

## How Russia Sanctions Bills Could Reshape Asset Forfeiture

By **Robin Rathmell, Jason Short and Scott Christopher** (January 29, 2024, 7:06 PM EST)

As the second anniversary of Russia's invasion of Ukraine looms, the global financial consequences of the conflict continue to increase. The U.S. has demonstrated considerable commitment to the Ukrainian cause, having allocated over \$75 billion to enhance Ukraine's infrastructure and defensive capabilities.[1]

In grappling with significant decisions regarding how to fund assistance packages for Ukraine, the U.S. has proposed legislation that could have dramatic consequences for the current U.S. sanctions regime.[2]

Ukraine's post-war reconstruction carries a staggering price tag, estimated at more than \$400 billion.[3] Governments around the world are debating the most effective means of financing Ukraine's post-war reconstruction, from multilateral aid packages to private investments.[4]

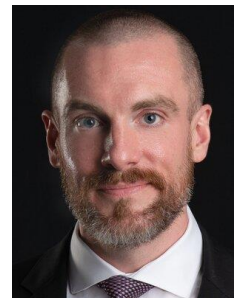
The U.S. government has latched onto one highly tempting source of funds to help finance its commitment: liquidating the seized or otherwise frozen assets that have been blocked as a result of sanctions against Russia and related designations targeting individuals, entities and industries involved in or otherwise supporting the harmful foreign activities of the Russian Federation, including threatening the peace, security, stability and sovereignty of Ukraine.[5]

These assets are estimated to be worth hundreds of billions of dollars.[6]

The Make Putin Pay Act, H.R. 5925, is the legislative manifestation of the proposed new seizure approach.[7] Proponents of this proposed legislation, which facilitates the direct seizure and forfeiture of these assets, argue that the funds could direct vital resources toward Ukraine's reconstruction efforts.[8] The proposed legislation, however, raises significant questions regarding procedural justice and the rule of law that normally provide important guardrails protecting individuals from having their property wrongfully seized.

This article explores the potential ramifications of such legislation, specifically for practitioners of international law and economic sanctions law.

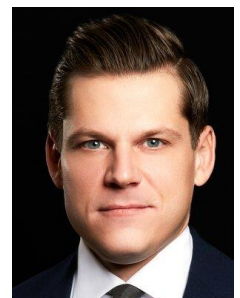
### Make Putin Pay Act and Related Sanctions Legislation



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Introduced in late 2023 by U.S. Rep. Richard McCormick, R-Ga., the Make Putin Pay Act would empower the president, in collaboration with the secretary of the U.S. Department of the Treasury, to seize and confiscate certain assets that — broadly — constitute (1) those subjected to sanctions due to associations with individuals profiting from political patronage or corruption tied to Russian President Vladimir Putin, and (2) sovereign assets linked to the government of the Russian Federation or its Central Bank.[9]

Importantly, H.R. 5925 delineates a specific course of action for the use of the seized assets. Specifically, it mandates that the proceeds from the sale of any asset seized or otherwise confiscated pursuant to this legislation be used to reimburse the U.S. for expenses incurred since Feb. 24, 2022, in connection with the Russia-Ukraine conflict.[10]

While current U.S. sanctions law permits the freezing of assets, it does not provide for the confiscation or forfeiture of those assets within the sanctions program. H.R. 5925 would therefore profoundly reshape current U.S. sanctions frameworks by facilitating the immediate forfeiture of a significant portion of the \$300 billion in assets that have been blocked or frozen as a result of sanctions against Russia and related actors.

Several other legislative initiatives have emerged, each introducing a mechanism for converting frozen assets to seized or confiscated assets.

#### ***Make Russia Pay Act — H.R. 892***

Introduced by Rep. Stephanie Bice, R-Okla., early last year, H.R. 892 proposes that the Treasury deem forfeited all Russian assets seized by the U.S.[11] Subsequently, these funds would be allocated to a Ukrainian humanitarian aid fund created under this legislation.[12]

The Treasury would have the discretion to use these resources to support Ukraine, potentially offering financial aid to the Ukrainian government for humanitarian and security purposes.[13]

#### ***Asset Seizure for Ukraine Reconstruction Act — S. 3359***

Introduced by Sen. Sheldon Whitehouse, D-R.I., on Nov. 29, 2023, S. 3359 would allow the U.S. Department of Justice to seize high-value assets owned by sanctioned Russian oligarchs more quickly through existing administrative forfeiture processes and transfer the sales proceeds of those assets to Ukraine.[14]

#### ***REPO for Ukrainians Act — S. 2003***

Introduced by Sen. James Risch, R-Idaho, on June 15, 2023, the Rebuilding Economic Prosperity and Opportunity, or REPO, for Ukrainians Act would provide the president with the authority to confiscate Russian sovereign assets that have been frozen in the U.S. and transfer those assets to assist in Ukraine's reconstruction efforts.[15]

In particular, S. 2003 would prohibit the release of funds to sanctioned Russian entities until Russia withdrew from Ukraine and agreed to provide compensation for harm caused by its unprovoked war.[16]

The bill would further provide the U.S. Department of State's Office of Sanctions Coordination with

additional resources to work with foreign partners on confiscating additional Russian sovereign assets located abroad.[17] Recently, the Biden administration has signaled its support for S. 2003, which — along with broad bipartisan support in Congress — has generated considerable interest among members of the global community that are contemplating Ukraine's reconstruction.[18]

Although each of these bills would provide for expanded powers regarding the disposition of frozen or blocked Russian assets, the Make Putin Pay Act — H.R. 5925 — stands out as a particularly notable initiative, not least because it diverges from its counterparts by proposing both an immediate seizure and confiscation of assets blocked pursuant to Russia-related sanctions, and the direct transfer of the proceeds of any sold or otherwise liquidated assets for the reimbursement of the U.S.

This latter provision represents a marked departure from the core objectives posed by the other legislation — that is, rather than emphasizing future reconstruction efforts or long-term stabilization initiatives in Ukraine, H.R. 5925 prioritizes reimbursing the U.S. for the substantial economic support it has extended to Ukraine since the onset of the war.

### **Departure From Traditional Forfeiture Methods**

The passage into law of H.R. 5925 would mark a pivot from the traditional mechanisms that the U.S. has employed to seize and forfeit assets, particularly in the context of sanctions enforcement.

The forfeiture of assets under U.S. federal law has traditionally followed three procedural routes: (1) civil forfeiture, which is conducted as an *in rem* proceeding in which the asset itself is the defendant in the matter; (2) criminal forfeiture, which is conducted as an *in personam* proceeding in which the asset is forfeitable upon conviction of the owner of that property; and (3) administrative forfeiture, which is considered a largely nonjudicial undertaking authorized in certain limited and uncontested civil forfeiture matters.[19]

Broadly, civil and criminal forfeiture are commonly predicated upon the commission of certain offenses — otherwise known as specified unlawful activity or predicate offenses — that, if demonstrated as part of the relevant legal proceedings, would authorize confiscation of property related to said offense(s).[20]

Both civil and criminal forfeiture follow carefully delineated procedural guidelines that, in no small part, are intended to take into consideration constitutional concerns arising from the governmental taking of property.

Historically, where property has been seized or blocked due to sanctions, the U.S. has sought to employ these traditional forfeiture avenues in seeking to forfeit or confiscate such assets.

For example, in April 2022, the DOJ issued a seizure warrant for the Motor Yacht *Tango*, a 255-foot luxury super yacht with an estimated value of \$90 million, owned by Russian oligarch Viktor Vekselberg.[21] According to the seizure warrant, Vekselberg — who had been designated under U.S. sanctions since 2018[22] — had acquired the *Tango* in 2011.[23]

Subsequently, Vekselberg allegedly utilized multiple shell companies to conceal his ownership of the *Tango* and hide his connection to any U.S. dollar-denominated transactions relating to the vessel.[24] For instance, in order to maintain the *Tango*, Vekselberg allegedly made several U.S. dollar payments

through U.S. correspondent banks, including a December 2020 payment relating to mooring fees for the vessel.[25]

Even though such illicit payments constitute a mere fraction of the Tango's overall value, the DOJ has sought forfeiture of the Tango based upon commonly alleged violations of money laundering and bank fraud statutes.[26]

However, H.R. 5925, if enacted, would bypass these traditional approaches to forfeiture, and instead permit the immediate confiscation and liquidation of assets seized in connection with U.S. sanctions relating to Russia. This would throw aside the clearly defined judicial and administrative oversight of government forfeiture of private property, which has long sought to ensure an appropriate balance between facilitating law enforcement objectives while safeguarding individual rights.

It is understandable that — amid the geopolitical discussions surrounding Russia's war and Ukraine's reconstruction — it is tempting for the U.S. government to want to simplify the confiscation and liquidation of assets frozen pursuant to Russia-related sanctions. Nonetheless, these proposed bills raise significant legal concerns: The U.S. government should not bypass statutory frameworks and ignore the rule of law when depriving individuals of their property.

This conflict arises from the dilemma facing the U.S. — that is, how to appropriately deal with blocked Russian assets totaling billions of U.S. dollars, while lacking an appropriate framework to liquidate those assets and, simultaneously, pay for post-war reconstruction in Ukraine. Addressing this challenge necessitates a nuanced approach, and proposed legislation such as H.R. 5925 offers a blunt solution to such an intricate issue.

### **Guidance for Practitioners**

For practitioners advising foreign or domestic clients on the potential scope and impact of U.S. sanctions, attention to and the study of the ever-evolving sanctions landscape is of crucial importance.

A successful practice requires not only remaining apprised of developing legislation and sanctions policies, but recognizing when to engage on behalf of clients with the U.S. government bodies responsible for implementing, administering and enforcing sanctions.

Equally important is understanding which bodies should be engaged depending on the client's circumstances, such as — but not necessarily limited to — the Department of State's Office of Economic Sanctions Policy Implementation and Office of Sanctions Coordination, and the Treasury's Office of Global Targeting and Office of Foreign Assets Control.

When a client — or a client's assets — may be at risk of a U.S. sanctions designation, proactively communicating with the Department of State or OFAC may be significantly less complicated, and likely more successful, than reactively seeking to remedy an already-implemented designation.

When considering sanctions designations, government agencies sometimes rely on salacious and inaccurate public reporting, while lacking evidence demonstrating that sanctioning the client would be unjustified. By proactively engaging and coordinating with the appropriate government agency, counsel is better positioned to provide detailed analysis in defense of their client's position, while remaining available to address any inquiries regarding their client's questioned conduct or associations.

The potential benefits of adopting such a proactive strategy cannot be understated, as it is easier to stop the bell being rung than trying to unring it. While proactively engaging with government decision-makers will pose challenges, those challenges often pale in comparison to the significant administrative and procedural hurdles that arise once a client — or its assets — have been designated.

In such circumstances, little recourse may be sought in the federal courts, which often defer entirely to the discretion of OFAC and the Department of State. Moreover, the remedies that remain available to the client are largely limited to seeking outright delisting or removal from designation, or to obtaining specific licenses authorizing certain conduct by the client, which OFAC and other decision-makers may be unwilling to provide, given the current political environment concerning Russia and the ever-expanding list of designations issued by the government.

## Conclusion

While H.R. 5925 and related legislation may face substantial challenges, their vast implications toward reshaping existing sanctions policies and traditional approaches to asset forfeiture warrant sustained dialogue among policymakers and practitioners. Practitioners must remain vigilant regarding the ever-shifting U.S. sanctions landscape, and continue to employ aggressive and proactive tactics in representing their clients' interests.

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[1] Jonathan Masters and Will Merrow, How Much Aid Has the U.S. Sent Ukraine? Here Are Six Charts., Council on Foreign Relations (Last updated December 8, 2023) <https://www.cfr.org/article/how-much-aid-has-us-sent-ukraine-here-are-six-charts>.

[2] Chris Megerian, US credibility on the line in Ukraine funding debate, Associated Press (December 13, 2023) <https://apnews.com/article/joe-biden-ukraine-russia-660a3603c72a0b51b734d6a41499027b>.

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[5] See, e.g., Russian Harmful Foreign Activities Sanctions, 31 C.F.R. Part 587; Ukraine/Russia-related

Sanctions, 31 C.F.R. Part 589; Magnitsky Sanctions, 31 CFR Part 584.

[6] Jonathan Masters, How Frozen Russian Assets Could Pay for Rebuilding Ukraine, Council on Foreign Relations (July 24, 2023) <https://www.cfr.org/in-brief/how-frozen-russian-assets-could-pay-rebuilding-ukraine>.

[7] Michael Katz, Rep. McCormick to Newsmax: Make Putin Pay for Ukraine War Effort, Newsmax (October 16, 2023) <https://www.newsmax.com/newsmax-tv/rich-mccormick-vladimir-putin-russia/2023/10/16/id/1138511/>.

[8] Id.

[9] Make Putin Pay Act, H.R. 5925, 118th Cong. (2023) at § 3(a).

[10] Id. at § 3(b).

[11] Make Russia Pay Act, H.R. 892, 118th Cong. (2023) at § 2(b).

[12] Id. at § 2(c).

[13] Id.

[14] Asset Seizure for Ukraine Reconstruction Act, S. 3359, 118th Cong. (2023). See also, Wilson, Cohen, Whitehouse, Graham, Introduce Bipartisan, Bicameral Legislation to Seize Russian Oligarch Assets to Aid Ukraine, Joe Wilson House. Gov (Nov. 29, 2023) <https://joewilson.house.gov/media/press-releases/wilson-cohen-whitehouse-graham-introduce-bipartisan-bicameral-legislation>.

[15] REPO for Ukrainians Act, S. 2003, 118th Cong. (2023). See also, Risch, Whitehouse, McCaul, Kaptur Introduce Legislation to Repurpose Sovereign Russian Assets for Ukraine, Foreign Relations Committee (June 15, 2023) <https://www.foreign.senate.gov/press/rep/release/risch-whitehouse-mccaul-kaptur-introduce-legislation-to-repurpose-sovereign-russian-assets-for-ukraine>.

[16] Id.

[17] Id.

[18] Daniel Flatley, White House Throws Support Behind Seizing Frozen Russian Assets, Bloomberg (January 10, 2024) <https://www.bloomberg.com/news/articles/2024-01-10/white-house-throws-support-behind-seizing-frozen-russian-assets?embedded-checkout=true>.

[19] Types of Federal Forfeiture, Department of Justice (last accessed January 11, 2024) <https://www.justice.gov/afp/types-federal-forfeiture>.

[20] See, e.g., 18 U.S.C. § 981; 28 U.S.C. § 2461(c).

[21] \$90 Million Yacht of Sanctioned Russian Oligarch Viktor Vekselberg Seized by Spain at Request of U.S., Department of Justice (April 4, 2022) <https://www.justice.gov/opa/pr/90-million-yacht-sanctioned-russian-oligarch-viktor-vekselberg-seized-spain-request-united>.

[22] Treasury Designates Russian Oligarchs, Officials, and Entities in Response to Worldwide Malign Activity, Treasury. Gov (April 6, 2018) <https://home.treasury.gov/news/press-releases/sm0338>.

[23] In the Matter of the Seizure of the Motor Yacht Tango, with International Maritime Organization Number 1010703, Case No. 22-sz-5 (D.D.C.), Application for a Warrant to Seize Property Subject to Forfeiture.

[24] Id.

[25] Id.

[26] Id.