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## Targeting the Oligarchs

March 8, 2022

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# Biden Administration Anti-Oligarch Initiative

- Biden in SOTU:
  - “To the Russian oligarchs and the corrupt leaders who bilked billions of dollars off this violent regime: No more. We are joining with European allies to find and seize their yachts, their luxury apartments, their private jets. We’re coming for your ill-begotten gains.”
  - “The U.S. Department of Justice is assembling a dedicated task force to go after the crimes of Russian oligarchs”
- DAG Lisa Monaco:
  - “Oligarchs be warned: we will use every tool to freeze and seize your criminal proceeds.”
- Questions:
  - Can DOJ seize the property of oligarchs just because they are sanctioned?
  - If not, how can they do this?
  - What legal challenges will they face?
  - What legal defenses can the oligarchs use?
  - When can we expect results from the task force?

# Sanctions vs. Forfeiture

- Two main tools available to the US government: (i) sanctions and (ii) forfeiture
- Sanctions
  - Imposed administratively by Treasury (OFAC)
  - Results in blocking, but not seizure of the property
  - Property need not be connected to the reasons for the designation
  - Little/no judicial oversight
  - Does not require proof of a crime
- Forfeiture
  - Pursued by DOJ
  - Requires judicial order
  - Requires proof of a crime
  - Requires proof of connection of the property to a crime

# Sanctions – Legal Basis

- International Emergency Economic Powers Act (IEEPA) gives the President the power to impose economic sanctions on persons and entities upon determining that there exists an “*unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.*”
- Executive Order 13660 of March 6, 2014 declared a national emergency to deal with the threat posed by the actions and policies of certain persons who had undermined democratic processes and institutions in Ukraine; threatened the peace, security, stability, sovereignty, and territorial integrity of Ukraine; and contributed to the misappropriation of Ukraine’s assets.”
- Subsequent EOs expanded the scope of 13660

# Types of Russia Sanctions

- Blocking sanctions against designated individuals and entities
- Sectoral sanctions against entities operating in certain sectors of the Russian economy
- Investment ban and prohibition on the exportation or importation of goods, technology, or services to/from Crimea, LNR or DNR

# Blocking Sanctions

- Unless otherwise authorized or exempt, transactions by U.S. persons or in the United States are prohibited if they involve transferring, paying, exporting, withdrawing, or otherwise dealing in the property or interests in property of an entity or individual listed on OFAC's SDN list.
- The property and interests in property of an entity that is 50% or more owned, whether individually or in the aggregate, directly or indirectly, by one or more persons whose property and interests in property are blocked are also blocked, regardless of whether the entity itself is listed.
- In other words, the property is ***blocked***, but not ***forfeited***.
- OFAC sometimes issues general and specific licenses authorizing limited transactions in blocked property.

# Delisting/Judicial Challenges

- Under OFAC regulations, parties may be removed by demonstrating a change in the circumstances that their designation.
- OFAC: *“The ultimate goal of sanctions is not to punish, but to bring about a positive change in behavior. Each year, OFAC removes hundreds of individuals and entities from the SDN list. Each removal is based on a thorough review by OFAC.”*
- Judicial challenge is also possible, but extremely difficult given the deference the “extreme deference” that courts afford government decisions to designate and the “arbitrary and capricious” standard applied to review of administrative decisions.
- Deripaska cases as examples

# OFAC Delisting of EN+, Rusal and ESE

- In late 2018, OFAC agreed to remove the sanctions imposed on En+ Group, UC Rusal and JSC EuroSibEnergo (ESE) because they *“agreed to undertake significant restructuring and corporate governance changes to address the circumstances that led to their designation, including reducing Oleg Deripaska’s direct and indirect shareholding stake in those entities to below 50 percent; overhauling the composition of those entities’ boards of directors; taking restrictive steps related to their corporate governance; and agreeing to unprecedented transparency by undertaking extensive, ongoing auditing, certification, and reporting requirements.”*
- *“None of the transactions to be undertaken to divest Deripaska of his interests in these companies will allow Deripaska to obtain cash in return for shares relinquished or from future dividends...”*
- Source: OFAC notification letter to Senator McConnell dated December 19, 2018



# Deripaska Court Challenge to Designation

- OFAC rejected Deripaska's personal petition to be delisted and Deripaska then challenged OFAC's designation in court on the grounds that it was "arbitrary and capricious" and that it violated his due process rights under the 5<sup>th</sup> Amendment
- Court rejected the claim stating, *inter alia*, that judicial review in the "area at the intersection of national security, foreign policy, and administrative law is extremely deferential."
- Source: Deripaska v. Yellen, 19-cv-00727 (APM) Memorandum Opinion, June 13, 2021

# Forfeiture

- In contrast to blocking sanctions, forfeiture:
  - requires a judicial order
  - is carried out by DOJ
  - requires proof of a connection between the property and a crime
- Two types:
  - Criminal:
    - pursuant to a criminal conviction
    - criminal conviction requires proof beyond a reasonable doubt, but forfeiture standard is preponderance of the evidence
  - Civil/In rem
    - action against the property, not an individual
    - does not require criminal prosecution of the property owner
    - proof by a preponderance of the evidence

# Justice Kennedy on Civil Forfeiture

- *“These statutes are not directed at those who carry out the crimes, but at owners who are culpable for the criminal misuse of the property. The theory is that the property, whether or not illegal and dangerous in nature, is hazardous in the hands of the owner because either he uses it to commit crimes, or allows others to do so. The owner can be held accountable for the misuse of the property.”* United States v. Ursery, 518 U.S. 267, 294 (1996) (concurring opinion).
- *“, Only the culpable stand to lose their property; no interest of any owner is forfeited if he can show he did not know of or consent to the crime.”* United States v. Ursery, 518 U.S. 267, 294 (1996) (concurring opinion).

# Forfeiture Challenges

- Locating the property
- Identifying/proving the UBO (difficult if hidden behind multiple nominee owners and offshore fronts)
- Proving the underlying crime (especially difficult if committed in a foreign corrupt country)
- Proving the connection between the underlying crime and the property
- Competing demands on agents/prosecutors related to domestic crimes
- Difficult, but not impossible (Lazarenko example)
- Requires dedicated substantial resources and a long time horizon (presumably the point of the task force)



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#### Related Services

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#### Education

- J.D., *cum laude*, Harvard Law School, 1993
- M.A., University of California at Berkeley, 1987
- B.A., *magna cum laude* with highest honors, Harvard College, 1986

## Tom Firestone

### Partner

Tom Firestone is the co-chair of the firm's White Collar & Internal Investigations practice and a member of the firm's National Security/CFIUS/Compliance Practice Group. He specializes in complex transnational investigations and international risk management and represents companies and individuals before the Department of Justice (DOJ), the Securities and Exchange Commission (SEC), the Office of Foreign Assets Control (OFAC) of the Department of Treasury and other U.S. agencies. His matters often involve the Foreign Corrupt Practices Act (FCPA), the International Emergency Economic Powers Act (IEEPA) and other sanctions laws, the Bank Secrecy Act (BSA) and other anti-money laundering laws, the Foreign Agents Registration Act (FARA), and other federal criminal statutes related to business crime and national security. He has also represented individuals in proceedings before Interpol and the European Court of Human Rights (ECHR). He also regularly advises foreign governments on issues relating to anti-corruption and the rule of law.

Tom previously worked as an Assistant U.S. Attorney in the Eastern District of New York, where he specialized in the investigation and prosecution of transnational organized crime. While with the Department of Justice, he also served as the Resident Legal Advisor and Acting Chief of the Law Enforcement Section at the U.S. Embassy in Moscow and twice won the U.S. State Department Superior Honor Award. He has testified as an expert before the U.S. Senate Judiciary Committee and the UK House of Lords and is recognized by *Best Lawyers in America* in the area of white collar criminal defense. He is fluent in Russian and reads Polish and Bulgarian.

#### Representative Matters

- Served as Global Compliance Counsel to major international company under monitorship pursuant to DOJ/SEC settlement for FCPA violations
- Conducted internal investigations and risk assessments for U.S. and European companies in various countries including, Azerbaijan, Bulgaria, China, Kazakhstan, Korea, Kyrgyzstan, Nigeria, Pakistan, Paraguay, Russia, Ukraine and Uzbekistan, and represented companies before the DOJ and SEC in connection with many of these matters
- Negotiated \$65 million plea agreement on behalf of large Asian engineering company in connection with fraud in U.S. Department of Defense contract
- Led major investigation for U.S. pharmaceutical company into possible improper payments to healthcare professionals