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Venezuela Sanctions Complicate Compliance For Cos.

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On May 21, 2018, in response to recent activities of the regime of Venezuelan President Nicolas Maduro, President Donald Trump issued a new executive order, "Prohibiting Certain Additional Transactions with Respect to Venezuela."[1] Building upon previous sanctions[2] issued to "prevent U.S. persons from contributing to the Government of Venezuela's corrupt and shortsighted financing schemes,"[3] the new sanctions prohibit, among other things, transactions involving the purchase of any debt owed to the government of Venezuela, as well as transactions involving any debt owed to the government of Venezuela that is pledged as collateral.

The new sanctions also prohibit transactions involving the sale, transfer, assignment or pledging as collateral by the government of Venezuela of any equity interests involving entities in which the government of Venezuela has a 50 percent or greater ownership interest. By targeting debt owed to the government of Venezuela, the new sanctions limit the government of Venezuela's ability to liquidate assets into usable capital.

Summary of New Executive Order

The executive order applies to U.S. persons and to transactions within the United States. Subsection 1(a) of the order prohibits "[a]ll transactions related to, provision of financing for, and other dealings" in "(i) the purchase of any debt owed to the Government of Venezuela,[4] including accounts receivable; (ii) any debt owed to the Government of Venezuela that is pledged as collateral after the effective date of th[e] order, including accounts receivable; and (iii) the sale, transfer, assignment or pledging as collateral by the Government of Venezuela of any equity interest in which the Government of Venezuela has a 50 percent or greater ownership interest."

These new sanctions, according to the executive order, were issued "particularly in light of the recent activities of the Maduro regime, including endemic economic mismanagement and public corruption at the expense of the Venezuelan people and their prosperity, and ongoing repression of the political opposition; attempts to undermine democratic order by holding snap elections that are neither free nor fair; and the regime's responsibility for the deepening humanitarian and public health crisis in Venezuela."[5]

Fundamentally, the new sanctions, like prior sanctions, are a further attempt to prevent U.S. persons from contributing to the government of Venezuela's financial scheme.[6] But unlike prior sanctions, which, among other things, prohibited transactions involving certain new debt of specific maturities and bonds issued by the government of Venezuela, the new sanctions prohibit, among other things, transactions involving debt owed to the government of Venezuela.

The prohibition is phrased broadly and extends to accounts receivable and any other type of debt owed to the Venezuelan government. The new sanctions do not, however, further restrict trading in debt issued by the Venezuelan government beyond the significant limitations imposed in August 2017.

Subsection 1(b) provides that the prohibitions in subsection (a) apply "notwithstanding any contract entered into or any license or permit granted before the effective date" of the executive order. Because the executive order overrides any previously issued licenses or permits, firms engaging in the performance of certain categories of transactions previously authorized by a general license, and even firms that have received a specific license authorizing a particular transaction, must have ceased transactions prohibited by the executive order by its effective date of May 21, 2018, unless and to the extent they have obtained a new license.

Subsection 2(a) prohibits "[a]ny 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" the executive order. In addition, Subsection 2(b) prohibits a conspiracy to violate the executive order.

The sanctions were not accompanied by any new or revised general or specific licenses; nor, to date, has the U.S. Department of Treasury's Office of Foreign Assets Controlissued any new or revised FAQs concerning the scope of the sanctions.

OFAC's 50 Percent Rule

The application of OFAC FAQ 513 — which was issued in connection with the prior sanctions against Venezuela imposed on Aug. 24, 2017, and notes that the prohibitions in Executive Order 13808 extend to entities owned 50 percent or more by the government of Venezuela — is worth considering in the context of this order.

Under OFAC's 50 percent rule, any entity owned in the aggregate, directly or indirectly, 50 percent or more by one or more blocked persons is itself considered to be a blocked person.[7] Accordingly, firms should carefully scrutinize customers and transactions that may be connected to the government of Venezuela.

Takeaways

As the political situation in Venezuela continues to deteriorate, and the sanctions with respect to Venezuela become increasingly complex, firms can and should implement measures to mitigate the risk of directly or indirectly providing services to — or dealing in property in which there is an ownership or other interest belonging to — parties subject to sanctions, including the government of Venezuela.

In that regard, firms should keep in mind that the government of Venezuela is heavily involved in the oil, gas and natural resources industries, so companies involved in those sectors may be higher risk, and should be carefully scrutinized. This is not always easy for firms that buy and sell securities because the interest of a sanctioned party in any given security or transaction may not be readily apparent.

Among other things, compliance personnel should be educated regarding the appropriate diligence questions to ask when considering whether transactions should be allowed. Compliance measures may also include obtaining representations from a counterparty that it understands that the firm is bound by U.S. sanctions against the government of Venezuela, that it acknowledges the type of activities that are prohibited and that a proposed transaction will not cause the firm to take any action that would violate the sanctions.

In addition to following these best practices for compliance, firms should monitor for further sanctions-related actions targeting the government of Venezuela, review relevant FAQS and, when in doubt, contact counsel.

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[1] An electronic copy of the Executive Order "Prohibiting Certain Additional Transactions with Respect to Venezuela" is available here.

[2] Previous sanctions under Executive Order 13808, issued Aug. 24, 2017, had prohibited transactions related to, provisions of financing for or other dealings in, among other things, "new debt" of certain maturities and new equity of the government of Venezuela, bonds issued by the government of Venezuela, dividend payments or other distributions of profits to the government of Venezuela from any entity owned or controlled by the government of Venezuela, as well as the purchase of securities from the government of Venezuela. See Executive Order 13808, Imposing Additional Sanctions with Respect to the Situation in Venezuela, (Aug. 24, 2017). In addition, President Trump has recently imposed sanctions prohibiting, among other things, digital currency transactions issued by, for or on behalf of the government of Venezuela. See Executive Order 13827, Taking Additional Steps to Address the Situation in Venezuela (Mar. 19, 2018).

[3] See OFAC FAQs at No. 512 (Aug. 25, 2017).

[4] The term "Government of Venezuela" is defined to mean "the Government of Venezuela, any political subdivision, agency, or instrumentality thereof, including the Central Bank of Venezuela and Petroleos de Venezuela, S.A. (PdVSA), and any person owned or controlled by, or acting for or on behalf of, the Government of Venezuela." See Subsection 3(d) of the Executive Order.

[5] Executive Order Prohibiting Certain Additional Transactions with Respect to Venezuela (May 21, 2018).

[6] Concurrent with the issuance of previous sanctions in July 2017, Secretary of the Treasury Steven T. Mnuchin stated: "Yesterday's illegitimate elections confirm that Maduro is a dictator who disregards the will of the Venezuelan people. By sanctioning Maduro, the United States makes clear our opposition to the policies of his regime and our support for the people of Venezuela who seek to return their country to a full and prosperous democracy." See Press Release, U.S. Department of the Treasury, Treasury Sanctions the President of Venezuela (July 31, 2017), available here.

[7] OFAC, Revised Guidance on Entities Owned by Persons Whose Property and Interest in Property are Blocked (Aug. 13, 2014).