

## ASIA PACIFIC COMPANIES TAKE COVER AS US TESTS NEW SANCTIONS STRATEGIES ON RUSSIA, VENEZUELA

It appears the Trump administration has decided to embrace economic sanctions as a tactical foreign policy weapon, using the US Office of Foreign Assets Control (OFAC) to maximize its leverage over foreign adversaries. In particular, OFAC is sanctioning major companies – United Company RUSAL (RUSAL) and Petr6leos de Venezuela (PdVSA), to name just two – as a way to influence their beneficial owners and more importantly, their home governments. What does this mean for bystanders in Asia Pacific and elsewhere?

### "NOT PERMANENT"

What makes OFAC's new strategy remarkable is that the US Treasury Department has accompanied the sanctions with explicit conditions for their removal, including requiring individual owners to divest or transfer control to US allies, *i.e.*, regime change.

In the first instance, RUSAL's beneficial owner, Oleg Deripaska, a Russian businessman included in the so called "Putin list," was required to divest a significant portion of his holdings and take other measures in order to obtain sanctions relief for the companies. During negotiations with RUSAL, from April 2018 to January 2019, Treasury Secretary Steven Mnuchin maintained that sanctions relief would be premised on Deripaska's relinquishing control over his companies. OFAC lifted the sanctions on RUSAL and other Deripaska-linked companies on 27 January 2019. Deripaska, however, remains a Specially Designated National (SDN).

On the day after it removed RUSAL from the SDN List, 28 January 2019, OFAC sanctioned PdVSA and other Venezuelan persons tied to the Nicol6s Maduro regime. In the news release announcing the sanctions, OFAC stated:

*As with previous OFAC designations of certain Venezuelan officials and their supporters, U.S. sanctions need not be permanent. Sanctions are intended to change behavior. The United States has made it clear that we will consider lifting sanctions for those who take concrete, meaningful, and verifiable actions to support democratic order and combat corruption in Venezuela, including PdVSA.*

To make their intentions even more clear, three days later, on 31 January 2019, OFAC issued FAQ 660, which states, in part:

### Key issues

- OFAC is increasingly targeting large, foreign companies with sanctions to influence or punish their beneficial owners.
- Non-US companies must decide how to comply with US sanctions affecting their counterparties.
- Factors to consider include the availability of general licenses and exposure to the US financial system.
- Keeping aware of US foreign policy developments and instituting strong compliance controls can help proactively manage risks.

*The path to sanctions relief for PdVSA and its subsidiaries is through the expeditious transfer of control of the company to Interim President Juan Guaidó or a subsequent, democratically elected government that is committed to taking concrete and meaningful actions to combat corruption, restore democracy, and respect human rights.*

Similar demands were made in conjunction with OFAC's sanctioning of Venezuela-based television network Globovisión on 8 January 2019.

To be clear, the companies are not accused of wrongdoing, and OFAC has always been willing to de-list sanctioned companies that distance themselves from their SDN owners. And the OFAC 50 Percent Rule allows SDNs to unblock non-sanctioned companies by divesting their holdings to below 50 percent. However, the recent trend toward sanctioning companies directly and making public demands for their owners to divest is something new, and it's worth noting.

## **SHOULD I STAY OR SHOULD I GO?**

When RUSAL was sanctioned on 6 April 2018, many non-US companies severed their business ties to the company in order to minimize their own exposure to OFAC risk. However, companies that stuck with RUSAL, taking comfort in OFAC's numerous Russia-related general licenses and extensions, had their patience rewarded when OFAC lifted the sanctions in January 2019. To our knowledge, there are no pending enforcement cases against non-US companies in relation to their business with Deripaska's companies.

OFAC has followed the same tack with PdVSA, issuing a slew of general licenses to ease the effects on petroleum markets from the sudden SDN designations. It is unlikely that the PdVSA sanctions will be as quickly resolved as those involving Deripaska, as national regime change is more difficult than a transfer of company shares.

## **STAY SHARP**

There were warning signs ahead of both companies' listings. Deripaska was among the senior Russian government officials and businessmen named pursuant to the Countering America's Adversaries Through Sanctions Act (CAATSA) months before OFAC sanctioned him and his companies. OFAC gradually ramped up sanctions against PdVSA following the issuance of Executive Order 13808 on 24 August 2017. In both cases, media reports speculated about the likelihood of sanctions well in advance of OFAC's actions.

Non-US companies, especially financial institutions, should keep aware of such developments in US foreign policy and "hot spots" where economic sanctions are likely to be used.

Non-US companies should also focus on developing robust (but flexible) compliance policies and procedures to anticipate and respond to rapid sanctions deployments. Some good practices include:

- Ensuring policies against business with sanctioned persons allow for case-by-case exceptions where the law permits and according to clear criteria and lines of authority.
- Front-line staff should have clear guidance for identifying and escalating high-risk activities for immediate review by compliance and legal teams based on qualified external guidance.

- Touchpoints to US persons and the US financial system should be mapped out to ensure compliance with US primary sanctions where general licenses may not cover ongoing activities.
- Senior management should be personally involved in making risk-based decisions and communicating key compliance messages to internal and external stakeholders.
- Legal and compliance teams should keep abreast of new developments and pronouncements from US officials concerning expectations for non-US companies doing business with major sanctioned companies, as well as applicable general licenses, likely outcomes, and timelines for the removal of sanctions.

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