to, or transferred within Russia or Belarus, that are subject to its jurisdiction. Likewise, BIS broadened the scope of U.S. licensing mandates for *foreign-produced* items that are exported, reexported, or transferred within Russia or Belarus in, for example, the following situations:

- Products considered "foreign made" that incorporate over 25% U.S.-origin content controlled anywhere on the CCL, are required to comply with BIS' export controls requirements, based on application of the *de minimis* rule.

- "Foreign made" products described on the CCL (i.e., not an EAR99 item), which are destined for a person in Belarus or Russia, are subject to a licensing requirement when they are considered the "direct product" of controlled U.S.-origin software or technology, equipment derived from such software or technology, or come from a manufacturing site of such software or technology.

- "Foreign made" items that would be classified as EAR99 under U.S. export control laws and that are destined for Russian or Belarusian military end users described on BIS's Entity List are now subject to a licensing requirement when they are the "direct product" of controlled U.S.-origin software or technology, or equipment or a manufacturing site derived from such software or technology.

These "direct product" rules, in an effort to avoid duplicative licensing requirements, provide that products manufactured in allied countries are exempt from the U.S. licensing mandate, because these countries have imposed substantially similar export controls regimes on Russia and Belarus.

Moreover, BIS continued broadening the scope of existing military end use and end user rules applicable to Belarus and Russia so that they now cover any item subject to the

U.S. Export Administration Regulations ("EAR"). This includes items subject to the foreign direct product rules discussed above.

In addition to imposing a ban on "luxury goods" exported to Russia or Belarus or to sanctioned Russian or Belarusian oligarchs (irrespective of their location), BIS broadened the scope of its licensing controls impacting select goods, parts and equipment, and resources used in significant industry sectors, such as industrial and manufacturing activities, oil refining, and the production of chemical and biological agents. The UK and the EU have taken a similar approach, but the types of goods covered vary across the three jurisdictions.

Notably, BIS has aggressively targeted the Russian aviation sector with its robust export controls regime. Indeed, various private and commercial aircraft owned, leased, or operated by Russian or Belarusian individuals or entities are restricted from traveling between these countries, and U.S. persons are prohibited from providing equipment or services.

To facilitate compliance and to monitor the effectiveness of the aforementioned rules, in June 2022, BIS, together with the Financial Crimes Enforcement Network ("FinCEN"), released a first-of-its-kind joint alert to financial institutions advising that they should apply increased due diligence to transactions that are more likely to enable the evasion of export controls. The joint alert (1) underscores "red flags" with respect to transactions, to aid both financial institutions and other actors in the field; and (2) contains a list of products BIS considers of special concern given their potential repurposing for military applications in Russia and Belarus. The list includes cameras, global positioning systems, integrated circuits, oil field equipment, and aircraft parts. The alert also listed a number of shipment hubs presenting diversion risks to Russia and Belarus.

In September, BIS imposed additional export controls on new categories of EAR99 items that did not previously require an export license. The list included restrictions on certain quantum computing and advanced manufacturing items—mirroring a contemporaneous OFAC prohibition on the provision of quantum computing services to persons in Russia.

Although it is technically possible to obtain export licenses for the items subject to the expanded export controls described above, export license applications related to products destined for Russia and Belarus are in most cases going to be reviewed by the U.S., EU and UK under a general policy of denial.

The U.S. has also enacted regulations banning the exportation, re-exportation, sale, or supply of U.S. Dollar-denominated banknotes to any person located in the Russian Federation, including the government. The EU and UK have implemented comparable policies regarding the transfer of Euro and Sterling banknotes, respectively.

Russian Oil and Petroleum Price Caps

In December 2022, the G7 nations established a price cap of $60 per barrel on seaborne crude oil originating in Russia ("Russian Oil"). In early February 2023, the G7 set two new price caps related to the maritime transport of petroleum products that originate in Russia ("Russian Petroleum"). For premium to crude Russian Petroleum (e.g., diesel), the price cap is $100 per barrel, but the price cap for discount to crude Russian Petroleum (e.g., fuel oil and naphtha) is $45 per barrel. All three price caps are governed by similar policies implemented by the U.S., the EU, and the UK. The U.S. price cap policy bans "the exportation, reexportation, sale, or supply" of the following services with respect to the maritime transport of Russian Petroleum or Russian Oil, from the U.S. (or a U.S. person) to Russia, when the price per barrel is at or over the price caps described above: (1) trading/commodities brokering; (2) financing; (3) shipping; (4) insurance (including reinsurance and protection and indemnity); (5) flagging; and (6) customs brokering.

Notably, however, the U.S. (and the other jurisdictions) provides a safe harbor process whereby certain actors can avoid liability by meeting specific recordkeeping and attestation requirements. According to OFAC guidance, the level of diligence that different service providers have to perform depends upon the nature of the service provided and the provider's access to price information. In addition to the safe harbor provisions, and other exceptions found in its guidance, OFAC has issued a few general licenses allowing certain transactions concerning Russian Oil or Russian Petroleum. For instance, General License No. 57A permits transactions "that are ordinarily incident and necessary to addressing vessel emergencies related to the health or safety of the crew or environmental protection." The EU & UK have implemented similar price cap policies to the US and ongoing coordination among these jurisdictions is expected going forward as they all endeavor to stop Russia's ability to fund its war efforts against Ukraine. For additional details, see prior alerts on the Russian Oil price cap and the Russian Petroleum price cap.

Outlook for 2023

With no end in sight to the Russian invasion of Ukraine, we do not anticipate that the extensive sanctions implemented over the course of 2022 will unwind in the near-term.

To the contrary, it is likely that the Biden administration will continue to issue new sanctions on Russian individuals with connections to the Putin regime and Russian entities in the industrial and financial sectors. On February 21, 2023, Deputy Secretary of the Treasury Wally Adeyemo previewed likely next steps in the sanctions program, which could include a focus on targeting sanctions evasion and increased coordination with multilateral partners.

More drastic steps remain available, but are unlikely except as an instrument of last resort. Unlike comprehensively sanctioned jurisdictions such as Cuba, Iran, North Korea, and Syria, there have been no signals that Russia will be designated as a state sponsor of terrorism in 2023.

China

Although overshadowed by the response to Russia's further invasion of Ukraine, the Biden administration continued deploying export controls and, to a lesser extent, sanctions, throughout 2022 in an effort to slow China's development of technologies that the administration assesses threaten U.S. national security. In addition, as discussed further below, enforcement of the Uyghur Forced Labor Prevention Act has hit imports from China in certain industries.

Export Controls

In August 2022, without following a formal rulemaking process, BIS used the "is informed" provision of the Military End Use / User ("MEU") Rule to notify parties (privately) that a license is required to export certain products, as a result of an "unacceptable risk of use in or diversion to a 'military end use' or a 'military end user.'" Parties receiving these notices violate U.S. law if they export a product listed in the notice to one of the countries specified in the notice unless they have BIS authorization. License applications for these products are reviewed under a presumption of denial. This provision has reportedly been deployed by BIS to prevent multiple semiconductor companies from exporting particular types of integrated circuits ("ICs") and related technology, which is frequently used in advanced AI applications, to China (and Russia).

Along the same lines, in October 2022, BIS issued expansive export controls with respect to advanced computing integrated circuits ("ACICs"), computer products containing ACICs, and specific semiconductor manufacturing products destined for China. The U.S. government seems to be using these new export controls to prevent China from acquiring the technological resources (e.g., advanced computing software or

supercomputers) it needs to develop sophisticated weaponry and computing that, among other things, could enable human rights abuses and pose a national security risk to the U.S.

First, these new export controls regulate certain high-performance ACICs, specified computers, electronic assemblies, and parts with such ACICs; the listed semiconductor manufacturing equipment and specially designed associated pieces; and related technology and software. The U.S. Government applies Regional Stability restrictions, which require license authorizations, for items that fall under these new ECCNs when they are being transported to China, which now includes Macau (since January 2023) and Hong Kong.

Second, BIS enacted two new foreign direct product ("FDP") rules (and revised an already existing one). The foreign direct product rules extend the scope of U.S. export controls to specified foreign-produced goods connected to certain technology and software. While each FDP rule is different, the ones aimed at China are attempts to completely cut off its access to semiconductor manufacturing equipment, certain foreign-produced advanced ACICs, and products used in constructing and sustaining supercomputers, as follows:

- The advanced computing FDP rule restricts the export of specified foreign-produced advanced computing items destined for China as well as certain technology developed by entities headquartered in China for the production of an ACIC wafer, die, or a mask.

- The supercomputer FDP rule extends export controls over specified foreign-produced products used to design, develop, produce, operate, install (including on-site), maintain, repair, overhaul, or refurbish a "supercomputer" (defined in the rules), which is either destined for China or is already located there. Notably, this rule is broad in that it applies to items incorporated into or used in the production or development of equipment, parts, and components that will ultimately be used in a supercomputer located in, or destined for, China.

- The existing Entity List FDP rule was expanded and now prohibits the transfer of particular products manufactured abroad to an additional 28 China-based entities that were previously included on the Entity List.

There are also new license requirements in effect for specific products where the exporter has knowledge (actual knowledge or an awareness of a high probability, which may be inferred based on acts amounting to willful blindness) that the product will be

used in particular activities (1) related to the construction or upkeep of a "supercomputer," or relevant equipment or parts, which are either being transported to China or are already located there; or (2) intended to ultimately be used in facilities fabricating semiconductors, including particular ACICs, in China. The latter applies even when the exporter may not know whether the facility produces the specified ACICs.

Importantly, aside from focusing on regulating advanced computing technology destined for China, BIS has placed significant restrictions on U.S. persons who are seeking to enable or engage in shipping or transferring certain items not controlled by the EAR, but that meet the parameters of certain ECCNs. While these activities were not previously controlled, they are now broken down into three prohibition categories and further detailed in the rule. These categories are summarized as follows:

- Any product, not subject to the EAR, that an individual or entity knows will be used in the production, development, or servicing of ICs at a semiconductor manufacturing facility located in China that fabricates particular ICs (e.g., advanced logic, DRAM, and NAND ICs).

- Any product, not subject to the EAR and meeting the parameters of any ECCN in Product Groups B, C, D, or E in Category 3 of the CCL, that an individual or entity knows will be used in the production, development, or servicing of ICs at a semiconductor manufacturing facility located in China, but does not know if the facility actually fabricates advanced ICs.

- Any product, not subject to the EAR, irrespective of the end use or end user, which meets the criterion of ECCNs 3B090, 3D001 (for 3B090), or 3E001 (for 3B090) or that is used in the servicing of any such products.

U.S. persons, including lawful permanent residents and dual nationals (wherever located), are required to apply for licenses to facilitate or engage in the above activities. These restrictions apply even when the U.S. person's activities are not connected to controlled U.S.-origin items.

BIS issued limited guidance regarding the application of the new rules. It bears mention that BIS also announced a temporary general license allowing organizations not headquartered in Country Groups D:1 or D:5 or E to proceed with exports, reexports, and in-country transfers of particular ACICs and related technology and software to their affiliates and subsidiaries in China, for certain purposes, until April 7, 2023.

Lastly, it is noteworthy that, throughout 2022, the executive branch often deployed the Entity List and Unverified List to regulate entities based in China. The former list had over 60 new additions in 2022, many consisting of semiconductor and ACIC manufacturers, for instance, Yangtze Memory Technologies and Hefei Core Storage Electronic Limited.

Outlook for 2023

With no apparent off-ramp to cool tensions between the U.S. and China, and with fears that China may begin to supply military equipment to Russia for use in the war against Ukraine, it is clear that the U.S. will continue to use export controls, sanctions, and import restrictions to pressure China in 2023.

Iran

In 2022, the Biden administration continued to widen sanctions against Iran due to Iran's involvement in supplying arms to Russia for use in the war in Ukraine and human rights abuses. Sanctions targeted Iran's petrochemical industry, entities related to the production and transfer of Unmanned Aerial Vehicles ("UAVs"), and human rights-related sanctions in response to the Iranian regime's crackdown on protestors.

Beginning June 2022, OFAC launched the first of five rounds of designations targeting Iran's petroleum and petrochemical trade including numerous Iranian petrochemical producers and international sanctions evasion networks supporting Iranian petrochemical sales. Unsurprisingly, the trend has continued into 2023 as OFAC designated more companies in February who were involved in the production, sale and shipment of Iranian petrochemical and petroleum. Further, on February 24, 2023, BIS issued a Final Rule amending the EAR to impose new export control measures related to Iranian UAVs. New licensing requirements for EAR99 items related to UAVs (listed in new Supplement no. 7 to part 746 of the EAR) were imposed for items destined for Iran, Russia, or Belarus, regardless of whether a U.S. person is involved in the transaction. These items are subject to the new Iran Foreign Direct Product Rule (Iran FDP rule) and revised Russia/Belarus Foreign Direct Product Rule.

On September 8, 2022, OFAC designated numerous persons who were involved in research, development, production, procurement, and shipment of Iranian UAVs and UAV components to Russia for its war against Ukraine. On November 15, 2022, OFAC further sanctioned firms that facilitated production or transfer of UAVs to Russia after Russia's use of UAVs to attack civilian infrastructure in Ukraine. In January and February of 2023, OFAC continued to designate more Iranian persons responsible for the design

and production of UAVs. These sanctions were often imposed in coordination with the European Union and other allies. The Biden administration expressed its commitment to "sanction people and companies no matter where they are located that support Russia's unjustified invasion of Ukraine" and to "deny Putin the weapons that he is using to wage his barbaric and unprovoked war on Ukraine." With no end in sight to the war in Ukraine or Iran's support for Russia, the US will likely continue to designate more Iranian persons who contribute to Iran's UAV program.

On September 13, 2022, Mahsa Amini, a 22-year-old woman, was arrested and detained by Iran's Morality Police for allegedly wearing a hijab improperly, and on September 16, she died under suspicious circumstances. Peaceful protests started in response, and the Iranian government violently suppressed those protests. Starting on September 22, 2022, OFAC began designating Iranian persons who thwarted the protestors' freedom of expression. On November 16, 2022, OFAC further designated employees of Iranian state-run media.

Furthermore, on September 23, 2022, the US Department of Treasury issued Iran General License D-2 to support the free flow of information into Iran after the Iranian government cut off its citizens' access to the internet. In January 2023, with protests continuing, OFAC, in coordination with the UK and EU, designated more persons for violating human rights. With little chance of a change in Iran's political regime, it seems highly likely that additional human rights-related sanctions will be imposed in 2023.

Overall, we assess that sanctions against Iran will continue to increase in 2023, including by the EU, in response to deepening ties between Russia and Iran and political turmoil within Iran. The chances of a restoration of the JCPOA are virtually zero given geopolitical concerns and bipartisan opposition in the U.S. Congress.

Nicaragua

In 2022, the Biden administration continued to target officials of the Ortega-Murillo regime and executives in the gold sector. On January 10, 2022, OFAC designated six officials of the Ortega-Murillo regime pursuant to Executive Order 13851. These officials had been variously affiliated with the military, the Nicaraguan Institute of Telecommunications and Mail (TELCOR), and the state-owned Nicaraguan Mining Company Empresa Nicaragunese de Minas (ENIMINAS). On June 16, 2022, OFAC added ENIMINAS itself and the president of its board of directors to the SDN List. On October 24, 2022, OFAC added to the SDN List the Nicaraguan mining authority General

Directorate of Mines, as well as a close confidant of Ortega who was the head of state security under the first Ortega presidency.

On October 24, 2022, President Biden signed Executive Order 14088, which amended Executive Order 13851. This executive order expanded Treasury's authority to hold the Ortega-Murillo regime accountable for its continued attacks on Nicaraguan's freedom of expression and assembly. The executive order further provides OFAC the authority to target certain entities or persons that operate or have operated in the gold sector of the Nicaraguan economy and any other sector identified by the Secretary of Treasury, in consultation with the Secretary of State. Lastly, the executive order allowed expanded sanctions authorities that could be used to prohibit new U.S. investment in certain identified sectors in Nicaragua, the importation of certain products of Nicaraguan origin into the United States, or the exportation from the United States, or by United States person, wherever located, of certain items to Nicaragua.

In February 2023, the Ortega regime freed more than 200 political prisoners, which the U.S. State Department has described as a "constructive step towards addressing human rights abuses" in Nicaragua that could "open[] the door to further dialogue between the United States and Nicaragua." Whether this ultimately leads to an easing of U.S. sanctions remains to be seen. As of the time of this writing, sanctions on Nicaragua have not changed since the last round of sanctions that were imposed in October 2022.

Venezuela

In November 2022, Venezuela's government met with Venezuela's democratic opposition to resume negotiations. Both sides agreed to enact an estimated $3 billion humanitarian relief program and discussed continuing efforts to proceed with fair and free elections in 2024.

Not long after the parties reached agreement, OFAC announced Venezuela General License 41 ("GL 41"), which authorizes select transactions "related to the operation and management by Chevron Corporation and its joint venturers in Venezuela involving state-owned Petróleos de Venezuela, S.A. PdVSA." Notably, these transactions include: (1) the "production and lifting of petroleum or petroleum products produced" by Chevron and its joint venturers; (2) the sale "exportation to, or importation into the United States of petroleum or petroleum products produced by the" joint venturers, as long as it is sold to Chevron first; and (3) the "purchase and importation into Venezuela of goods or inputs related to the" above activities "including diluents, condensates, petroleum, or natural gas products."

GL 41 significantly limits the U.S.'s pressure campaign against the Maduro regime for the first time since 2018, when essentially any dealings with a U.S. nexus that involved Venezuela's oil sector were prohibited. However, reflecting the U.S.'s reluctance to de-escalate Venezuela sanctions, GL 41 makes clear that, among other things, sales of petroleum products for exportation to destinations outside the U.S.'s jurisdiction as well as certain types of payments to the Venezuelan government are still prohibited.

Notwithstanding GL 41, all other Venezuela-related sanctions and SDN designations remain in place. However, depending on how negotiations proceed between Maduro's regime and the democratic opposition, the U.S. may look for additional ways to ease some Venezuelan sanctions to encourage further progress.

Export Controls

In addition to the targeted export controls imposed on Russia, Belarus, and China discussed above, both the Department of Commerce and Department of State imposed new, generally applicable, export controls.

U.S. Department of Commerce – General Export Control Developments

Section 1758 of the Export Control Reform Act of 2018 mandates that BIS establish export controls on "emerging and foundational technologies" ("Section 1758 Technologies"). In August 2022, BIS enacted an interim rule that imposes new export controls on four Section 1758 Technologies. These technologies are comprised of: two substrates of ultra-wide bandgap semiconductors (Gallium Oxide (Ga2O3) and diamond), which were added to ECCNs 3C001.e and f, 3C005.a and b, and 3C006; Electronic Computer Aided Design software specially designed for the development of integrated circuits with any Gate-All-Around Field-Effect Transistor structure, which was added to new ECCN 3D006; and pressure gain combustion technology for the production and development of gas turbine engine components or systems, which was added to ECCN 9E003.a.2.e. Section 1758 Technologies were also the subject of new BIS export controls issued in January 2023 covering four marine toxins (brevetoxin, gonyautoxin, nodularin, and palytoxin) that are controlled, respectively, under ECCNs 1C351.d.4, d.9, d.13, and d.14.

U.S Department of State – General Export Control Developments

In March 2022, the U.S. Department of State's Directorate of Defense Trade Controls ("DDTC") announced it was conducting a multi-year comprehensive review and revision of the

International Traffic in Arms Regulations ("ITAR"), which is being referred to as the "ITAR Reorganization" effort. DDTC took the first step when it amended the ITAR in September 2022 in an attempt to better organize the purposes and definitions of the regulations by consolidating and co-locating authorities, general guidance, and definitions. While these were not substantive revisions, we anticipate those will come over the next few years.

In July 2022, DDTC initiated a pilot program for an Open General License ("OGL") process based on ITAR Section 126.9(b). So far, DDTC has announced two OGLs that, unless otherwise noted, are in effect until July 31, 2023. One OGL provides for the reexport—to end users in the United Kingdom, Canada, or Australia that are pre-verified and approved—of unclassified defense articles. The other provides for the retransfer—to end users in the United Kingdom, Canada, or Australia that are pre-verified and approved—of unclassified defense articles.

In early December 2022, DDTC announced its International Traffic in Arms Regulations Compliance Program Guidelines (the "ITAR Guidelines"). The ITAR Guidelines outline DDTC's expectations for developing and maintaining an effective ITAR compliance program. These guidelines now contain a structure that is more consistent with that of the Framework for OFAC Compliance Commitments and BIS's Export Compliance Guidelines. Similarly to OFAC and BIS, DDTC specified that an ITAR compliance program should be based on a company's risk profile and should include the following critical elements:

(1) management commitment;
(2) DDTC registration, jurisdiction and classification, authorizations, and other ITAR activities;
(3) recordkeeping;
(4) detecting, reporting, and disclosing violations;
(5) ITAR training;
(6) risk assessments;
(7) audits and compliance monitoring; and
(8) a written ITAR compliance manual.

Finally, DDTC has released new guidance for those interested in soliciting authorizations with respect to defense service exports by U.S. persons overseas. DDTC is likely to issue additional guidance and revisions to the ITAR in 2023.

CFIUS UPDATES

The Committee on Foreign Investment in the United States ("CFIUS") had a busy year in 2022, and shows no sign of slowing down in 2023.

On Aug. 2, 2022, the committee published an annual report analyzing its activities in 2021 after its first full calendar year under the expanded jurisdiction granted by the Foreign Investment Risk Review Modernization Act of 2018. In September, President Biden issued an executive order instructing the committee to consider particular national security risk factors, such as risk to supply chain resilience and security when reviewing covered transactions. And in October, the Department of Treasury released the first-ever CFIUS Enforcement and Penalty Guidelines, providing important visibility into the committee's enforcement approach by spelling out categories of acts or omissions that may constitute a violation leading to a penalty.

Taken together, these three releases reinforce a continuation of trends seen over the past few years and suggest increased committee activity in the year to come. For 2023, high technology — including quantum computing — life sciences, and green energy technology will continue to be key areas of interest for CFIUS, as will critical technologies.

Moreover, a holistic analysis of an investment will be required to assess the security risks of covered transactions. Transactions that appear to pose no threat in isolation, but that may represent a larger trend towards increasing control of a company or sector by foreign investors, will also continue to attract CFIUS's attention. Risks to critical U.S. supply chains, U.S. technological leadership, cybersecurity, and U.S. persons' sensitive data will be particularly considered.

Transactions from China reviewed by CFIUS more than doubled in 2021, rising to 44 transactions. However, most reviewed transactions are expected to continue to involve foreign investors from allied countries, such as Canada, the UK, Germany, South Korea, Singapore, and Japan, which pose less of a national security risk and are more likely to be approved by CFIUS without mitigation.

We additionally expect CFIUS to continue to put non-notified/non-declared transactions under heightened scrutiny as the committee devotes resources to identifying such transactions through a variety of channels. The committee is expected to increase enforcement, especially for parties that fail to submit mandatory filings, fail to comply with CFIUS mitigation terms, or make inaccurate filings. For additional information concerning CFIUS's activities in 2022 and what to expect from CFIUS in 2023, consult or previous client alert on this topic or article in Bloomberg.

OTHER ISSUES TO WATCH:

Virtual Currency Sanctions Risks

Platforms providing services related to virtual currency emerged as a hotspot of OFAC enforcement activities in 2022. This increased emphasis has been a part of a whole-of-government approach to addressing risks associated with the use of virtual currencies, including sanctions evasion, but also as relating to money laundering, cybercrime, and financing of illegal activities.

OFAC released a brochure in 2021 providing detailed guidance to the virtual currency industry in relation to sanctions compliance. That brochure can now be seen in context as a part of a government-wide strategy to address risks associated with the proliferation and popularization of these currencies. In February 2022, Treasury's National Money Laundering Risk Assessment highlighted a rise in the use of virtual assets for money laundering and their use as a vector for sanctions evasion. And on March 9, 2022, the Biden administration issued an Executive Order on Ensuring Responsible Development of Digital Assets, noting their use as a tool to circumvent sanctions.

This increased scrutiny generated a number of enforcement actions against participants in the virtual currency industry in 2022. On May 6, OFAC designated Blender.io, a "virtual currency mixer" that was being used to conceal transactions involving entities associated with the Democratic People's Republic of Korea ("DPRK"). A virtual currency mixer takes virtual currency tokens from a variety of sources and co-mingles them before re-distributing the tokens back to users, ultimately obfuscating the source, destination, and parties associated with transactions. OFAC alleged that Blender.io was being used by the DPRK's Lazarus Group in order to launder over $20.5 million in illicit funds.

OFAC followed the Blender.io designation by targeting mixer Tornado Cash on August 8, 2022. OFAC again indicated association with the DPRK's Lazarus Group, alleging that it had been used to launder over $455 million by that Group, as well as over $100 million of other stolen virtual assets. The Blender.io and Tornado Cash designations represent the first actions by OFAC to target virtual currency mixers, but are not the first time that these services have been targeted for their association with financial crime. Given the nature of the services provided by cryptocurrency mixers, continued scrutiny by financial regulators and OFAC can be expected to continue into 2023 and beyond. In addition, OFAC's designations have included the addition of specific cryptocurrency wallet addresses to the SDN List. Users of virtual currency must avoid any transactions involving these addresses.

On October 11, 2022, OFAC and FinCEN announced parallel enforcement actions against the virtual currency Exchange Bittrex for its failure to comply with sanctions and Bank Secrecy Act

(BSA) requirements. OFAC announced a settlement of $24 million with the platform identifying failures to prevent transactions originating out of Crimea, Cuba, Iran, Sudan and Syria in contravention of sanctions requirements. Concurrently, FinCEN announced a settlement of $29 million for failures to maintain effective anti-money laundering controls and failure to file suspicious activity reports from 2014-2017. The parallel actions indicate the overlapping risks associated with cryptocurrency exchanges as well as inter-agency coordination in addressing those risks.

OFAC scrutiny of the industry continued into late 2022, with the office announcing on November 28, 2022, a settlement of over $360,000 with the virtual currency exchange Kraken. Despite maintaining an anti-money laundering and sanctions compliance program, OFAC identified over $1.6 million of transactions involving individuals located in Iran. In particular, the release identifies that users in Iran were able to circumvent compliance controls because Kraken did not implement IP address blocking on transactional activities across the platform. The need for IP-address controls was emphasized in OFAC's 2021 guidance related to virtual currencies.

It is now well-established that cryptocurrency exchanges and other virtual currency providers are highly vulnerable to charges of facilitating sanctions evasion without robust due diligence and know-your-customer protections. As the SEC, CFTC, and FinCEN continue enforcement actions, OFAC is likely to play a role in joint enforcement action or on its own where violations have a sanctions-evasion dimension.

Uyghur Forced Labor Prevention Act

On June 13, 2022, the U.S. Department of Homeland Security's Customs and Border Protection agency ("CBP") published guidance for importers regarding compliance requirements under the Uyghur Forced Labor Prevention Act ("UFLPA"), a law enacted in December 2021 and that went into effect as of June 21, 2022. Under the UFLPA, all goods produced in whole or in part in the Xinjiang Uyghur Autonomous Region ("XUAR") of China, or produced by entities on the UFLPA Entity List (CBP added over 30 entities to this list), are presumed to be made with forced labor and are prohibited from entry into the U.S. This presumption also applies to goods made in, or shipped through, other parts of China and other countries that include inputs made in the XUAR. Importers must produce "clear and convincing" evidence in order to rebut the presumption of forced labor after a shipment is detained.

The guidance provided by CBP describes the documentation and supply chain due diligence required to release a detained shipment. The guidance also highlighted enforcement priorities for CBP including cotton, polysilicon, and tomatoes connected to the XUAR. For imports made

on or after June 21, 2022, the UFLPA superseded the withhold release orders ("WRO") previously issued on cotton from the XUAR and products made by the Xinjiang Production and Construction Corps. CBP issues WROs upon evidence that reasonably – but not conclusively – indicates that a product is made with forced labor to block such products from entry into the U.S. Additional details on CBP's UFLPA guidance is available in our previous client alert.

WROs/Findings Issued in 2022

a. YTY Industry Holdings Sdn Bhd (YTY Group)

On January 28, 2022, CBP issued a WRO on imports of synthetic disposable gloves manufactured by YTY Group and its subsidiaries in Malaysia. At the time, CBP concluded that evidence reasonably indicated that conditions of forced labor existed in the YTY Group's production and employee housing facilities. To redress such findings, the YTY Group outlined and implemented a corrective action plan, reimbursed recruitment fees paid by its migrant workers, commissioned an independent social compliance audit, and submitted comprehensive documentation showing the YTY Group's commitment to remediate conditions of forced labor in its production and housing facilities. On February 8, 2023, CBP lifted the WRO after determining that gloves were no longer produced using forced labor, and conditions of forced labor no longer existed.

b. Natchi Apparel (P) Ltd.

On July 29, 2022, CBP issued a WRO against Natchi Apparel (P) Ltd. ("Natchi"), one of several entities owned and operated by its parent company, Eastman Exports (which itself was not subject to a comprehensive WRO). Somewhat unusually, the WRO was not accompanied by a press release, but media reports prior to the issuance of the WRO highlighted abuse against female workers by other employees at Natchi. CBP lifted the WRO in record time, on September 7, 2022, a mere 6 weeks after the WRO was issued. CBP cited swift and successful collaboration between civil society and worker rights organizations, Natchi, Eastman Exports, and CBP as the reason the WRO was lifted. The press release announcing modification of the WRO stated the Natchi had addressed all five of the ILO indicators of forced labor identified by the WRO although the specific indicators at issue were never made public.

Natchi's success in getting CBP to lift the WRO so quickly is evidence of the benefits of partnering with civil society and labor unions to resolve worker rights issues.

c. Fishing Vessel Da Wang

On January 8, 2022, CBP upgraded a previously-issued WRO on the fishing vessel, Da Wang, to a finding based on evidence that conclusively demonstrated that certain seafood, mainly tuna products, has been in whole or in part harvested by the *Da Wang* fishing vessel using forced

labor. CBP found evidence of all 11 of the ILO's forced labor indicators on the Da Wang vessel. Da Wang is owned and operated by Yong Feng Fishery Ltd.

d. Central Romana Corporation Limited

Most recently, on November 23, 2022, CBP issued a WRO on raw sugar and sugar-based products produced in the Dominican Republic by Central Romana Corporation Limited. CBP identified abuse of vulnerability, isolation, withholding of wages, abusive working and living conditions, and excessive overtime in Central Romana's operations. This is the first time an entity located in the Caribbean has been the subject of a WRO and the first time the sugar industry has been targeted, which demonstrates the global scope of CBP's forced labor enforcement activities.

WHAT TO EXPECT in 2023

We expect CBP to continue to ramp up enforcement of the UFLPA and to continue to issue additional WROs for jurisdictions outside of the XUAR. In particular, a report in December 2022 by the Helena Kennedy Centre at Sheffield Hallam University and follow-on press has significantly increased the risk that CBP will take enforcement action against the aluminum industry in China including automotive parts sourced from the XUAR. Cotton and apparel will continue to be a main focus of CBP's enforcement of the UFLPA.

Based on public comments from CBP officials, we anticipate that several WROs will be modified or revoked in 2023. Already this year, two Malaysian firms, Sime Darby Plantation Berhad and, as noted above, YTY, have respectively had their finding and WRO lifted by CBP. In response to tremendous public interest in this topic, CBP has also indicated that it would like to make its processes more transparent and it would not be surprising if CBP issued additional guidance this year on how companies can address imports blocked pursuant to WROs, findings, and/or the UFLPA.

International Trade Enforcement Activities

Throughout 2022, the Department of Justice ("DOJ"), BIS, the DDTC, FinCEN, and OFAC, among others, have been actively enforcing U.S. sanctions and export controls programs. As detailed below, they show no signs of letting up. Before describing some notable enforcement actions, however, enforcement guidance issued by BIS in August 2022 bears mention.

BIS Enforcement Guidance

BIS has modified its enforcement regulations so that BIS charging letters, some of which are already available on the agency's website, can be made publicly available after they are issued. It has also issued a revised enforcement regime via a memorandum (the "EAR Memo") that stresses four points: (1) substantially larger penalties; (2) more frequent use of non-monetary settlements for less egregious violations; (3) no longer allowing persons to settle a matter while neither admitting nor denying their actions (i.e., the party settling must admit the alleged conduct occurred); and (4) the institution of a 60-day "fast-track" review of voluntary self-disclosures involving technical (or minor) violations. Assistant Secretary for Export Enforcement, Matthew Axelrod, who issued the EAR Memo, has also made clear that BIS will consider additional amendments "to maximize the effectiveness of [its] administrative enforcement of export violations."

BIS has also continued to develop its antiboycott rules. These rules restrict parties' participation in foreign boycotts, which are not sanctioned by the U.S., and include three categories of violations (Categories A, B, and C), which BIS updated in October 2022.Category A includes only the most serious infractions calling for the maximum penalty, while Category B reflects infractions that often occur in commercial transactions and increased penalties are needed to "promote awareness, accountability and deterrence." Category C covers failing to timely report receipt of boycott requests.

Along with the redefined categories, Assistant Secretary Axelrod issued a separate memorandum outlining revised antiboycott enforcement policies, which, like the EAR Memo, underscored important enforcement priorities for BIS. According to the antiboycott memo, in settling matters involving antiboycott infractions, admissions of misconduct are now required. Also, not only will BIS be imposing higher penalties across the three categories identified above, but its enforcement will target foreign subsidiaries of U.S. organizations who violate the U.S. antiboycott rules.

Academic Outreach Initiative

In June 2022, the Department of Commerce's Office of Export Enforcement announced a new academic outreach initiative focused on preventing export controls violations by academic research institutions. The initiative contains the following four prongs:

1. **Prioritized engagement:** The Department of Commerce will focus on academic research institutions whose work gives them an elevated risk profile. This includes institutions that possess ties to foreign universities that are on the Entity List; involved in research with the Department of Defense; or are conducting research in sensitive technologies.

2. **Assignment of agents for institutions with an elevated risk profile**: The Department of Commerce will assign agents for prioritized institutions who will work closely with those institutions to help prevent unauthorized exports.

3. **Background briefings**: Assigned agents will be advising universities that work with foreign partners on national security risks associated with those partners.

4. **Training**: Assigned agents will be offering training to institutions with an elevated risk profile on export controls in an academic setting and the national security threats facing academic research institutions.

The initiative signals a greater focus on investigation and enforcement by the U.S. government of export-controls related violations committed by universities and other academic research institutions, making important for such institutions to have robust export control compliance programs in place, including export control training for faculty and staff engaged in proprietary research.

Export Controls Enforcement

In early 2022, DDTC entered into a $840,000 consent agreement with Torrey Pines Logic ("TPL"), Inc. and its sole owner, Dr. Leonid Volfson, based on their respective violations of the ITAR. According to the DDTC, TPL and Dr. Volfson both engaged in ITAR violations that included attempted export of defense articles to various countries including China and Lebanon.

Notably, Dr. Volfson was flagged when seeking to travel on a commercial flight from Seattle, Washington to Singapore via Tokyo, Japan with two thermal imaging systems— regulated by the ITAR and designated Significant Military Equipment on the U.S. Munitions List —in his carry-on luggage. CBP officers in Seattle seized the systems when Dr. Volfson failed to present the required export documentation. Ultimately, in addition to agreeing to pay the close to seven-figure fine, TPL agreed to implement a specific export compliance program including the appointment of "a qualified individual to serve as a Special Compliance Officer . . . for the entire term that the Consent Agreement is in force."

On October 19, 2022, in the U.S. District Court for the District of Connecticut, four individuals and two European companies were charged with, *inter alia*, conspiracy to defraud the U.S. and violations of the Export Control Reform Act. The defendants allegedly engaged in a scheme to illicitly transport a jig grinder, which is a high-precision instrument that is often used in nuclear proliferation and defense programs, from Connecticut to Russia (they were stopped in Latvia). The defendants failed to obtain export authorizations and, thus, were indicted. The DOJ's

approach to enforcement, particularly with respect to Russian sanctions or export controls programs, is clearly to target those who aid Russia's war efforts against Ukraine.

Sanctions Enforcement

Cryptocurrency is a growing focus of enforcement for OFAC and FinCEN. In October 2022, OFAC reached a $24 million settlement with Bittrex, Inc. ("Bittrex"), a cryptocurrency exchange, while FinCEN reached a $29 million consent agreement with Bittrex, based on similar conduct. Due to its inadequate sanctions compliance programs, Bittrex allegedly failed to prevent U.S. users from engaging in over $250 million in transactions on its platform with others in sanctioned jurisdictions, including the Crimea region of Ukraine, Cuba, Iran, Sudan, and Syria. The Department of the Treasury's press release notes that, when onboarding customers, Bittrex collected customer IP address and physical location data, but then failed to use this information for sanctions screening. Meanwhile, FinCEN's agreement was connected to Bittrex's deficient anti-money laundering system and multiple failures to meet suspicious activity reporting requirements.

A few weeks after the Bittrex settlement, the DOJ indicted several individuals and corporate entities in two separate cases relating to military aid to Russia. Five Russian nationals and two Venezuelan oil brokers were charged in the Eastern District of New York for allegedly participating in a scheme to evade U.S. sanctions and launder money. The defendants were charged with criminally enabling Russian oligarchs by providing them with military technology from U.S. companies, countless barrels of oil, and millions of dollars in laundered funds. Much of this activity was said to have been completed through a front company controlled by two individuals involved in the scheme.

OFAC closed out 2022 by settling with Danfoss A/S ("Danfoss"), a Dutch manufacturer and vendor of refrigeration and cooling products, for $4.3 million. Danfoss's wholly owned UAE subsidiary, Danfoss FZCO, instructed clients in sanctioned jurisdictions (Iran, Syria, and Sudan) to make payments to a certain account and committed numerous sanctions violations, when it remitted payments from the exact same account to Iranian and Syrian entities. According to OFAC, Danfoss provided inadequate guidance to Danfoss FZCO, considering it did not have systems in place to regularly monitor its subsidiary's activity.

Most recently, in late January 2023, the DOJ indicted Charles McGonigal, a former high-level FBI official, and Sergey Shestakov, a court interpreter, for their attempts to aid a Russian Oligarch, Oleg Deripaska, who appears on OFAC's SDN List. In particular, the indictment alleges that sanctions violations included providing professional investigative services to Derispaska. The

indictment also alleges that the defendants tried to conceal Deripaska's involvement through the use of shell companies and by other means.

Finally, the U.S. Supreme Court decision in *Turkiye Halk Bankasi A.S. v. United States* bears mention. Turkiye Halk Bankasi ("Halkbank"), a bank majority-owned by Turkey, was indicted for fraud and conspiracy for its alleged involvement in a money laundering scheme to assist Iran with evading U.S. sanctions. Halkbank claimed immunity under the Foreign Sovereign Immunities Act ("FSIA") and common law. As discussed in a prior alert, the U.S. Court of Appeals for the Second Circuit held that it had subject matter jurisdiction and, assuming *arguendo* that the FSIA applied in the criminal context, Halkbank was not immune because of the commercial activity exception. It also held that common law immunity had been superseded by the FSIA and thus was inapplicable, but, even if it was, the commercial activity exception would still apply. The case was argued at the Supreme Court in January, as detailed in a previous alert. The Court has now issued its decision, finding that the federal courts have original jurisdiction over criminal cases pursuant to 18 U.S.C. s. 3231, and that the FSIA applied only to civil, not criminal, matters. The Court then sent the case back to the Second Circuit to evaluate various common law immunity arguments raised but not fully considered below. Consequently, subject to the possibility of common law immunity, the Court concluded that foreign states and their instrumentalities could be prosecuted for violating or aiding the violation of U.S. sanctions programs. The Court also noted that if national security and foreign policy interests are not sufficiently protected, Congress and the President continue to have the power to respond.

Given Deputy Attorney General Lisa Monaco's characterization that "sanctions are the new FCPA" and DOJ, BIS, and State Department leadership also emphasizing the importance of export controls, we expect 2023 to be a busy year from an international trade enforcement perspective.