

## Commentary: Responding to Russia

by Richard Nephew\*

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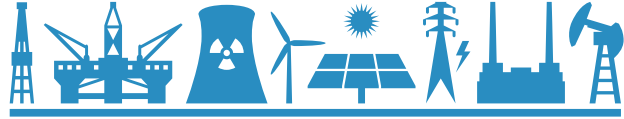
On December 29, President Obama authorized the U.S. government to take three sets of actions in direct response to Russian interference with the 2016 U.S. Presidential Election.

- First, he authorized the amendment of Executive Order 13964, which he had previously issued in April 2015 to deal with cyber threats to U.S. security mostly in terms of economic espionage and sabotage, to now permit the imposition of sanctions against any who “...tamper with, alter, or cause a misappropriation of information with the purpose or effect of interfering with or undermining election processes or institutions.” With this expanded sanctions authority, he then authorized the imposition of blocking sanctions on nine Russian entities and individuals, as well as blocking sanctions on two further individuals under the original terms of E.O. 13964.
- Second, he authorized the State Department to declare 35 Russian officials “persona non grata,” requiring their expulsion from the United States in 72 hours or less. The State Department also forbade access to two Russian-owned facilities in the United States, one in rural Maryland and the other in New York.
- Third, he directed the Department of Homeland Security and the FBI to release information about the hacking endeavor so that other entities in the United States (and foreign governments) could develop and execute the appropriate countermeasures.

Obama also left open the possibility of other U.S. responses, including in a non-attribution manner that could foreshadow covert action or intelligence-based actions.

Taken together, these actions appear mostly to be a political and diplomatic response to Russian hacking, rather than an economic response. Moreover, owing as they do to Executive action and authority, these actions could be superseded by different instructions when Donald Trump takes office on January 20. However, there are three important implications of these actions which bear consideration.

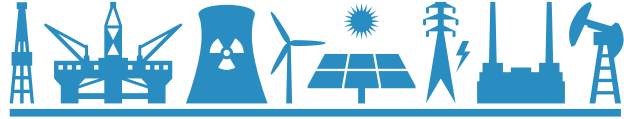
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First, these sanctions say much about U.S. confidence in the nature of the information supporting the allegation of Russian government involvement in and direction of the information campaign launched against the Clinton campaign. Targeted designations of not only Russian intelligence agencies (who naturally would be involved in any such effort), but also individual Russian citizens and ostensibly non-governmental entities mean that the U.S. government must have a pretty thorough understanding of their role in the hacking. Such designations are subject to legal challenge and, as such, the evidentiary requirements of these sanctions would likewise be substantial. Simply put, Treasury would not sanction these individuals and entities if they weren't reasonably sure that they could win a court case filed against the U.S. government, contesting the sanctions. Other governments will take notice and we may see soon similar efforts on the part of the European Union, member governments, and others around the world. Moreover, since the normal practice of the U.S. government is to provide information even beyond what's available publicly to foreign partners about U.S. sanctions, it is possible if not probable that these partners have even more details about what the United States knows, what it suspects, and why it chose to sanction those people and entities. Taken in combination with the technical report (which is beyond my own technical analysis), these measures today are a firm affirmation of Russia's involvement and a warning bell for other governments around the world.

Second, though these sanctions are not themselves economic in nature, their impact may have economic repercussions. First, as blocking sanctions, it is always possible that the U.S. Treasury Department will find some assets owned by these entities and individuals in U.S. banks. If so, those assets would be frozen. Presumably, neither of Russia's named intelligence agencies have accounts with their names on them in the United States, but the identified individuals and companies may. Second, Russian hacking – particularly with named entities and individuals – may cast a pall over business with Russia in the fields of computers and electronics. Though not a major source of Russian export revenue and similar allegations against Chinese companies Huawei and ZTE did not impose much of a hit on either company, this action could be problematic for at least those Russian entities operating in those fields even beyond the identified targets, especially if these sanctions lead to diminished access abroad for Russian companies operating in these sectors.

But, beyond these direct effects, we have yet to see how Russia might respond and how U.S. countermeasures might be employed. Russia's Foreign Ministry has already signaled that a Russian retaliation will come, though Putin has already rejected a Foreign Ministry proposal to expel a similar number of U.S. diplomats from Russia and to forbid U.S. personnel access to particular facilities or buildings in Russia. Putin may stick with this approach, playing to his audience in Russia and Trump's Administration that he is the more reasonable, constructive party. But, it is also possible that Russia could escalate the situation, particularly when the expected Intelligence Community report on Russian hacking is released in January, if Putin is confident that he can strike a deal with Trump when he is in office. Putin may also be holding fire, waiting for the almost inevitable Congressional consideration of new economic sanctions against Russia. Russia does have some means at its disposal to retaliate. For example, Russia could expel U.S. banks or companies from Russia, and by denying them access to Russian markets in the future (as Russia did with specific Turkish industries after the Spring 2016 shoot-down of a Russian jet fighter by Turkey's military). It is possible Russia could seize their assets in retaliation for the blocking provisions of Obama's Executive Order. And, it is possible that Russia could step up its cyber attacks against the United



States, its companies, and its banks. All of this will depend on how the Russians believe the United States will respond, their own need to regain any lost face with U.S. sanctions, and their expectations for what Trump will do.

On this point, the third implication must be drawn: Trump will find it hard to walk away from these sanctions and, of course, the declassification of information concerning the hack is permanent. Sanctions against Russia for Russian interference in Ukraine could be dismantled on Day One, should Trump so choose. He could announce a new deal with Putin to “resolve” the situation in Ukraine, thus ending the rationale for the U.S. sanctions regime (and its companion in Europe). Trump could then terminate these sanctions with a stroke of a pen.

Trump would find undoing these sanctions much more difficult, especially if Russia’s reaction is publicly mild and proportional. Trump would be placed in the position of removing sanctions on Russian intelligence agencies because their designation put a shadow over his election, which is hardly the bold start any President wishes for his Administration. Moreover, with the evidentiary basis set and absent a compelling quid pro quo with the Russians, it would look to the entire world as if Trump were seeking to cover up the crimes of his Russian benefactors.

Moreover, Congress would likely object (as I believe they would also do with respect to the Ukraine sanctions being dismantled). Congress may not be able to prevent Trump from formally terminating these sanctions, but they can impose new ones of their own, provided the votes are there in both chambers. Here, the Republican-controlled (but not really dominated) Congress will be in a pickle: punish the Russians and go against their new President, or accede to Trump’s approach and thereby concede to Russian interference in two sovereign countries, one of which is their own. Politics may push in one direction but national security and pride will weigh in for the other, and this could be an early, problematic test for both the incoming White House and Congress.

There is much we still do not know about how Russia interfered in the U.S. election and how its actions will complicate (or facilitate) U.S.-Russian relations. Today, President Obama made clear that his Administration will not accept and will respond to Russia’s infringement of the American system of government. In my view, this is not only a merited position, but also one that should be augmented with consideration of further sanctions measures in the weeks and months to come absent an acknowledgment from Russia that these kinds of activities are out of bounds. How Russia and Trump react will determine whether Russia pays a long-term price or if this is a short-term, isolated bit of resistance.