

Different Sides of the Same Coin: OFAC Lifts Some Sanctions Against Russia and Tightens Sanctions Against Venezuela

This week the US Department of the Treasury's Office of Foreign Assets Control ("OFAC") announced two significant changes to US sanctions with consequences for the global aluminum and oil markets. On January 27, 2019, under the terms of a negotiated deal, OFAC lifted sanctions on UC Rusal plc ("Rusal"), the world's second largest aluminum producer; its parent, En+ Group plc ("EN+"); and another subsidiary of EN+, JSC EuroSibEnergO ("ESE"). In delisting the companies, OFAC provided an extraordinary level of detail regarding its agreement with the sanctioned parties. This not only sheds light on some of the ongoing conditions for the removal but also highlights the Treasury Department's explicit threat to re-impose sanctions if the parties "fail to comply" with these conditions. Upon the release of the news, global aluminum prices declined and purchasers of aluminum were able to enter new supply contracts with Rusal. The following day, OFAC expanded sanctions against Venezuela's state-owned oil company, Petroleos de Venezuela ("PdVSA"), as part of the Trump administration's efforts to put pressure on Venezuelan President Nicolas Maduro to leave office. In a press release, the Department of the Treasury announced that the new sanctions are "intended to change behavior" and could be lifted if PdVSA takes actions to support democracy and fight corruption in Venezuela. Below we discuss both of these actions and the implications they have for business.

US companies should carefully evaluate their potential dealings with both parties in order to manage the associated sanctions risks.

OFAC Terminates Sanctions on EN+, Rusal and ESE

On January 27, 2019, OFAC terminated US sanctions imposed on EN+, Rusal and ESE after congressional efforts to prevent such action failed.¹ The termination process started on December 19, 2018, when OFAC submitted notification to Congress of its intention to terminate the sanctions in 30 days ("Notification Letter"). The Notification Letter indicated that the three companies had agreed to undertake significant restructuring and corporate governance changes to address the circumstances that led to their designation and inclusion on OFAC's list of Specially Designated Nationals and Blocked Persons ("SDN List") this year. These changes focus on restructuring and compliance measures to ensure that Oleg Deripaska, a Russian oligarch who remains a US-sanctioned party, relinquishes control over the companies on a long-term basis. The Notification Letter took special note of the "unprecedented transparency" required from the three global companies through extensive auditing, certification and reporting requirements.

NOTIFICATION PROCESS

The Notification Letter was sent to Congress pursuant to a provision in the Countering America's Adversaries Through Sanctions Act ("CAATSA") that requires the president to provide a report to congressional committees and leadership of any proposed action to lift certain Russian-related sanctions. Under CAATSA, Congress had 30 days to review the Notification Letter and hold hearings and briefings and "otherwise obtain information" to fully review the Notification Letter. During the 30-day review period, the Trump administration was barred from terminating the sanctions against EN+, Rusal and ESE unless Congress enacted a joint resolution of approval. Congress could have prevented the sanctions termination past the 30-day period if both houses of Congress passed a joint resolution of disapproval during this period. If Congress had passed such a joint resolution of disapproval, the president could have exercised his veto power, which Congress in turn could have tried to override with a 2/3 supermajority vote. If a joint resolution of disapproval had been enacted either by the president signing the joint resolution or by Congress overriding a presidential veto, the president would have been barred from terminating the sanctions against the three companies.

However, Congress failed to pass a joint resolution of disapproval. On January 16, 2019, the Senate resolution of disapproval, which required 60 votes to proceed, failed by three votes.² For its part, the House passed its companion resolution with overwhelming support the next day.³ As a result, the Trump administration has lifted the sanctions as proposed in the Notification Letter.

TERMS OF REMOVAL

The de-listing of EN+ and its affiliates is conditioned on what Treasury officials described as a commitment to complete a "significant restructuring and governance changes that sever Deripaska's control" of these companies. In

testimony before Congress, Secretary Steven Mnuchin emphasized that Treasury would be "vigilant in ensuring that EN+ and Rusal meet these commitments" and noted that they would be exposed to re-imposition of sanctions if they fail to do so.

EN+, Rusal and ESE were placed on the SDN List on April 6, 2018,⁴ because they were owned and controlled by Oleg Deripaska either directly or indirectly.⁵ Deripaska was designated as an SDN for his actions in support of senior Russian government officials and for operating in the Russian energy sector.⁶ The sanctions imposed on Rusal were particularly impactful as Rusal is the world's second largest producer of aluminum. The price of aluminum soared in the weeks following Rusal's designation. To prevent disruption to the global aluminum market, OFAC provided temporary sanctions relief through general licenses that authorized continued dealings with the three companies. Upon their designation in April, the three companies petitioned OFAC to be removed from the SDN List. After eight months of negotiations, OFAC and the companies reached what the Notification Letter describes as a binding agreement specifying the terms of the companies' removal from the SDN List, referred to as the "Terms of Removal."

The Notification Letter emphasized that the objectives of the sanctions against EN+, Rusal and ESE were "to reduce Deripaska's ownership in and sever his control of these entities,"⁷ which the Terms of Removal aim to achieve. Secretary Mnuchin has also highlighted that the companies were designated not due to their own conduct but because of Deripaska's ownership and control over them. As described in the Notification Letter, the Terms of Removal will sever Deripaska's control over the three companies, thereby extricating and insulating them from what the Notification Letter dubs "the controlling influence of a Kremlin insider." Specifically, the three companies have agreed to

implement the following measures in exchange for the removal:

- Reduce Deripaska's direct and indirect ownership interest to below 50 percent;⁸
- Limit Deripaska's and his affiliates' voting rights in EN+;
- Require EN+, which will own and control Rusal and ESE, to isolate Deripaska from its two subsidiaries;
- Overhaul the composition of the companies' boards of directors to ensure majority-control by directors having no ties to Deripaska;
- Take restrictive steps related to the companies' corporate governance; and
- Consent to unprecedented transparency by fulfilling extensive, ongoing auditing, certification and reporting requirements.

Notably, half of EN+'s restructured board of directors will be composed of US or UK nationals, and Rusal's current board chairman was required to step down. In addition, Deripaska will not receive any cash from the divestment of his shares or from future dividends from the three companies. Some of Deripaska's shares in EN+ will be allocated to VTB Bank, a Russian state-owned bank, as collateral for previous obligations of companies controlled by Deripaska while other shares will be allocated to the Swiss company Glencore in a swap of Glencore's shares in Rusal for shares in EN+. Deripaska will also donate some EN+ shares to a charitable foundation. Although the Notification Letter does not specify the exact allocation of shares among these entities, there have been press reports that the Terms of Removal itself, which OFAC has not publicly released, provide this information and other details about the corporate restructuring and ownership stakes that will result from the deal.⁹

Although the three companies will no longer be on the SDN List, Deripaska will remain sanctioned by the United States. All of Deripaska's property and interests in property,

including entities in which he owns a 50 percent or greater interest, will remain blocked. US persons will continue to be prohibited from transacting with Deripaska, and foreign persons will continue to be subject to secondary sanctions should they knowingly facilitate a significant transaction for or on behalf of Deripaska. Furthermore, OFAC has indicated that it will continue to enforce its sanctions on Deripaska aggressively, including by closely monitoring the three companies' compliance with the Terms of Removal. OFAC has indicated that it could re-designate any or all of these companies should they violate the Terms of Removal.

TAKEAWAYS

Sunday's removal paves the way for companies to resume dealings with EN+, Rusal and ESE. However, companies should be mindful of the risk of re-designation of these entities in the event of a determination that they have not complied with the Terms of Removal. Companies engaged in dealings with these three companies should consider including appropriate contractual termination provisions in the event of a re-imposition of sanctions. In addition, Deripaska remains subject to sanctions and continues to have some role in these companies, which could raise sanctions compliance issues under certain circumstances. Parties involved in transactions with the de-listed entities should take steps to ensure that they have adequate compliance measures in place to avoid prohibited dealings with Deripaska and other sanctioned Russian entities, including conducting due diligence on the ownership of counterparties in order to identify and address potential risk exposure.

OFAC Adds Venezuela's State-Owned Oil Company to the SDN List

BACKGROUND

On January 28, 2019, OFAC added PdVSA to the SDN List pursuant to Executive Order ("EO") 13850 for operating in the oil sector of the Venezuelan economy. PdVSA was previously designated under OFAC's sectoral sanctions program against Venezuela, which prohibited dealing in certain debt and equity of PdVSA. Under those sanctions, US persons were still permitted to deal with PdVSA and its subsidiaries outside of the specific debt and equity restrictions. OFAC's most recent action, however, is more restrictive, as US persons are now broadly prohibited from dealing with PdVSA.

The White House has stated that OFAC's actions are part of the Trump administration's overall strategy to block Maduro's regime from obtaining revenue, which, according to the Trump administration, is largely derived from PdVSA's operations. The US imports roughly 3 percent of its oil from Venezuela and also exports light oil to Venezuela that is used in diluting heavy oil so that it's suitable for transportation through pipelines. Moreover, certain US oil and gas services companies have significant operations in Venezuela involving PdVSA.

In recognition of these significant ties between the US and Venezuelan economies, OFAC also amended and issued nine General Licenses ("GLs") in conjunction with its designation of PdVSA to authorize certain transactions and activities by US persons within specific time periods. Specifically, OFAC modified and issued the following GLs:

- **GL 3A** – Previously, under GL 3, OFAC had authorized US persons to deal in bonds specifically listed in an annex or issued prior to August 25, 2017 (the sanctions effective

date for EO 13808) by US person entities owned or controlled, directly or indirectly, by PdVSA. Under GL 3A, which supersedes GL 3, this prior authorization largely remains intact. However, in addition to amending the list of specific bonds listed in the annex to GL 3A, OFAC has also amended this authorization to exclude certain US subsidiaries of PdVSA. Specifically, US persons are no longer authorized to deal in certain bonds of Nynas AB ("Nynas"), PDV Holding, Inc. ("PDVH"), CITGO Holding, Inc. ("CITGO") and any of their subsidiaries pursuant to GL 3A. However, as described below, US persons may still utilize the authorizations in GL 9 to engage in transactions involving certain bonds issued by these three entities.

- **GL 7** – GL 7 is intended, in large part, to minimize the impact that PdVSA's designation will have on its US subsidiaries. It does so by authorizing, through July 27, 2019, US persons to engage in all transactions and activities with PDVH, CITGO and any of their subsidiaries. GL 7 clarifies, however, that such authorized transactions can only involve PDVH, CITGO or their subsidiaries.

GL 7 also authorizes, through April 28, 2019, PDVH, CITGO and any of their subsidiaries to engage in all transactions and activities that are ordinarily incident and necessary to the purchase and importation of petroleum and petroleum products from PdVSA and any entity in which PdVSA owns, directly or indirectly, a majority (50 percent or more) interest. In other words, GL 7 authorizes the above-mentioned transactions and activities involving PDVH and CITGO, up to the specified deadlines, that would otherwise be prohibited due to PdVSA's designation on the SDN List. Note that any payment to or for the direct or indirect benefit of a blocked person other than PDVH, CITGO and any of their subsidiaries that is ordinarily incident and necessary to give effect to transactions authorized in GL 7 must be made into a

blocked, interest-bearing account located in the United States.

- **GL 8** – In an effort to protect certain US interests, GL 8 authorizes five US entities and their subsidiaries with significant operations in Venezuela to continue to operate in the country through July 27, 2019. Specifically, GL 8 authorizes the companies to engage in all transactions and activities ordinarily incident and necessary to operations in Venezuela involving PdVSA or any of its majority-owned subsidiaries that would otherwise be prohibited by EO 13850. Notably, the above-mentioned US companies' continued operations in Venezuela are limited to their dealings with PdVSA and its majority-owned subsidiaries. GL 8 does not authorize any dealings with any other person designated under US sanctions. Moreover, while GL 8 authorizes the five US companies to continue their operations in Venezuela involving PdVSA, it does not authorize any exportations or re-exportations of diluents from the U.S. to Venezuela.

- **GL 9** – As briefly noted above, OFAC has transferred the authorization for US persons to engage in all transactions and activities ordinarily incident and necessary to dealing with the bonds specifically listed in the annex to GL 9 that were issued by Nynas, PDVH and CITGO from GL 3A to GL 9. Moreover, GL 9 authorizes US persons to engage in all transactions and activities ordinarily incident and necessary to dealings in any other bonds issued prior to August 25, 2017, by these three entities.

GL 9 also authorizes US persons to engage in all transactions and activities ordinarily incident to dealing in any debt of PdVSA or its subsidiaries (including promissory notes or receivables) that was issued prior to August 25, 2017. However, any divestment or transfer of any holdings in such debt must be to a non-US person. This authorization also covers facilitating, clearing and settling transactions

to divest such debt to non-US persons, including such activities done on behalf of US persons. It is important to note that while GL 9 restricts the divestment or transfer of any holding in PdVSA debt to non-US persons, GL 3A does not contain the same restriction. Accordingly, pursuant to GL 3A, US persons are still permitted to divest or transfer to other US persons the bonds that are issued by PdVSA's other majority-owned US subsidiaries that were issued prior to August 25, 2017.

- **GL 10** – GL 10 authorizes US persons located in Venezuela to purchase refined petroleum products for personal, commercial or humanitarian uses from PdVSA or its majority-owned subsidiaries. US persons, however, are still prohibited from reselling, transferring exporting, or re-exporting such petroleum products.
- **GL 11** – GL 11 authorizes, through March 29, 2019, US person employees and contractors of non-US companies located in a country other than the United States or Venezuela to engage in all transactions and activities that are ordinarily incident and necessary to the maintenance or wind down of operations, contracts or other agreements involving PdVSA or its majority-owned subsidiaries that were in effect prior to January 28, 2019. GL 11 also authorizes, through March 29, 2019, US financial institutions to reject funds transfers between PdVSA or its majority-owned subsidiaries and non-US entities located in a country other than the United States or Venezuela. This allows US banks to reject rather than block these transactions until the end of March if certain conditions are met. Specifically, US financial institutions are only authorized to reject such funds transfers provided that the transfers originate and terminate outside the United States, that neither the originator nor the beneficiary of the transfer is a US person and that the funds

are not destined for a blocked account on the books of the US person.

- **GL 12** – GL 12 is intended to ease the impact of the prohibition on the importation of petroleum products from PdVSA into the United States resulting from PdVSA’s designation. Accordingly, GL 12 authorizes, through April 28, 2019, US persons to engage in all transactions and activities ordinarily incident and necessary to the purchase and importation into the United States of petroleum and petroleum products from PdVSA or any of its majority-owned subsidiaries.

Furthermore, US persons are also authorized, through February 27, 2019, to engage in all transactions and activities that are ordinarily incident and necessary to the wind down of operations, contracts or other agreements with PdVSA or its majority-owned subsidiaries, including the importation into the United States of goods, services or technology connected to these operations, contracts or agreements.

Importantly, GL 12 clarifies that except as otherwise authorized by OFAC in other GLs, any payment to a designated or “blocked” person that is ordinarily incident and necessary to give effect to US imports of PdVSA petroleum products must be made into a blocked, interest-bearing account located in the United States. GL 12 does not appear to apply this requirement to transactions related to the wind down of business with PdVSA and its subsidiaries that is also authorized by GL 12.

Both GLs 11 and 12 expressly note that they do not authorize any transactions or dealings with ALBA de Nicaragua (“ALBANISA”) or any of its majority-owned subsidiaries. ALBANISA is a subsidiary of PdVSA based in Nicaragua and was established as part of Nicaragua’s entry into ALBA, which is an intergovernmental organization that seeks to promote social, economic and political

integration in Latin America and the Caribbean. It appears that OFAC is clarifying that no transactions with ALBANISA will be authorized under any circumstances.

- **GL 13** – The authorizations in GL 13 are specific to US persons dealings with Nynas, a Swedish specialty oil manufacturer in which PdVSA owns half the shares. In particular, GL 13 authorizes, through July 27, 2019, all transactions and activities where Nynas or any of its majority-owned entities are the only entities involved (i.e., direct, bilateral engagements with Nynas or its majority-owned subsidiaries). Similar to GL 12, all payments made to a blocked person that are ordinarily incident and necessary to give effect to the transactions authorized in GL 13 must be placed into a blocked, interest-bearing account in the United States. Any exportation or re-exportation of goods, services or technology by a US person resulting from the authorizations in GL 13 can only be made to Nynas. Any such exportation or re-exportation to PdVSA or any of its other majority-owned subsidiaries are still prohibited.
- **GL 14** – GL 14 authorizes employees, grantees and contractors of the US government to engage in all transactions related to the conduct of the official business of the US government.

TAKEAWAYS

With OFAC’s designation of PdVSA on the SDN List, companies should keep the following in mind:

- First, US persons are generally prohibited from engaging in any transactions involving PdVSA or its majority-owned subsidiaries outside of the limited authorizations contained in the above-mentioned GLs. Otherwise, US persons will be required to block any property of PdVSA or its subsidiaries that come within their possession

or control and will have to report such property to OFAC.

- Second, any US persons who have operations, contracts or other agreements with PdVSA or its subsidiaries will also have to take measures to wind down or maintain such dealings in accordance with the terms of the applicable general license. In this regard, we note that GL 11 authorizes, through March 29, 2019, US person employees and contractors of non-US companies located in a country other than the United States or Venezuela to engage in all transactions and activities that are ordinarily incident and necessary to the “maintenance or wind down” of dealings with PdVSA or its subsidiaries. Although OFAC has yet to issue published guidance on these latest sanctions, it has previously noted in its published guidance (including with respect to an earlier Venezuela general license) that the term “maintenance” generally includes all transactions and activities ordinarily incident to performing under a contract or agreement that was in effect prior to the sanctions effective date (i.e., the date PdVSA was designated), provided that the level of performance is consistent with the terms of the general license and consistent with practices that existed between the party and the blocked entity prior to the sanctions effective date. OFAC has also previously taken the position that to the extent there is no preexisting contract or agreement, the authorization for “maintenance” also generally includes all transactions and activities ordinarily incident to obtaining goods or services from or providing goods or services to a blocked entity in a manner consistent with the terms of the general license and consistent with practices that existed between the party and the blocked entity prior to the sanctions effective date. OFAC will consider the transaction history between the party, or any intermediary party, and the blocked entity prior to the sanctions effective date in assessing whether activity is

consistent with past practices. Importantly, GL 12 does not contain the same authorization for maintenance. Therefore, US persons will have to take steps to completely wind down dealings with PdVSA or its majority-owned subsidiaries by February 27, 2019.

- Third, while many dealings with PdVSA and its subsidiaries are prohibited, it is important to note that US persons are still authorized to deal with certain PdVSA subsidiaries. In particular, GLs 7 and 14 permit US persons to deal with PDVH, CITGO and Nynas at least until July 27, 2019. Therefore, US persons that have dealings with these entities will have more time to take measures to wind down operations with them.
- Finally, we note that in implementing this action, the Trump administration has stated its desire for any PdVSA revenue to go to Interim President Juan Guaidó and the National Assembly. In an effort to give the opposition control of these accounts, the new sanctions authorize imports of petroleum from PdVSA but require such payments to be made into blocked accounts. Given the Trump administration’s intent and the fact that it will not receive the revenue from such transactions, it is unclear whether PdVSA will continue to export oil to the United States under these circumstances.

Due to the various deadlines imposed under the various GLs, it will be critical for US persons to stay abreast of any US sanctions developments involving these entities.

For more information about the topics raised in this Legal Update, please contact any of the following lawyers.

Tamer A. Soliman

Partner

+1 202 263 3292

tsoliman@mayerbrown.com

Ori Lev

Partner

+1 202 263 3270

olev@mayerbrown.com**Margaret-Rose Sales**

Counsel

+1 202 263 3414

msales@mayerbrown.com**Yoshihide Ito**

Partner

+1 202 263 3490

yito@mayerbrown.com**Jason Hungerford**

Partner

+44 20 3130 3084

jhungerford@mayerbrown.com**Timothy C. Lee**

Associate

+1 202 263 3055

tlee@mayerbrown.com**Gretel Echarte Morales**

Associate

+1 202 263 3426

gecharte@mayerbrown.com**Jing Zhang**

Associate

+1 202 263 3385

jzhang@mayerbrown.com**Regional Contacts****US****Tamer A. Soliman**

Partner

+1 202 263 3292

tsoliman@mayerbrown.com**EU****Paulette Vander Schueren**

Partner

+32 2 551 5950

pvanderschueren@mayerbrown.com**MIDDLE EAST****Tahan (Tom) A. Thraya**

Partner

+971 4 375 7161

tthraya@mayerbrown.com**LATIN AMERICA****Eduardo Molan Gaban**

Partner

+55 11 2504 4639

egaban@mayerbrown.com**Endnotes**

¹ CNN, *Senate Democrats' Effort to Block Trump Move on Russia Sanctions Fails* (Jan. 16, 2019),

<https://www.cnn.com/2019/01/16/politics/senate-democrats-sanctions-russia/index.html>.

² *Id.*

³ CNN, *House Republicans Join Democrats to Rebuke Trump on Russia Moves* (Jan. 17, 2019),

<https://www.cnn.com/2019/01/17/politics/house-russia-sanctions-rebuke/index.html>.

⁴ *Mayer Brown Legal Update*, New US Sanctions Against Russia raise New Legal Risks for US and Foreign Companies,

<https://www.mayerbrown.com/New-US-Sanctions-Against-Russia-Raise-New-Legal-Risks-for-US-and-Foreign-Companies>.

[Russia-Raise-New-Legal-Risks-for-US-and-Foreign-Companies-04-06-2018](#).

⁵ *Notification Letter* at 2.

⁶ See *US Department of Treasury Press Release* at <https://home.treasury.gov/news/press-releases/sm0338>.

⁷ *Notification Letter* at 2.

⁸ Specifically, Deripaska's direct interest in EN+ will fall from approximately 70 percent to 44.95 percent and will be further reduced through corporate restructuring transactions agreed to in the Terms of Removal. Deripaska's stake in EN+ cannot be increased in the future. Deripaska's direct shareholding interest in Rusal and ESE will be reduced to 0.01 percent and zero, respectively. EN+ will, in turn, own and control Rusal and ESE and has agreed to restrictions isolating Deripaska from the two companies. *Id.* at 4.

⁹ <https://www.nytimes.com/2019/01/21/us/politics/oleg-deripaska-russian-sanctions.html>.

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