

INTERNATIONAL FINANCE - SPRING 2021

SANCTIONS 2

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VENEZUELA

Since 2006 the US Secretary of State has determined each year that Venezuela is not co-operating with US anti-terrorism efforts and has prohibited commercial arms sales to Venezuela under the Arms Export Control Act.² The US has sanctioned individual Venezuelans for involvement in supporting Hezbollah, and for being involved in narcotics trafficking, corruption, trafficking in persons, human rights abuses and antidemocratic actions.³

In 2014 the US began reacting to increasing repression in Venezuela. Congress enacted the **Venezuela Defense of Human Rights and Civil Society Act of 2014** noting high levels of inflation in Venezuela, currency controls which exacerbated economic problems, an increase in violent crime, and an erosion of Human Rights, identified by Human Rights Watch and the US State Department (lack of respect for judicial independence and use of the judiciary to “intimidate and selectively prosecute political, union, business, and civil society leaders who were critical of government policies or actions”). The Government of Venezuela had detained foreign journalists and expelled media outlets, had responded to protests with violence and arrests, including the arrest of Leopoldo Lopez.⁴ Section 4 of the statute provides that:

It is the policy of the United States— (1) to support the people of Venezuela in their aspiration to live under conditions of peace and representative democracy as defined by the Inter-American Democratic Charter of the Organization of American States; (2) to work in concert with the other member states within the Organization of American States, as well as the countries of the European Union, to ensure the peaceful resolution of the current situation in Venezuela and the immediate cessation of violence against antigovernment protestors; (3) to hold accountable government and security officials in Venezuela responsible for or complicit in the use of force in relation to antigovernment protests

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² Arms Export Control Act (22 U.S.C. 2781). See Congressional Research Service, Venezuela: Overview of US Sanctions (Updated Jan. 22, 2021).

³ Id.

⁴ Public Law 113–278 (113th Congress).

and similar future acts of violence; and (4) to continue to support the development of democratic political processes and independent civil society in Venezuela.

The statute mandated the imposition of sanctions until December 31, 2016, including the blocking and prohibition of transactions in property (that is in the US or within the possession or control of a US person) of persons “the President determines... has“perpetrated, or is responsible for ordering or otherwise directing, significant acts of violence or serious human rights abuses in Venezuela against persons associated with the antigovernment protests...has ordered or otherwise directed the arrest or prosecution of a person in Venezuela primarily because of the person’s legitimate exercise of freedom of expression or assembly; or ... has knowingly materially assisted, sponsored, or provided significant financial, material, or technological support for, or goods or services in support of, the commission of [such] acts.”

The statute defines a US person as a US citizen or lawfully permanent resident alien or “an entity organized under the laws of the United States or of any jurisdiction within the United States, including a foreign branch of such an entity.”

Executive Order 13692 was issued to implement the statute in March 2015,⁵ and the Treasury issued regulations in July 2015.⁶ Executive Order 13692 blocks assets of a number of named persons, and states that no prior notice of the block need be made to the identified persons because the ability to transfer assets instantaneously would render the measures ineffectual. The Secretaries of State and Treasury have the power to determine that other persons should have their assets blocked, including persons who have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of a person whose property and interests in property are blocked. The regulations contain provisions relating to blocked property and interest in property, including provisions for nullity of transfers in violation of the regulations, for the holding of blocked funds in interest bearing accounts. And the regulations contain a number of expansive definitions:

financial, material, or technological support means: “any property, tangible or intangible, including but not limited to currency, financial instruments, securities, or any other transmission of value; weapons or related materiel; chemical or biological agents; explosives; false documentation or identification; communications equipment; computers; electronic or other devices or equipment; technologies; lodging; safe houses; facilities; vehicles or other means of

⁵ See

<https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/venezuela-related-sanctions> .

⁶ 31 C.F.R. Part 591.

transportation; or goods. "Technologies" as used in this definition means specific information necessary for the development, production, or use of a product, including related technical data such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals, or other recorded instructions."

property and property interest : "include, but are not limited to, money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness, obligations, notes, guarantees, debentures, stocks, bonds, coupons, any other financial instruments, bankers acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, letters of credit and any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors' sales agreements, land contracts, leaseholds, ground rents, real estate and any other interest therein, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, services of any nature whatsoever, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent."

transfer "means any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, convey, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property. Without limitation on the foregoing, it shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the making of any payment; the setting off of any obligation or credit; the appointment of any agent, trustee, or fiduciary; the creation or transfer of any lien; the issuance, docketing, or filing of, or levy of or under, any judgment, decree, attachment, injunction, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition; the exercise of any power of appointment, power of attorney, or other power; or the acquisition, disposition, transportation, importation, exportation, or withdrawal of any security."

The regulations provide authorizations for some transactions including payments between blocked accounts with US financial institutions, the provision of and payment for some legal services, and the provision of emergency medical services.

Since 2017 a number of other Executive Orders have been issued with respect to Venezuela (and these have been issued under IEEPA and the National Emergencies Act):⁷

EO 13808 - Imposing Additional Sanctions with Respect to the Situation in Venezuela (August 24, 2017)⁸

Section 1. (a) All transactions related to, provision of financing for, and other dealings in the following by a United States person or within the United States are prohibited:

(i) new debt with a maturity of greater than 90 days of Petroleos de Venezuela, S.A. (PdVSA);

(ii) new debt with a maturity of greater than 30 days, or new equity, of the Government of Venezuela, other than debt of PdVSA covered by subsection (a)(i) of this section;

(iii) bonds issued by the Government of Venezuela prior to the effective date of this order; or

(iv) dividend payments or other distributions of profits to the Government of Venezuela from any entity owned or controlled, directly or indirectly, by the Government of Venezuela.

(b) The purchase, directly or indirectly, by a United States person or within the United States, of securities from the Government of Venezuela, other than securities qualifying as new debt with a maturity of less than or equal to 90 or 30 days as covered by subsections (a)(i) or (a)(ii) of this section, respectively, is prohibited.

(c) The prohibitions in subsections (a) and (b) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted before the effective date of this order.

Sec. 2. (a) Any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.⁹

Sec. 3. For the purposes of this order:

(a) the term “person” means an individual or entity;

(b) the term “entity” means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(c) the term “United States person” means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States; and

(d) the term “Government of Venezuela” means the Government of Venezuela, any political subdivision, agency, or instrumentality thereof, including the Central Bank of Venezuela and PdVSA, and any person owned or controlled by, or acting for or on behalf of, the Government

⁷ The US Treasury’s Venezuela-related sanctions page is at <https://www.treasury.gov/resource-center/sanctions/Programs/pages/venezuela.aspx> .

⁸ 82 Fed. Reg. 41155 (Aug, 29, 2017).

⁹ Subsequent Executive orders contain similar anti-evasion provisions.

of Venezuela.¹⁰

EO 13827 - Taking Additional Steps to Deal with the Situation in Venezuela (March 19, 2018)¹¹

Section 1. (a) All transactions related to, provision of financing for, and other dealings in, by a United States person or within the United States, any digital currency, digital coin, or digital token, that was issued by, for, or on behalf of the Government of Venezuela on or after January 9, 2018, are prohibited as of the effective date of this order. (b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted before the effective date of this order.

EO 13835 - Prohibiting Certain Additional Transactions with Respect to Venezuela (May 21, 2018)¹²

Section 1. (a) All transactions related to, provision of financing for, and other dealings in the following by a United States person or within the United States are prohibited: (i) the purchase of any debt owed to the Government of Venezuela, including accounts receivable; (ii) any debt owed to the Government of Venezuela that is pledged as collateral after the effective date of this order, including accounts receivable; and (iii) the sale, transfer, assignment, or pledging as collateral by the Government of Venezuela of any equity interest in any entity in which the Government of Venezuela has a 50 percent or greater ownership interest. (b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted before the effective date of this order.

EO 13850 - Blocking Property of Additional Persons Contributing to the Situation in Venezuela (November 1, 2018)¹³

Section 1. (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(i) to operate in the gold sector of the Venezuelan economy or in any other sector of the

¹⁰ Subsequent Executive orders include these definitions. And see EO 13857 amending this definition in this and other Executive Orders.

¹¹ 83 Fed. Reg. 12469 (Mar. 21, 2018)

¹² 83 Fed. Reg. 24001 (May 24, 2018).

¹³ 83 Fed. Reg. 55243 (Nov. 2, 2018).

Venezuelan economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State;

(ii) to be responsible for or complicit in, or to have directly or indirectly engaged in, any transaction or series of transactions involving deceptive practices or corruption and the Government of Venezuela or projects or programs administered by the Government of Venezuela, or to be an immediate adult family member of such a person;

(iii) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any activity or transaction described in subsection (a)(ii) of this section, or any person whose property and interests in property are blocked pursuant to this order; or

(iv) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order.

These provisions relating to material assistance etc raise questions as to the application of the provisions to non-US persons.

EO 13857 - Taking Additional Steps to Address the National Emergency With Respect to Venezuela (January 28, 2019)¹⁴

Section 1. (a) Subsection (d) of section 6 of Executive Order 13692, subsection (d) of section 3 of Executive Order 13808, subsection (d) of section 3 of Executive Order 13827, subsection (d) of section 3 of Executive Order 13835, and subsection (d) of section 6 of Executive Order 13850, are hereby amended to read as follows:

“(d) the term “Government of Venezuela” includes the state and Government of Venezuela, any political subdivision, agency, or instrumentality thereof, including the Central Bank of Venezuela and Petroleos de Venezuela, S.A. (PDVSA), any person owned or controlled, directly or indirectly, by the foregoing, and any person who has acted or purported to act directly or indirectly for or on behalf of, any of the foregoing, including as a member of the Maduro regime.”

EO 13884 - Blocking Property of the Government of Venezuela - (August 5, 2019)¹⁵

Section 1. (a) All property and interests in property of the Government of Venezuela that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

¹⁴ 84 Fed. Reg. 509 (Jan. 30, 2019).

¹⁵ 84 Fed. Reg. 38843(Aug. 7, 2019)

(b) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(i) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any person included on the list of Specially Designated Nationals and Blocked Persons maintained by the Office of Foreign Assets Control whose property and interests in property are blocked pursuant to this order; or

(ii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

Sec. 3. The prohibitions in section 1 of this order include:

(a) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and

(b) the receipt of any contribution or provision of funds, goods, or services from any such person.

Sec. 4. (a) Any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

Sec. 5. Nothing in this order shall prohibit:

(a) transactions for the conduct of the official business of the Federal Government by employees, grantees, or contractors thereof; or

(b) transactions related to the provision of articles such as food, clothing, and medicine intended to be used to relieve human suffering.

Sec. 6. For the purposes of this order:

(a) the term "person" means an individual or entity;

(b) the term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(c) the term "United States person" means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States; and

(d) the term "Government of Venezuela" includes the state and Government of Venezuela, any political subdivision, agency, or instrumentality thereof, including the Central Bank of Venezuela and Petroleos de Venezuela, S.A. (PdVSA), any person owned or controlled, directly or indirectly, by the foregoing, and any person who has acted or purported to act directly or indirectly for or on behalf of, any of the foregoing, including as a member of the Maduro regime. For the purposes of section 2 of this order, the term "Government of Venezuela" shall not include any United States citizen, any permanent resident alien of the United States, any alien lawfully admitted to the United States, or any alien holding a valid United States visa.

Sec. 7. For those persons whose property and interests in property are blocked pursuant to this order who might have a constitutional presence in the United States, I find that because of the

ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render those measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in Executive Order 13692, there need be no prior notice of a listing or determination made pursuant to section 1 of this order.

Again, here, with the references to material assistance there is a question as to the application of these measures to non-US persons.

The Executive Orders provide that the Secretaries of State and Treasury can designate persons to be subject to the various restrictions, and they publish announcements of such designations.¹⁶ The Office of Foreign Assets Control publishes lists of specially designated nationals and blocked persons.¹⁷ The March 10, 2021 version of this list (individual designations under all sanctions programs, not just Venezuela) is 1536 pages long.

The Venezuela sanctions measures are subject to a number of General Licenses which permit activities that would otherwise be prohibited. For example, General License No. 9G authorized transactions related to dealings in certain securities (“debt (including the bonds listed on the Annex to this general license, promissory notes, and other receivables) of, or any equity in, Petróleos de Venezuela, S.A. (PdVSA) or any entity in which PdVSA owns, directly or indirectly, a 50 percent or greater interest.” There are, therefore, Executive Orders setting out very general restrictions, followed by General Licenses which contain permissions or exceptions to the general restrictions. If you look at OFAC’s lists of sanctions measures and General Licenses relating to particular countries it is clear that these measures are not designed to be easily navigable or particularly transparent. Since 2017 there has been a ban on US persons participating in the issuance of Venezuelan debt, and in secondary market trading. For a period PDVSA benefited from an exemption.¹⁸

¹⁶ See, e.g., US Department of the Treasury, Press Release: Treasury Sanctions Officials Aligned with Former President Nicolas Maduro and Involved in Repression and Corruption (Feb. 15, 2019) (“Today, the U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) designated five officials aligned with illegitimate former President Nicolas Maduro, who continue to repress democracy and democratic actors in Venezuela and engage in significant corruption and fraud against the people of Venezuela. This action, pursuant to Executive Order (E.O.) 13692, targets the head of the Venezuelan National Intelligence Service (SEBIN), Manuel Ricardo Christopher Figuera, and SEBIN’s First Commissioner, Hildemaro Jose Rodriguez Mucura; the Commander of Venezuela’s Directorate General of Military Counter-Intelligence, Ivan Rafael Hernandez Dala; and the Director of the Venezuelan National Police’s Special Actions Force (FAES), Rafael Enrique Bastardo Mendoza. Additionally OFAC designated the illegitimate President of Venezuela’s state-owned oil company, Petroleos de Venezuela, S.A. (PdVSA), Manuel Salvador Quevedo Fernandez.”); US Department of the Treasury, Press Release: Treasury Sanctions Governors of Venezuelan States Aligned with Maduro (Feb. 25, 2019).

¹⁷ <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>.

¹⁸ Thomas Laryea, Why it’s time to lift the trading ban on Venezuela’s debt, FT (Feb. 19, 2021). Laryea notes: “the costs of the trading ban in the Venezuela situation are being absorbed by the debt

Alexander Campbell argued that US sanctions have impeded Venezuela's ability to address its economic problems by means of normal measures like debt restructuring, and also that the US recognition of Juan Guaidó as president of Venezuela¹⁹ was a de facto oil embargo.²⁰ By early 2021 the Biden administration was signalling an interest in working with other countries to seek a diplomatic solution to the situation in Venezuela.²¹ Meanwhile, Alena Douhan, the UN Special Rapporteur on unilateral coercive measures and human rights urged the US, the EU and other countries to drop Venezuela sanctions.²²

The extension of sanctions to PDVSA and entities in which PDVSA had a 50% or greater interest was significant. Trading in PDVSA's debt stopped.²³ CITGO, owned by PDVSA, has a significant presence in the US. News reports suggested CITGO was cutting ties with PDVSA,²⁴ in the hopes of obtaining a General License from OFAC.²⁵

holders, rather than the associates of the Maduro administration. Relative to their already distressed prices at the time of the trading ban's imposition, the Republic's and PDVSA's bonds have fallen 80 per cent. While the crash in bond prices can be attributed to a range of factors, the effect of the trading ban in the United States, where the vast majority of the trading of these bonds has traditionally taken place, was certainly a factor."

¹⁹ US Department of State, Press release: Recognition of Juan Guaido as Venezuela's Interim President (Jan. 23, 2019).

²⁰ Alexander Campbell, What's the Deal with Sanctions in Venezuela, and Why's It So Hard for Media to Understand? (Feb. 4, 2019) <https://www.cepr.net/what-s-the-deal-with-sanctions-in-venezuela-and-why-s-it-so-hard-for-media-to-understand/>.

²¹ Matt Spetalnick, Biden in no rush to lift Venezuela sanctions, seeks 'serious steps' by Maduro, Reuters (Feb. 28, 2021) .

²² UN human rights expert urges to lift unilateral sanctions against Venezuela (Feb 12, 2021) at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26749&LangID=E>.

²³ Kenneth Rapoza, Washington Essentially Kills The Venezuela PDVSA Bond Market, Forbes (Feb. 11, 2019).

²⁴ <https://finance.yahoo.com/news/citgo-loans-price-potential-regime-211837373.html> ("The link has been broken, personnel ties are not there anymore since the new board is in and commercial ties are not there," said an investor holding PDVSA debt. "Maduro's appointees were asked to leave so the company can more easily abide by sanctions."); <https://www.reuters.com/article/us-venezuela-politics-citgo-idUSKCN1QF2IG> ("Citgo has halted payments to its parent, subscriptions to corporate services, email communications and minimized mentions to PDVSA on marketing materials and its website. Expatriate Venezuelan employees this month returned to Venezuela and a procurement subsidiary operating from Citgo's headquarters, PDVSA Services, was shut, the people familiar with the matter said.")

²⁵ Citgo Severing Ties with PDVSA to Avoid Us Sanctions: Sources (Feb. 27, 2019) at <https://www.spglobal.com/platts/en/market-insights/latest-news/oil/022719-citgo-severing-ties-with-pdvsa-t>

CITGO had been spared the effects of US Venezuela sanctions in 2017.²⁶ As we discussed when looking at the litigation involving Venezuelan gold at the Bank of England and who had the right to appoint directors of Dealware entities owned by PdVSA, the Treasury protected Citgo from claims by PdVSA's creditors.²⁷ And, as OFAC extended sanctions to PDVSA and entities it controls, OFAC issued a number of General Licenses:

OFAC published eight new general licenses (GLs 7-14) related to the PdVSA designation. While some of the GLs facilitate the divestment or wind down of transactions or dealings with PdVSA and its subsidiaries, others create authorizations that are likely intended to be more indefinite and possibly the subject of ongoing negotiations between certain parties and OFAC. Among other things, the GLs authorize (subject to certain conditions) the importation of Venezuelan oil by US persons and the operation of CITGO – so long as payments for oil and any other funds that would normally go to PdVSA are placed into a blocked account. It is unclear whether PdVSA will continue to export oil under such conditions. In a White House press briefing, Secretary Mnuchin indicated that blocked funds may eventually be provided to the National Assembly President Juan Guaidó, who the US recognizes as the current president of Venezuela.²⁸

On February 28, 2019 Russia and China opposed a US proposed resolution on Venezuela in the UN Security Council.²⁹ EU sanctions relating to Venezuela have been much more limited than the US sanctions.

LOBBYING AND SANCTIONS

Proposals for sanctions measures are not subject to notice and comment rule-making as many administrative actions are, and nor are they subject to a legislative process. For many reasons sanctions measures may seem to be unpredictable, in

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²⁶ Lachlan Markay, Trump Saves Citgo, Repped by His Ex-Aides, From New Sanctions, Daily Beast (Aug 25, 2017) (“The White House on Friday announced a new round of sanctions against Venezuela that explicitly exempt the U.S. arm of the country’s state-owned oil company. That company, Citgo, donated six-figure sums to Trump’s inauguration and recently hired former Trump officials to lobby for that exemption.”)

²⁷ Meghan Gordon & Jennifer Pedrick, US Treasury extends Venezuela order blocking potential Citgo seizure through January (Oct. 6, 2020).

²⁸ Brian Egan, Edward J. Krauland, Meredith Rathbone, Tom Best, Jack R. Hayes, Peter Jeydel, Evan T. Abrams, Jillian Norton, PdVSA Sanctions Designation Has Significant Implications for US Business (Feb. 14, 2019) at <https://www.stepto.com/en/news-publications/pdvsa-sanctions-designation-has-significant-implications-for-us-business.html>

²⁹ See, e.g., Michael Schwartz, Russia Blocks Venezuela Measure at U.N., Calling It a U.S. Ploy for Regime Change, New York Times (Feb. 28, 2019).

terms of whether and when sanctions measures may be imposed and by what countries, and also in terms of the scope and content of the sanctions measures. You will have noticed that the measures sometimes specify that it is not necessary to warn targets of the measures in advance. A process for developing sanctions measures that lacks transparency also risks unanticipated effects.

We have discussed the idea that sanctions measures may have adverse impacts on the populations of countries targeted for sanctions measures, either because the sanctions measures are designed to be very broad, or are unthinkingly broad, or because there is over-compliance (derisking) because of concerns about enforcement action. Human Rights Groups campaign to limit the harmful impact of sanctions measures.³⁰

Businesses that are adversely affected by sanctions measures may apply for a license, or may lobby to have the sanctions amended more generally. But targeted countries and businesses also engage in lobbying. In May 2020 a complaint was filed by a PDVSA entity against David Rivera's consulting firm alleging that a contract under which he was to be paid \$50m for "strategic consulting services" had been breached when he provided only 5 pages of reports.³¹ News articles suggest this was only part of Venezuela's lobbying efforts.³²

Lobbying activities may constitute a violation of sanctions measures.³³

COMPLIANCE AND SANCTIONS

Making sure to comply with the rules is complicated.³⁴ If lists of designated persons and details of the rules change, then compliance needs to respond to the changes, which can be complicated. A PWC publication states:
The process of complying with watch list filtering requirements would seem to be straightforward: financial institutions have to screen the names of individuals and entities on

³⁰ See, e.g., Human Rights Watch, Myanmar, Sanctions, and Human Rights (Febv. 18, 2021) at https://www.hrw.org/news/2021/02/18/myanmar-sanctions-and-human-rights#_What_is_Human.

³¹ Complaint in PDV USA Inc. V InterAmerican Consulting Inc, Case 20-cv-3699, SDNY. See also Patricia Mazzei, Venezuelan Oil Company Sues Miami Ex-Congressman Over \$50 Million Deal, NY Times (May 12, 2020).

³² Antonio Maria Delgado & Jay Weaver, Rivera is the tip of the iceberg; Citgo had 'multiple' lobbying contracts, sources say, Miami Herald (Jun. 4, 2020); Alex Gangitano, Maduro ally hires lobbyist to ease US sanctions, The Hill (Jan. 27, 2020).

³³ See, e.g., OFAC Press Release, Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and Park Strategies, LLC (Jan. 21, 2020).

³⁴ See, e.g., Mengqi Sun, Evolving Venezuela Sanctions Pose Problems for Banks, WSJ (Feb 25, 2019).

various lists and, depending on the list and the entity, decline business with potential customers or conduct enhanced due diligence. But the reality is far more complicated. Even institutions with relatively mature screening programs can find themselves struggling to align their programs quickly enough with a highly mutable and ever-more-complex policy and regulatory environment.³⁵

The information in this section relates to sanctions involving one country and imposed by the US and the EU. Imagine a financial institution faced with a proposed transaction involving multiple different jurisdictions trying to make sure to comply with all of the relevant sanctions regimes. A number of businesses offer technological assistance for compliance with these requirements.³⁶

In a **Joint Fact Sheet on Foreign Correspondent Banking**, US federal banking agencies (FBAs) described their expectations of US financial institutions in their relationships with foreign financial institutions (FFIs) as follows:

The FBAs expect U.S. depository institutions to have robust BSA and OFAC compliance programs that include appropriate customer due diligence so that the institutions have a clear understanding of FFI risk profiles and expected account activity. This information helps U.S. depository institutions make informed decisions regarding the risks associated with their FFI relationships and the level and nature of suspicious activity monitoring needed to manage those risks effectively. In order for U.S. depository institutions to develop a clear understanding of FFI risk profiles and determine how best to manage the risks associated with these relationships, they are expected to obtain and review sufficient information about their FFI relationships, including the types of customers the FFI serves and the markets in which the FFI is active. This approach allows the U.S. depository institution to conduct an adequate assessment of the risks present in: (i) the FFI's business and markets, (ii) the type, purpose and anticipated activity, (iii) the nature and duration of the relationship with the FFI, and (iv) the supervisory regime of the jurisdiction in which the FFI is licensed, and to design and implement controls to manage these risks effectively. Under existing U.S. regulations, there is no general requirement for U.S. depository institutions to conduct due diligence on an FFI's customers. In determining the appropriate level of due diligence necessary for an FFI relationship, U.S. depository institutions should consider the extent to which information related to the FFI's markets and types of customers is necessary to assess the risks posed by the relationship, satisfy the institution's obligations to detect and report suspicious activity, and comply with U.S. economic sanctions. This may require U.S. depository institutions to request additional information concerning the activity underlying the FFI's transactions in accordance with the suspicious activity reporting rules and sanctions compliance obligations....

³⁵ PWC, Name, Set, Match Enhancing Watch List Screening Through Analytics (Apr. 2016).

³⁶ See, e.g., Deloitte, RegTech Universe at <https://www2.deloitte.com/lu/en/pages/technology/articles/regtech-companies-compliance.html>; SWIFT Sanctions Screening at <https://www.swift.com/our-solutions/compliance-and-shared-services/financial-crime-compliance/sanctions-screening>.

Enforcement actions by the FBAs are an extension of the supervisory process and are used to address more serious deficiencies, or situations where deficiencies have not been corrected in the course of the supervisory process. Enforcement actions reinforce awareness of senior management and boards of directors of the deficiencies identified during the supervisory process and ensure they take prompt remedial actions to correct the identified deficiencies. Enforcement tools may vary and can include informal memoranda of understanding, or formal, public, written agreements, and cease-and-desist orders. The FBAs are required by statute to use their cease-and-desist authority when an institution fails to establish or maintain a BSA compliance program or fails to correct any problem with the program previously reported to the institution. In very limited instances, when corrective action has not been achieved within a reasonable amount of time or serious violations or unsafe or unsound practices or breaches of fiduciary duty have been identified, the FBAs also have the authority to assess civil money penalties (CMPs). CMPs are designed by statute to serve as a deterrent to future violations, practices or breaches of fiduciary duty, to encourage correction of violations, practices or breaches of fiduciary duty, and in the case of individual actions, to emphasize the accountability of individuals...

OFAC administers and enforces the U.S. economic and trade sanctions programs based on U.S. foreign policy and national security threats. In cases where institutions are supervised by the FBAs, the FBAs examine for BSA/AML and OFAC compliance, and in situations involving apparent BSA/AML or sanctions violations resulting from deficiencies, FinCEN and OFAC coordinate with the FBAs. In determining whether an enforcement action is appropriate, FinCEN considers whether the institution responded adequately to the FBA's previous corrective actions or if the institution engaged in significant violations. Similarly, in certain circumstances, OFAC will consult with relevant FBAs regarding the quality and effectiveness of an institution's compliance program when determining the appropriate enforcement response. OFAC investigates cases of sanctions violations, many of which (over 95 percent) are closed with administrative measures such as cautionary or no action letters. This means that less than five percent of all cases of sanctions-related violations investigated by OFAC have resulted in a civil monetary penalty or other public enforcement response.³⁷

In November 2018 OFAC announced a settlement with Société Générale for \$53,966,916.05 with respect to apparent sanctions violations under the Cuban Assets Control Regulations, the Iranian Transactions and Sanctions Regulations, and the Sudanese Sanctions Regulations.³⁸ In addition the bank entered into deferred prosecution agreements with the U.S Attorney's Office of the Southern District of New York and the New York County District Attorney's Office, and a separate agreement

³⁷ U.S. Department of the Treasury and Federal Banking Agencies, Joint Fact Sheet on Foreign Correspondent Banking: Approach to BSA/AML and OFAC Sanctions Supervision and Enforcement (Aug. 30, 2016)

³⁸ See US Department of the Treasury, Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and Société Générale S.A. (Nov. 19, 2018).

with agreement with the New York State Department of Financial Services. In total Société Générale agreed to pay \$1.3 billion.³⁹ Société Générale used similar mechanisms for disguising payments to those used by Standard Chartered, and the transactions which gave rise to the investigations occurred in the same time period. These cases are among the cases which have led financial institutions to be more concerned about compliance issues.

In February 2019 OFAC announced that it was identifying an individual based in Turkey as a foreign sanctions evader, the first time it had taken such action against an individual:

“Treasury is sanctioning Kayakiran not just for his willful violation of U.S. sanctions on Iran, but also for directing staff to commit and cover up these illegal acts. This is the first time that OFAC has designated an individual as a Foreign Sanctions Evader while resolving an enforcement matter, and is a marked change to how we will counter these acts of deception,” said Sigal Mandelker, Treasury Under Secretary for Terrorism and Financial Intelligence. “This action is a clear warning that anyone in supervisory or managerial positions who directs staff to provide services, falsify records, commit fraud, or obstruct an investigation into sanctions violations exposes themselves to serious personal risk.”⁴⁰

In class on March 11 I mentioned the work of Bryan Early and Keith Preble who traced an evolution of US sanctions enforcement from a strategy of focusing on catching a large number of violators to catching a smaller number of bigger enforcement actions (they describe this as a change from fishing to whale-hunting).⁴¹ And they argue that the whale-hunting strategy is more effective in obtaining compliance. On the targeting of foreign firms they write:

So, why are foreign banks responsible for all of OFAC’s largest penalties? For years, many foreign banks ignored or deliberately violated US sanctions provisions. When financial institutions flout US sanctions requirements, the volume of transactions they engage in can mean they engage in hundreds or even thousands of distinct sanctions violations. This volume makes such entities lucrative enforcement targets for OFAC and US criminal enforcement bodies, as those violators may have engaged in thousands of transactions subject to maximum statutory penalties. Foreign banks not only have the resources to pay the enormous fines, but they also have strong incentives to settle those liabilities rather than risk being denied access to the US financial system. While lucrative, pursuing these “whale” cases requires significant

³⁹ Société Générale Press Release, Société Générale Reaches Agreements with U.S. Authorities to Resolve U.S. Economic Sanctions and AML Investigations (Nov. 19, 2018).

⁴⁰ US Department of the Treasury, Treasury Sanctions Turkish National as Foreign Sanctions Evader Due To Repeated Violations of U.S. Sanctions Against Iran (Feb. 7, 2019).

⁴¹ Bryan R. Early & Keith A. Preble, Enforcing US Economic Sanctions: Why Whale Hunting Works, 43:1 The Washington Quarterly 159-175 (2020).

resources and expertise to pursue.

Financial firms are particularly vulnerable to large fines as the fines are calculated for each apparent violation and financial firms engage in many more transactions that may involve violations than non-financial corporations.