

Legal update: OFAC sanctions Venezuela's PdVSA in wake of political upheaval

Implications for US and non-US entities

By Steve McNabb, Kim Caine, Katie McDougall, Manny Levitt

I. PdVSA designated for sanctions under E.O. 13850

On January 28, 2019, the Department of the Treasury's Office of Foreign Assets Control (OFAC) added *Petróleos de Venezuela, S.A. (PdVSA)*, Venezuela's state-owned oil company and a primary source of the country's income and foreign currency, to its list of Specially Designated Nationals and Blocked Persons (SDN List) pursuant to Executive Order (E.O.) 13850.¹ This designation comes as Venezuela is mired in political upheaval, with Nicolás Maduro, who was reelected in a contested election in May 2018, and opposition leader Juan Guaidó claiming to be the legitimate president of Venezuela. The United States and many European countries, including the United Kingdom, Spain, France, Germany, Sweden and Denmark, have officially recognized Guaidó as Venezuela's interim president, with the United States calling Maduro's claim to the presidency "illegitimate."²

As a result of PdVSA's designation, US persons are generally prohibited from engaging in any transactions with any property or interests in property held by PdVSA as well as those working on behalf of PdVSA or entities owned 50

percent or more by PdVSA.³ The prohibitions of E.O. 13850 extend to transactions that are processed through a US financial institution or the US financial system. Transactions that are denominated in US dollars would normally be expected to flow through the US financial system. In addition, under E.O. 13850, PdVSA's designation creates increased risk for non-US entities that continue to do business with PdVSA, even where the non-US entity's activities or transactions with PdVSA have no US nexus. As explained in further detail below, OFAC has issued an assortment of general licenses and guidance in conjunction with PdVSA's designation, which allow for certain wind-down operations and create carve-outs for variously-situated entities and individuals engaged in business with PdVSA and its various subsidiaries. Transactions to purchase petroleum and petroleum products from PdVSA or any entity in which PdVSA owns, directly or indirectly, a 50 percent or greater interest, and that involve US persons or any other US nexus (e.g., transactions involving the US financial system or US commodity brokers) must be wound down by April 28, 2019.⁴ These include swap and non-cash transactions.⁵ US person employees and contractors of non-US companies located in a country other than the United States

¹ Press Release, US Dep't of Treasury, Treasury Sanctions Venezuela's State-Owned Oil Company *Petróleos de Venezuela, S.A.* (Jan. 28, 2019), <https://home.treasury.gov/news/press-releases/sm594>.

² Statement from President Donald J. Trump Recognizing Venezuelan National Assembly President Juan Guaidó as the Interim President of Venezuela (Jan. 23, 2018), <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-recognizing-venezuelan-national-assembly-president-juan-guaido-interim-president-venezuela/>.

³ *Id.*

⁴ 31 CFR § 591.501, Subpart E, OFAC, General License No. 12, *Authorizing Certain Activities Necessary to Wind Down of Operations or Existing Contracts with Petróleos de Venezuela, S.A. (PdVSA)*, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/venezuela_gl12.pdf.

⁵ *Id.* at FAQ 658. Prior to April 28, 2019, any funds or tangible proceeds of a swap or non-cash agreement owed to PdVSA or any entity in which it owns, directly or indirectly, a 50 percent or greater interest as a result of such purchases or exchanges must be blocked, and, in the case of blocked funds, must be placed into a blocked interest-bearing account in the US.

or Venezuela are authorized to engage in certain *maintenance or wind-down transactions*⁶ with PdVSA, or any entity in which PdVSA owns, directly or indirectly, a 50 percent or greater interest, until March 29, 2019.⁷

In designating PdVSA for sanctions, Secretary of the Treasury Steven Mnuchin and Secretary of State Mike Pompeo determined that “persons operating in Venezuela’s oil sector are subject to sanctions pursuant to E.O. 13850.”⁸ E.O. 13850, signed in November 2018, blocks all property and interests in property of any person that is within the United States or that comes within the possession or control of any US person from being transferred, purchased, exported, withdrawn or otherwise dealt in if the Secretary of the Treasury, in consultation with the Secretary of State, determines that the individual:

1. Operates in the gold sector of the Venezuelan economy or in any other sector of the Venezuelan economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State;
2. Is responsible for or complicit in, or has 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 is an immediate adult family member of such a person;
3. 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 paragraph 2, or any person whose property and interests in property are blocked pursuant to this order; or

4. Is owned or controlled by, or has 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.⁹

PdVSA’s designation under E.O. 13850 creates particular risks even for non-US entities that continue to do business with PdVSA. Specifically, with PdVSA’s designation, a non-US entity continuing to do business with PdVSA may as a result of those activities fall into category 3 under E.O. 13850. This risk is discussed in further detail below.

II. General licenses create carve-outs

As noted above, alongside PdVSA’s designation, OFAC has announced the amendment of two general licenses and the issuance of eight new general licenses that create various exceptions to these new sanctions for certain types of activities and transactions so long as those activities and transactions do not otherwise violate US sanctions.¹⁰ On January 31, 2019, several days after announcing PdVSA’s designation, OFAC released further guidance to clarify the effect of PdVSA’s designation and the scope of authorized activities under the general licenses associated with the Venezuela-related sanctions.¹¹ In addition, OFAC amended two other general licenses on February 1, 2019, and amended them again on February 11, 2019.¹²

OFAC issued the following new and amended licenses:

- General License 3C¹³, which supersedes General License 3B, authorizes:
 - all transactions related to, the provision of financing for, and other dealings in specified bonds, provided that any divestment or transfer of, or facilitation of divestment or transfer of, any holdings in such bonds must be to a non-US person;

⁶ These are described in General License 11 as “transactions and activities ordinarily prohibited by Executive Order 13850 that are incident and necessary to the maintenance or wind down of operations, contracts, or other agreements involving PdVSA or entities owned, directly or indirectly, 50 percent or more by PdVSA that were in effect prior to January 28, 2019.” 31 CFR § 591.501, Subpart E, OFAC, General License No. 11, *Authorizing Certain Activities Necessary to Maintenance or Wind Down of Operations or Existing Contracts with Petroléos De Venezuela, S.A. (PdVSA)*, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/venezuela_gl11.pdf.

⁷ US Dep’t of Treasury, Resource Center, FAQ 657, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#661

⁸ US Dep’t of Treasury, *Issuance of a New Venezuela-related Executive Order and General Licenses; Venezuela-related Designation*, <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20190128.aspx>.

⁹ Exec. Order No. 13850, 83 Fed. Reg. 55243 (Nov. 2, 2018).

¹⁰ US Dep’t of Treasury, *Issuance of a New Venezuela-related Executive Order and General Licenses; Venezuela-related Designation*, <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20190128.aspx>.

¹¹ US Dep’t of Treasury, Resource Center, OFAC FAQs: Other Sanctions Programs, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#661. See FAQs 595, 648, 649, and 650-62.

¹² *Id.*

¹³ 31 CFR § 591.501, Subpart E, OFAC, General License No. 3C, *Authorizing Transactions Related to, Provision of Financing for, and Other Dealings in Certain Bonds*, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/venezuela_gl3c.pdf. Specified bonds were listed in an Annex to General License 3C.

- all transactions ordinarily incident and necessary to facilitating, clearing, and settling trades of holdings in specified bonds, provided such trades were placed prior to 4:00 p.m. eastern standard time on February 1, 2019;
- through March 11, 2019, all transactions ordinarily incident and necessary to the wind down of financial contracts or other agreements that were entered into prior to 4:00 p.m. eastern standard time on February 1, 2019, involving, or linked to, specified bonds; and
- transactions related to, the provision of financing for, and other dealings in bonds issued both i) prior to August 25, 2017 and ii) by US person entities owned or controlled, directly or indirectly, by the Government of Venezuela, other than Nynas AB, PDV Holding, Inc. (PDVH), CITGO Holding, Inc., and any of their subsidiaries.
- General License 7¹⁴ authorizes:
 - through July 27, 2019, all transactions and activities with respect to PDVH, CITGO Holding, Inc., and any of their subsidiaries where the only PdVSA entities involved are PDVH, CITGO Holding, Inc., or any of their subsidiaries; and
 - through April 28, 2019 all activities and transactions 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 50 percent or greater interest.
- General License 8¹⁵ authorizes:
 - through July 27, 2019, Chevron Corporation, Halliburton, Schlumberger Limited, Baker Hughes, and Weatherford International to conduct all transactions and activities ordinarily incident and necessary to their operations in Venezuela involving PdVSA or any entity in which PdVSA owns, directly or indirectly, a 50 percent or greater interest.
- General License 9B¹⁶, which supersedes General License 9, authorizes:
 - transactions and activities, ordinarily incident and necessary to dealings in any debt (including specified bonds, promissory notes, and other receivables) of, or equity in PdVSA or its subsidiaries, issued prior to August 25, 2017, provided that any divestment or transfer of, or facilitation of divestment or transfer of, any holdings in such debt must be to a non-US person; and
 - all transactions ordinarily incident and necessary to facilitating, clearing, and settling trades of holdings in specified bonds, provided such trades were placed prior to 4:00 p.m. eastern standard time on January 28, 2019;
 - through March 11, 2019, all transactions ordinarily incident and necessary to the wind down of financial contracts or other agreements that were entered into prior to 4:00 p.m. eastern standard time on January 28, 2019, involving, or linked to, specified bonds;
 - all transactions and activities ordinarily incident and necessary to dealings in any bonds issued prior to August 25, 2017 by PDVH, CITGO, Nynas AB, or any of their subsidiaries.
 - **NOTE:** In guidance discussing this license, OFAC describes the due diligence it expects financial institutions and broker dealers to undertake to ensure these divestments or transfers are to non-US persons. Financial institutions or registered broker-dealers in securities may rely upon the information ordinarily available to them, but must conduct due diligence on their direct customers. If a US broker or financial institution possesses information leading it to know or have reason to know that the buyer of such debt is a US person, the broker or financial institution will be held responsible if it does not take appropriate steps to ensure that the trade is not consummated.¹⁷

¹⁴ 31 CFR § 591.501, Subpart E, OFAC, General License No. 7, *Authorizing Certain Activities Involving PDV Holding, Inc. and CITGO Holding, Inc.*, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/venezuela_gl7.pdf. Any payment to or for the direct or indirect benefit of a blocked person other than PDVH, CITGO Holding, Inc., and any of their subsidiaries that is ordinarily incident and necessary to give effect to transactions authorized by this general license must be made into a blocked, interest-bearing account located in the United States.

¹⁵ 31 CFR § 591.501, Subpart E, OFAC, General License No. 8, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/venezuela_gl8.pdf.

¹⁶ 31 CFR § 591.501, Subpart E, OFAC, General License No. 9B, *Authorizing Transactions Related to Dealings in Certain Debt*, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/venezuela_gl9b.pdf.

¹⁷ US Dep't of Treasury, Resource Center, FAQ 650, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#661.

- General License 10¹⁸ authorizes:
 - US persons in Venezuela to purchase refined petroleum products for personal, commercial, or humanitarian uses from PdVSA or any entity in which PdVSA owns, directly or indirectly, a 50 percent or greater interest.
 - **NOTE:** OFAC has noted that General License 10 authorizes, among other things, US commercial airlines providing passenger or cargo services in Venezuela to purchase petroleum for fueling aircraft in Venezuela, and individuals to purchase petroleum for use in household goods, such as generators. General License 10 does not authorize the commercial resale, transfer, exportation, or reexportation of refined petroleum products.¹⁹
- General License 11²⁰ authorizes US employees and contractors of non-US entities located in a country other than the United States or Venezuela:
 - through March 29, 2019, to engage in all transactions and activities ordinarily incident and necessary to the maintenance or wind down of operations, contracts, or other agreements involving PdVSA or entities owned, directly or indirectly, 50 percent or more by PdVSA that were in effect prior to January 28, 2019.
 - **NOTE:** US financial institutions are prohibited from processing such transactions but are authorized to *reject, rather than block*, funds transfers that involve both PdVSA or any entity owned, directly or indirectly, 50 percent or more by PdVSA and a non-US entity located in a country other than the United States or Venezuela, provided that: (i) the funds transfers originate and terminate outside the United States; (ii) the originator and the beneficiary are non-US persons; (iii) the funds are not destined for a blocked account on the books of a US person; and (iv) the funds transfers otherwise are effected in accordance with General License 11.²¹
- General License 12²² authorizes:
 - through April 28, 2019, all transactions and activities ordinarily incident and necessary to the purchase and importation into the US of petroleum and petroleum products from PdVSA or entities owned, directly or indirectly, 50 percent or more by PdVSA;
 - **NOTE:** OFAC has stated that this authorization includes the importation into, or the exportation from the US of goods, services, or technology (other than the exportation of diluents) involving PdVSA or any entity in which it owns, directly or indirectly, a 50 percent or greater interest (other than ALBA de Nicaragua (ALBANISA) or any entity in which ALBANISA owns, directly or indirectly, a 50 percent or greater interest).²³
 - through February 27, 2019, all transactions and activities ordinarily incident and necessary to the wind down of operations, contracts, or other agreements, including the importation into the US of goods, services, or technology involving PdVSA or entities owned, directly or indirectly, 50 percent or more by PdVSA.
- General License 13²⁴ authorizes:
 - through July 27, 2019, all transactions and activities where the only PdVSA entities involved are Nynas AB or any of its subsidiaries.
- General License 14²⁵ authorizes:
 - all transactions that are for the conduct of the official business of the US Government by employees, grantees, or contractors thereof.

18 31 CFR § 591.501, Subpart E, OFAC, General License No. 10, *Authorizing the Purchase in Venezuela of Refined Petroleum Products from Petroleos de Venezuela, S.A. (PdVSA)*, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/venezuela_gl10.pdf.

19 US Dep't of Treasury, Resource Center, FAQ 656, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#661.

20 31 CFR § 591.501, Subpart E, OFAC, General License No. 11, *Authorizing Certain Activities Necessary to Maintenance or Wind Down of Operations or Existing Contracts with Petroleos De Venezuela, S.A. (PdVSA)*, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/venezuela_gl11.pdf. Payments must be made into blocked interest-bearing accounts located in the United States.

21 US Dep't of Treasury, Resource Center, FAQ 654, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#661.

22 31 CFR § 591.501, Subpart E, OFAC, General License No. 12, *Authorizing Certain Activities Necessary to Wind Down of Operations or Existing Contracts with Petroleos de Venezuela, S.A. (PdVSA)*, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/venezuela_gl12.pdf.

23 US Dep't of Treasury, Resource Center, FAQ 659, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#661.

24 31 CFR § 591.501, Subpart E, OFAC, General License No. 13, *Authorizing Certain Activities Involving Nynas AB*, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/venezuela_gl13.pdf. Payments must be made into blocked interest-bearing accounts located in the United States.

25 31 CFR § 591.501, Subpart E, OFAC, General License No. 14, *Official Business of the United States Government*, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/venezuela_gl14.pdf.

III. Further guidance from OFAC on mutual funds and ETFs

Further guidance issued by OFAC emphasizes that mutual funds and exchange traded funds (“ETFs”) are prohibited from engaging or transacting with any blocked persons and must block such holdings unless authorized by OFAC through a general or specific license. Mutual funds and ETFs that hold blocked holdings are not themselves blocked, but cannot divest themselves of blocked holdings without OFAC authorization.²⁶ In addition, OFAC has noted that ETFs that track but do not actually hold any interest in an entity or entities that appear on OFAC’s SDN List or an entity owned 50 percent or more, individually or in the aggregate, by an entity or individual on the SDN List, may continue to offer such funds, and US persons may trade in shares of these funds.²⁷

IV. Potential impact for Non-US entities

All non-US entities or individuals conducting business activities or transactions that involve PdVSA, in circumstances where such activities or transactions have any US nexus, including US dollar payments, should review their position immediately to ensure such they are not breaching US sanctions. Depending on the nature of their business activities or transactions, some of the general licenses and guidance issued by OFAC may be of assistance. Non-US businesses and individuals should note, however, that there is no “general” wind down period, and they will need to ensure their activities or transactions are covered by a general license and is otherwise consistent with OFAC’s guidance.

Importantly, even for **non-US** entities or individuals conducting ongoing business activities or transactions involving PdVSA that **do not** have a US nexus, possible designation as an SDN under E.O. 13850 still raises a potentially significant sanctions risk. The individuals or entities that can be designated under E.O. 13850, as described above, are not limited to Venezuelan entities or individuals. There is, therefore, a risk to non-US entities and individuals that the US Secretary of the Treasury, in consultation with the US Secretary of State, could designate them as SDNs if the US agencies determine that their activities with PdVSA (or its targeted subsidiaries) amount to the activities in outlined

E.O. 13850, including, under category 3, materially assisting, sponsoring or providing financial, material or technological support for, or goods or services to or in support of, PdVSA or its targeted subsidiaries.

The term “financial, material, or technological support” has been defined broadly by OFAC to mean “*any property, tangible or intangible, including but not limited to currency, financial instruments, securities, or any other transmission of value...*”²⁸ Determining the magnitude of this risk to non-US entities is very difficult, especially given the volatile political situation, however it is a concern for many non-US businesses. The nature of the business activities or relationship with PdVSA, among other factors, may impact the likelihood of being designated as an SDN and any concerned non-US businesses should seek advice in this respect.

V. Implications of PdVSA designation and key takeaways

In its announcement of the designation, OFAC indicated that the goal of the sanctions is to “hold accountable” PdVSA, the state-owned oil company, and to pressure Maduro to “transfer control to the Interim President or a subsequent, democratically-elected government.”²⁹ In subsequent guidance issued several days after PdVSA’s designation, OFAC indicated that the PdVSA sanctions may be lifted upon 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.”³⁰

This designation is another major signal in recent weeks that the Trump Administration is intent on ramping up sanctions on Venezuela. On January 25, 2019, in an effort to specifically target those working on behalf of Maduro and PdVSA, the administration issued an executive order titled “Taking Additional Steps To Address The National Emergency With Respect To Venezuela,” which expanded the definition of “Government of Venezuela” as it is used in the executive orders imposing sanctions on Venezuela³¹ to include the Central Bank of Venezuela and PdVSA, as well as “any person owned

²⁸ 31 CFR §591.304

²⁹ Press Release, US Dep’t of Treasury, *Supra* Note 1.

³⁰ US Dep’t of Treasury, Resource Center, FAQ 660, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#661.

³¹ Exec. Order No. 13692, 31 C.F.R. Part 591; Exec. Order No. 13808, 82 Fed. Reg. 41155 (Aug. 29, 2017); Exec. Order No. 13827, 83 Fed. Reg. 12469 (Mar. 21, 2018); Exec. Order No. 13835, 83 Fed. Reg. 24001 (May 24, 2018).

²⁶ US Dep’t of Treasury, Resource Center, FAQ 652, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#661.

²⁷ *Id.* at FAQ 653.

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.”³² In guidance issued on January 31, 2019, following PdVSA’s designation, OFAC stated that the US Treasury “will continue to use its economic tools to support Interim President Guaidó, the National Assembly, and the Venezuelan people’s efforts to restore their democracy.”³³

Individuals and entities conducting business involving PdVSA and its many subsidiaries, representatives, and related entities will need to examine whether any of their planned business activities are covered by the newly issued general licenses and prepare to comply with the new sanctions in accordance with the wind-down periods. It is important to note that this is **all** individuals and entities conducting business involving PdVSA and its many subsidiaries, representatives, and related entities, not just US businesses, or those conducting business with a US nexus.

As always, we will continue to monitor these developments and issue additional updates as warranted.

³² Executive Order, *Taking Additional Steps To Address The National Emergency With Respect To Venezuela*, Jan. 25, 2019, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/20190128_ven_eo.pdf.

³³ US Dep’t of Treasury, Resource Center, FAQ 660, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#661.

Contacts

If you would like further information please contact:



Steve McNabb
Chief Legal Officer, United States
Washington DC
+1 202 662 4528
stephen.mcnabb@nortonrosefulbright.com



Katie McDougall
Of Counsel
London
+44 20 7444 3344
katie.mcdougall@nortonrosefulbright.com



Kim Caine
Senior Counsel
Washington DC
+1 202 662 0394
kim.caine@nortonrosefulbright.com



Manny Levitt
Associate
Washington DC
+1 202 662 4662
manny.levitt@nortonrosefulbright.com

Norton Rose Fulbright

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 4000 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, Africa, the Middle East and Central Asia.

Recognized for our industry focus, we are strong across all the key industry sectors: financial institutions; energy; infrastructure, mining and commodities; transport; technology and innovation; and life sciences and healthcare. Through our global risk advisory group, we leverage our industry experience with our knowledge of legal, regulatory, compliance and governance issues to provide our clients with practical solutions to the legal and regulatory risks facing their businesses.

Wherever we are, we operate in accordance with our global business principles of quality, unity and integrity. We aim to provide the highest possible standard of legal service in each of our offices and to maintain that level of quality at every point of contact.

Norton Rose Fulbright Verein, a Swiss verein, helps coordinate the activities of Norton Rose Fulbright members but does not itself provide legal services to clients. Norton Rose Fulbright has offices in more than 50 cities worldwide, including London, Houston, New York, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg. For more information, see nortonrosefulbright.com/legal-notices.

The purpose of this communication is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.