

somewhat from jurisdiction to jurisdiction and it will probably take time to develop some reasonable jurisprudence.

At any rate, the general trend over the last decade or so is the emergence, at the side of the "old" system of prosecution, of "soft" regulations, not all of them strictly codified, but that, taken together, form a new global, somewhat harmonized and more efficient system of law<sup>66</sup>.

## Conclusion

*"It is essential that [sentences] should be public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by the law"*<sup>67</sup> wrote Cesare Beccaria in 1764. If he clearly indicated that crimes and penalties must be defined by law, he was less preoccupied by the place of the judge than by the efficiency and fairness of the judicial process. The legal scholar of the age of Enlightenment was more concerned by the ways in which justice is served rather than that by the theological principles on which it rests. As an adept of Jean Jacques Rousseau Social Contract theory, his goal was to create a better society through the deterrence of criminal acts.

Beccaria would certainly have considered positively the ongoing and increasing cooperation among specialized governmental entities with quasi prosecutorial powers such as the British SFO, the French AFA and specialized US agencies such as the SEC or CFTC. International cooperation is certainly the only effective way to fight international crime.

The rise and globalization of the DPA and similar procedures around the world show a practical and global approach to the need of creating a more efficient system of transnational corporate (and to some extent individual) criminal prosecution. While DPAs procedures are not perfect and need to be constantly improved and harmonized between jurisdictions, they became a key element in the creation of a system of corporate criminal justice which strives to deter criminal behavior and be both efficient and fair. ■

## Venezuela-Related Sanctions: U.S. and EU Developments and Compliance Challenges

**Joydeep Sengupta, B.C.L., LL.B.**

Skadden, Arps, Slate, Meagher & Flom LLP

**Ernst-Wesley Laine, LL.M.**

Skadden, Arps, Slate, Meagher & Flom LLP<sup>68</sup>

### I. Introduction

This article provides an overview of recent developments in Venezuela-related sanctions in the United States ("U.S.") and the European Union ("EU"), where authorities have imposed new sanctions in response to ongoing political developments. Since 2014, Venezuela has faced an increasingly hardened sanctions regime imposed by western nations. While this article focuses on the U.S. and the EU's Venezuela-related sanctions, several other jurisdictions have also issued sanctions against Venezuela, such as Canada,<sup>69</sup> several countries that are candidates for future membership of the EU,<sup>70</sup> and many of the United Kingdom's overseas territories.<sup>71</sup>

In parts II and III, we provide an overview of the U.S. and EU Venezuela-related sanctions, respectively. Part IV discusses compliance challenges for businesses navigating Venezuela-related sanctions and practical guidance to ensure compliance.

## II. Overview of the U.S. Venezuela-Related Sanctions Program

### 1. Venezuelan Political Context

Venezuela is currently experiencing a period of political opposition towards the Government of Venezuela under

68 - The views expressed in this article are those of the authors only. The authors would like to thank Justin Campbell and Malika Moore for their research assistance.

69 - Canada first issued sanctions against Venezuela pursuant to an Association Agreement it formed with the United States on September 22, 2017 and again on May 30, 2018 against 54 individuals in the Maduro regime it deemed responsible for the deterioration of democracy in Venezuela. See Special Economic Measures (Venezuela) Regulations, SOR/2017-204; see also Regulations Amending the Special Economic Measures (Venezuela) Regulations, SOR/2018-114.

70 - Macedonia, Montenegro, Albania, Bosnia and Herzegovina, Iceland, Liechtenstein, Norway, Ukraine, the Republic of Moldova and Georgia, which are currently not part of the EU, have aligned themselves with the EU Council Decision (CFSP) 2018/90 imposing sanctions on Venezuela. See Council of the EU Press Release 62/18, *Declaration by the High Representative on behalf of the EU on the alignment of certain third countries concerning restrictive measures in view of the situation in Venezuela* (Feb. 14, 2018), <http://www.consilium.europa.eu/en/press/press-releases/2018/02/14/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-alignment-of-certain-third-countries-concerning-restrictive-measures-in-view-of-the-situation-in-venezuela/pdf>.

71 - The United Kingdom passed an order giving effect to the EU sanctions against Venezuela in many of its overseas territories. See *The Venezuela (Sanctions) (Overseas Territories) Order 2018, No. 179*.

66 - See in particular the minutes of the conference "Influence through Law" of August 28, 2014 organized by the French Conseil d'Etat: <http://www.conseil-etat.fr/Actualites/Discours-Interventions/Influence-through-law-XXII-Conference-of-Ambassadors>.

67 - In "On Crimes and Punishments (*Dei delitti e delle pene*)" first published in 1764. See translation in English by David Young, Hackett Publishing, Company, Indianapolis, 1986.

the presidency of Nicolás Maduro.<sup>72</sup> Protestors have expressed their disapproval of the country's hyperinflation, food and medicine shortages, erosion of a fair democratic process, crime and poverty, among other human rights issues.<sup>73</sup> In response to the antigovernment protests in 2014, the U.S. government determined that several senior government officials in Venezuela were responsible for or complicit in significant acts of violence, abuses or violations of human rights against citizens of Venezuela, including antigovernment protestors.<sup>74</sup>

As a result, on December 8, 2014, President Barack Obama signed the Venezuela Defense of Human Rights and Civil Society Act of 2014 (the "Act").<sup>75</sup> The Act imposed targeted sanctions on persons responsible for violations of human rights of antigovernment protesters in Venezuela. U.S. government officials stressed that these targeted sanctions were not against the country of Venezuela but only against the individuals deemed responsible for or complicit in human rights and other violations.<sup>76</sup>

## 2. Implementation of Venezuela-Related Sanctions Program

### 2.1. Developments under the Obama Administration

The Venezuela-related sanctions program implemented by the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") began on March 8, 2015 when President Obama issued Executive Order ("E.O.") 13692 "Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela."<sup>77</sup> This

E.O. declared a national emergency with respect to the political situation in Venezuela and stated that the Government of Venezuela's erosion of human rights guarantees, persecution of political opponents and other acts of repression<sup>78</sup> constitute an unusual and extraordinary threat to the national security and foreign policy of the United States.<sup>79</sup> This list-based sanction was the first of a series of Venezuela-related sanctions.

E.O. 13692 blocks the property and interests in property of designated individuals and entities designated for the imposition of sanctions pursuant to this E.O. and generally prohibits U.S. persons wherever located from engaging in any transactions or dealings with such individuals or entities, including their property and interests in property. The E.O. designated seven Venezuelan military and law enforcement senior officials as blocked persons for their involvement in the situation in Venezuela. OFAC expanded the Venezuela-related sanctions program's Specially Designated Nationals ("SDN") list pursuant to this E.O., and as of September, 25, 2018, there were 65 individuals, six entities and one aircraft, which U.S. persons are generally prohibited from dealing with.<sup>80</sup> These sanctions also prohibit designated individuals from traveling to the United States, except as authorized by the Secretary of State.<sup>81</sup> Additionally, entry into the United States is suspended for other individuals, who are not explicitly named on the SDN list but meet the criteria of a blocked person under E.O. 13692.<sup>82</sup>

72 - See *How Venezuela's crisis developed and drove out millions of people*, BBC News (Aug. 22, 2018), <https://www.bbc.co.uk/news/world-latin-america-36319877>; Anthony Faiola, *Venezuelan President Nicolás Maduro wins reelection amid charges of irregularities*, WASH. POST (May 20, 2018), [https://www.washingtonpost.com/world/the\\_americas/crisis-weary-venezuelans-are-voting-in-election-decried-as-a-maduro-power-grab/2018/05/20/cb7b579e-57d6-11e8-9889-07bcc1327f4b\\_story.html?utm\\_term=.465cd0e9c9a4](https://www.washingtonpost.com/world/the_americas/crisis-weary-venezuelans-are-voting-in-election-decried-as-a-maduro-power-grab/2018/05/20/cb7b579e-57d6-11e8-9889-07bcc1327f4b_story.html?utm_term=.465cd0e9c9a4); see also William Neuman & Nicholas Casey, *Venezuela Election Won by Maduro Amid Widespread Disillusionment*, N.Y. TIMES (May 20, 2018), [https://www.nytimes.com/2018/05/20/world/americas/venezuela-election.html?rref=collection%2Ftimestopic%2FVenezuela&action=click&contentCollection=world&region=stream&module=stream\\_unit&version=latest&contentPlacemnt=16&pgtype=collection](https://www.nytimes.com/2018/05/20/world/americas/venezuela-election.html?rref=collection%2Ftimestopic%2FVenezuela&action=click&contentCollection=world&region=stream&module=stream_unit&version=latest&contentPlacemnt=16&pgtype=collection).

73 - Nicholas Casey, *Dying Infants and No Medicine: Inside Venezuela's Failing Hospitals*, N.Y. TIMES, (May 15, 2016), <https://www.nytimes.com/2016/05/16/world/americas/dying-infants-and-no-medicine-inside-venezuelas-failing-hospitals.html>; Kirk Semple, *In a Venezuela Ravaged by Inflation, 'a Race for Survival'*, N.Y. TIMES, (Dec. 2, 2017), <https://www.nytimes.com/2017/12/02/world/americas/venezuela-nicholas-maduro-inflation-hyperinflation.html?mtrref=www.nytimes.com&mtrref=www.nytimes.com&mtrref=www.nytimes.com>.

74 - See The White House Office of the Press Secretary, Fact Sheet: Venezuela Executive Order (Mar. 9, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/03/09/fact-sheet-venezuela-executive-order>; see also Venezuela Defense of Human Rights and Civil Society Act of 2014, Pub. L. No. 113-278, 128 Stat. 3011.

75 - Venezuela Defense of Human Rights and Civil Society Act of 2014, Pub. L. No. 113-278, 128 Stat. 3011 (imposing targeted sanctions on persons responsible for violations of human rights of antigovernment protesters in Venezuela, to strengthen civil society in Venezuela, and for other purposes; also highlighted the U.S. government's goal of working with the EU to ensure the peaceful resolution of the situation in Venezuela and the cessation of violence against antigovernment protestors).

76 - See generally Fact Sheet: Venezuela Executive Order, supra note 74.

77 - Exec. Order No. 13692, 80 Fed. Reg. 12,747 (Mar. 8, 2015); President Barack Obama Issued Executive Order 13692 pursuant to the International Emergency Economic Powers Act, 50 U.S.C. § 1701, the

National Emergencies Act, 50 U.S.C. § 1601, the Venezuela Defense of Human Rights and Civil Society Act of 2014, Pub. L. No. 113-278, section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. § 1182(f)) and section 301 of title 3 of the United States Code.

78 - Exec. Order 13692 also states that the Government of Venezuela's "curtailment of press freedoms, use of violence and human rights violations and abuses in response to antigovernment protests, and arbitrary arrest and detention of antigovernment protestors, as well as the exacerbating presence of significant public corruption" also constitute an "unusual and extraordinary threat to the national security and foreign policy of the United States." 80 Fed. Reg. at 12,747.

79 - Exec. Order No. 13692, supra note 78; see also International Emergency Economic Powers Act, 50 U.S.C. §1701 ("Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat."); National Emergencies Act, 50 U.S.C. §§ 1601-1651.

80 - OFAC's SDN List details the specific targets of U.S. sanctions. Designated individuals and entities on OFAC's SDN list are prohibited from engaging in any transactions involving U.S. persons or the territory of the United States. For an updated list of the Venezuelan individuals and entities on OFAC's SDN List, see U.S. Department of the Treasury, Office of Foreign Assets Control, Specially Designated Nationals and Blocked Persons List (SDN) Human Readable Lists (accessed on Aug. 31, 2018), <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>.

81 - See U.S. Department of State, Venezuela-Related Sanctions, <https://www.state.gov/e/eb/tfs/spi/venezuela> (last visited Aug. 31, 2018).

82 - Section 1(a)(ii)(A-E) of Exec. Order No. 13692, 80 Fed. Reg. 12747 (Mar. 8, 2015) ("(ii) [A]ny person determined by the Secretary of the Treasury, in consultation with the Secretary of State: (A) to be responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, or to have participated in, directly or indirectly, any of the following in or in relation to Venezuela: (1) actions or policies that undermine democratic processes or institutions; (2) significant acts of violence or conduct that constitutes a serious abuse or violation of human rights, including against persons involved in antigovernment protests in Venezuela in or since February 2014; (3) actions that prohibit, limit, or penalize the exercise of freedom of expression or peaceful assembly; or (4) public corruption by senior officials within the Government of Venezuela; (B) to be a current or former leader of an entity that has, or whose members have, engaged in any activity described in subsection (a)(ii)(A) of this section or of an entity whose

## 2.2. Developments under the Trump Administration

President Donald Trump issued three additional Executive Orders that impose increasingly broader sanctions related to the situation in Venezuela.<sup>83</sup> The sanctions issued under the Trump administration have focused on debt and equity transactions involving the Government of Venezuela or related entities.<sup>84</sup> More than two years after President Obama issued E.O. 13692, President Trump issued E.O. 13808 “Imposing Additional Sanctions with Respect to the Situation in Venezuela” on August 24, 2017.

E.O. 13808 broadly prohibits transactions related to the Government of Venezuela’s new medium- and long-term debt, new equity and certain pre-existing bonds it issued. OFAC first began issuing debt and equity sanctions in the context of the Ukraine/Russia-related sanctions program. Most OFAC sanctions programs try to balance the objective of reducing or eliminating blocked persons and entities’ access to capital on one hand, and a heightened awareness of how integrated such blocked persons and entities are in the global economy on the other.<sup>85</sup> Here, E.O. 13808 attempts to strike this balance by prohibiting transactions related to, providing financing for, or otherwise dealing in debt with a maturity longer than 90 days and is issued by, on behalf of, or for the benefit of Petróleos de Venezuela (“PdVSA”), its property, or its interest in property. The Government of Venezuela owns PdVSA and its subsidiaries.<sup>86</sup> E.O. 13808 also prohibits transactions related to, providing financing for, or otherwise dealing in new debt with a maturity of longer than 30 days issued by, on behalf of, or for the benefit of any other segment of the Government of Venezuela, its property, or its interests in property.

Further, E.O. 13808 targets dividend payments or other distributions of profits from any entity owned or controlled, directly or indirectly, by the Government of Venezuela to the Government of Venezuela. It also prohibits the purchase, directly or indirectly, of any securities from the Government of Venezuela other than certain specified debt securities. OFAC also has the authority to issue general and specific licenses that authorize the performance of certain categories of transactions.<sup>87</sup> In an effort to limit the broad

property and interests in property are blocked pursuant to this order; (C) to be a current or former official of the Government of Venezuela; (D) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of: (1) a person whose property and interests in property are blocked pursuant to this order; or (2) an activity described in subsection (a)(ii)(A) of this section; or (E) 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.”)

83 - Exec. Order No. 13808, 82 Fed. Reg. 41155 (Aug. 24, 2017); Exec. Order No. 13827, 83 Fed. Reg. 12469 (Mar. 19, 2018); Exec. Order No. 13835, 83 Fed. Reg. 24001 (May 21, 2018).

84 - Exec. Order No. 13808, 82 Fed. Reg. 41155 (Aug. 24, 2017), Exec. Order No. 13827, 83 Fed. Reg. 12469 (Mar. 19, 2018) and Exec. Order No. 13835, 83 Fed. Reg. 24001 (May 21, 2018) define “Government of Venezuela” broadly as “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 of Venezuela.”

85 - See generally OFAC Compliance in the Securities and Investment Sector, 13 J. Inv. Compliance 21 (2012), <http://dx.doi.org/10.1108/15285811211266074>.

86 - PdVSA, [http://www.pdvs.com/index.php?option=com\\_content&view=article&id=6541&Itemid=888&lang=en](http://www.pdvs.com/index.php?option=com_content&view=article&id=6541&Itemid=888&lang=en) (last visited Aug. 14, 2018).

87 - See U.S. Department of the Treasury, Office of Foreign Assets Control, OFAC Frequently Asked Questions: General Questions,

impact of these Venezuela-related sanctions, OFAC issued five general licenses<sup>88</sup> demonstrating the administration’s continued goal of placing financial pressure on the Government of Venezuela rather than unduly impacting U.S. persons, the global petroleum market, the secondary bond market and the Venezuelan people.<sup>89</sup>

On March 19, 2018, President Trump took additional measures and issued E.O. 13827, addressing the Government of Venezuela’s attempt to circumvent previously issued U.S. sanctions by issuing a digital currency called “petro.” This E.O. prohibits “[a]ll 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.”<sup>90</sup> This was the first U.S. sanction that addressed the use of cryptocurrencies and confirmed that in the context of this sanctions program, cryptocurrencies are not a viable option for conducting business with blocked persons. In an effort to halt hyper-inflation, the Government of Venezuela introduced banknotes named the “sovereign bolivar” on August 21, 2018, which have five fewer zeros than their predecessor and are pegged to the petro.<sup>91</sup>

Following the re-election of President Nicolás Maduro on May 20, 2018, President Trump issued E.O. 13835 “Prohibiting Certain Additional Transactions with Respect to Venezuela,” on May 21, 2018. This E.O. aims to prevent the Maduro regime from conducting “fire sales” and collateralizing Venezuela’s financial assets in order to gain immediate access to funds. This is an expansion of the

Question 4 (June 16, 2006), [https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq\\_general.aspx](https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx).

88 - U.S. Department of the Treasury, Office of Foreign Assets Control, OFAC Frequently Asked Questions: Other Sanctions Programs, Questions 509-510, 595 (July 19, 2018), [https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq\\_other.aspx#venezuela](https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#venezuela) (General License 1 provides a 30-day wind-down period from the order’s effective date with respect to contracts and other agreements that were in effect prior to E.O. of August 24, 2017 taking effect. General License 2 authorizes all transactions otherwise prohibited by Subsections 1(a)(i), (a)(ii), and (b) of E.O. 13808 provided that the only Government of Venezuela entities involved in the transactions are CITGO Holding, Inc., a U.S. subsidiary of PdVSA, and any of CITGO’s subsidiaries. General License 3 authorizes all transactions related to, the provision of financing for, and other dealings in bonds contained on the List of Authorized Venezuela-Related Bonds that would otherwise be prohibited by Section 1(a)(iii) of E.O. of August 24, 2017. General License 4 authorizes all transactions related to the provision of financing for, and other dealings in new debt related to, the exportation or reexportation of agricultural commodities, medicine, medical devices, or replacement parts and components for medical devices, to Venezuela, or to persons in third countries purchasing specifically for resale to Venezuela, provided that the exportation or reexportation is licensed or otherwise authorized by the Department of Commerce. General License 5 authorizes U.S. persons to engage in all transactions related to, the provision of financing for, and other dealings in the Petroleos de Venezuela SA 2020 8.5 Percent Bond that would be prohibited by Subsection 1(a)(iii) of E.O. 13835.).

89 - See Jamie L. Boucher, Eytan J. Fisch, William J. Sweet, Jr., Lindsey F. Randall, Joseph M. Sandman, *New Sanctions Target the Government of Venezuela’s Access to US Capital Markets*, Skadden (Aug. 30, 2017), <https://www.skadden.com/insights/publications/2017/08/newsanctionstargetgovvenezuelasaccessuscapmarkets>.

90 - Exec. Order No. 13,827, 83 Fed. Reg. 12469 (Mar. 19, 2018).

91 - Gideon Long, *Venezuela devalues currency by 95% in effort to stave off collapse*, FINANCIAL TIMES, Aug. 21, 2018, at 1. President Maduro stated that 60 new bolivars will be worth one petro, which in turn is worth \$60, implying a currency devaluation of 95%. To avoid the country’s economic collapse, President Maduro concurrently announced that his administration would also be cutting oil subsidies and raising the minimum wage by more than 3,000%. Analysts doubt whether these measures will allow the government to control Venezuela’s hyper-inflation.

existing Venezuela-related sanctions. It specifically prohibits all transactions by a U.S. person or that occur within the United States related to the purchase of any debt owed to the Government of Venezuela, including accounts receivable, that is pledged as collateral after May 21, 2018. E.O. 13835 also prohibits the sale, transfer, assignment or pledge as collateral of any equity interest in any entity of which the Government of Venezuela owns a fifty percent or greater interest, directly or indirectly.

E.O. 13835 prohibits the seizure of government-owned collateral for any unpaid Venezuelan bonds.<sup>92</sup> The Trump administration, however, did not want Maduro's government to take advantage of the sanctions to default on its bond obligations without consequence.<sup>93</sup> Moreover, with international trading and borrowing difficulties increasing for the Government of Venezuela, observers had predicted a partial default on its repayment obligations.<sup>94</sup> Thus, on July 19, 2018, OFAC issued General License 5, which authorizes U.S. persons to engage in "*all transactions related to, the provision of financing for, and other dealings in the [PdVSA] 2020 8.5 Percent Bond that would be prohibited by Subsection 1(a)(iii) of Executive Order 13835 of May 21, 2018.*"<sup>95</sup>

OFAC concurrently issued two Frequently Asked Questions ("FAQs"), which explained, inter alia, why General License 5 is limited to PdVSA 2020 8.5 percent bonds and does not apply to any other commercial transactions. The FAQs state that shares of CITGO Holding, Inc. ("CITGO") serve as collateral for the PdVSA 2020 8.5 percent bond.<sup>96</sup> Indeed, PdVSA's 2020 8.5 percent bonds are secured by a first-priority lien on a 50.1 percent stake in CITGO,<sup>97</sup> which owns three large U.S.-based refineries and a pipeline network. CITGO is a subsidiary of PDV Holding, Inc., which is a wholly owned subsidiary of PdVSA.<sup>98</sup>

Because they are backed by CITGO, the PdVSA's 2020 8.5 percent bonds are valued significantly higher than the rest of the Government of Venezuela's debt.<sup>99</sup> Following the issuance of E.O. 13835, bondholders became concerned that the executive order would interfere with their ability to enforce their rights under the PdVSA 2020 8.5 percent bonds (*i.e.*, CITGO's assets).<sup>100</sup> Thus, General License 5

modified E.O. 13835 by allowing U.S. bondholders to seize the Government of Venezuela's assets (including vessels, properties, and financial assets) in the event of its default on PdVSA's 2020 8.5 percent bonds. The FAQs explain that General License 5 is intended to secure bondholders' access to CITGO's assets while maintaining sanctions pressure on the Maduro regime by preventing it from defaulting on the Government of Venezuela's bond obligations without consequence.<sup>101</sup> Despite General License 5, U.S. bondholders' access to CITGO's assets may be in jeopardy given PdVSA's far-reaching problems with creditors. On August 20, 2018, PdVSA agreed to an over \$2 billion arbitration award by the International Chamber of Commerce in favor of ConocoPhillips, a Texas-based oil company, which arises from the Government of Venezuela's expropriation of several ConocoPhillips oil projects in 2007. ConocoPhillips has stated it will ensure the settlement meets all U.S. regulatory requirements, including applicable sanctions against Venezuela.<sup>102</sup> Additionally, on August 9, 2018, a federal judge in Delaware ruled that Crystallex, a Canadian gold mining company, is entitled to seize over \$1 billion in shares of CITGO to satisfy an arbitration award following the Government of Venezuela's nationalization of a gold mine in 2008.<sup>103</sup>

The FAQs also clarify that E.O. 13835 does not prohibit holders of a legal judgment against the Government of Venezuela from attaching and executing against the Government of Venezuela's assets *unless* the attachment involves "*(i) debt owed to the Government of Venezuela that was pledged as collateral after the effective date of E.O. 13835... or (ii) an equity interest in any entity in which the Government of Venezuela has a 50 percent or greater ownership interest (per subsection 1(a)(iii) of the E.O.).*" The FAQs further explain that OFAC authorization would likely be required for the attachment of an equity interest in any entity in which the Government of Venezuela has a 50 percent or greater ownership interest.<sup>104</sup>

The current Venezuela-related sanctions program suggests the U.S.'s willingness to continue to place pressure on the Government of Venezuela under the Maduro regime until it restores democracy, holds free and fair elections, releases all political prisoners immediately and unconditionally, and ends the repression and economic deprivation of the Vene-

92 - Paul Dobson, *Trump Admin Closes Venezuela Sanctions Loophole in Favour of US Bondholders*, VENEZUELANALYSIS.COM (July 20, 2018, 5:23 PM), <https://venezuelanalysis.com/news/13955>.

93 - U.S. Department of the Treasury, Office of Foreign Assets Control, OFAC Frequently Asked Questions: Other Sanctions Programs, Question 595, *Why is OFAC issuing General License 5?* (July 19, 2018), [https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq\\_oth\\_er.aspx#venezuela](https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_oth_er.aspx#venezuela).

94 - Dobson, *supra* note 92.

95 - U.S. Department of the Treasury, Office of Foreign Assets Control, General License No. 5, *Authorizing Certain Transactions Related to the Petroleos de Venezuela SA 2020 8.5 Percent Bond* (2018), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/venezuela\\_gl5.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/venezuela_gl5.pdf).

96 - OFAC Frequently Asked Questions: Other Sanctions Programs, *supra* note 93.

97 - Jef Feeley, Tiffany Kary & Justin Villamil, *PDVSA Bonds Backed by Citgo Tumble After U.S. Court Ruling*, BLOOMBERG (Aug. 10, 2018, 1:57 PM), <https://www.bloomberg.com/news/articles/2018-08-10/pdvsa-bonds-backed-by-citgo-stake-tumble-after-u-s-court-ruling>.

98 - S&P CAPITAL IQ, CITGO Holding Inc. Corporate Structure Tree, <https://www.spglobal.com> (last visited Aug. 3, 2018).

99 - Feeley et al., *supra* note 97.

100 - OFAC Frequently Asked Questions: Other Sanctions Programs, *supra* note 93.

101 - Id.

102 - See Clifford Krauss, *Venezuela Agrees to Pay \$2 Billion Over Seizure of Oil Projects*, N.Y. TIMES, (Aug. 20, 2018), <https://www.nytimes.com/2018/08/20/business/energy-environment/conocophillips-venezuela-oil.html>; See also *Conoco Says Venezuela will Pay \$2 Billion Arbitration Award*, Reuters (Aug. 20, 2018), <https://www.voanews.com/a/conoco-says-venezuela-will-pay-2-billion-arbitration-award/4536173.html>.

103 - On August 9, 2018, U.S. District Judge Leonard P. Stark ruled that Crystallex could seize shares of PDV Holding Inc., a subsidiary of PdVSA that owns CITGO, to enforce the award. See Caroline Simson, *Citgo Trying To Delay \$1.2B Venezuela Award Row*, MINER SAYS, LAW360 (Aug. 20, 2018), <https://www.law360.com/articles/1075042/citgo-trying-to-delay-1-2b-venezuela-award-row-miner-says>. PdVSA filed a notice of appeal to the United States Third Circuit Court of Appeals on August 10, 2018, which remains pending. See *Venezuela's PDVSA appealing Crystallex court ruling: court document*, Reuters (Aug. 13, 2018), <https://www.reuters.com/article/venezuela-pdvsa-crystallex/venezuelas-pdvsa-appealing-crystallex-court-ruling-court-document-idUSL1N1V3095?feedType=RSS&feedName=marketsNews>.

104 - U.S. Department of the Treasury, Office of Foreign Assets Control, OFAC Frequently Asked Questions: Other Sanctions Programs, Question 596, *Does E.O. 13835 prohibit me from attaching and executing against assets of the Government of Venezuela, including vessels, properties, or financial assets, if I have a legal judgment against the Government of Venezuela?* (July 19, 2018), [https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq\\_other.aspx#venezuela](https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#venezuela).

zuelan people.<sup>105</sup> While there is still concern that this sanctions program can have an impact on oil prices,<sup>106</sup> to date, none of the Venezuela-related sanctions have gone as far as prohibiting the importation of Venezuelan oil into the United States. As of September 25, 2018, OFAC had not publically announced any enforcement actions for Venezuela-related sanctions.

## III. Overview of EU Sanctions Against Venezuela

### 1. Background

On November 10, 2017, EU ambassadors agreed to impose an arms embargo on Venezuela and a ban on any equipment capable of repressing opponents within the state. This decision followed a report published by the United Nations in August 2017 stating that “*extensive human rights violations and abuses*” have occurred in the context of anti-government demonstrations.<sup>107</sup>

On November 13, 2017, the Council of the EU (the “Council”) adopted conclusions on the situation in Venezuela and agreed on targeted sanctions.<sup>108</sup> It stated that “*the setting-up of an all-powerful Constituent Assembly further erode[s] the democratic and independent institutions*” and targets the “*violations of human rights and fundamental freedoms*” reported by the UN High Commissioner for Human Rights.

On the same day, the Council unanimously decided to adopt restrictive measures: Council Decision 2017/2074<sup>109</sup> and Council Regulation 2017/2063<sup>110</sup> imposed an arms embargo on Venezuela and on related material that might be used for internal repression, as well as a legal framework for travel bans and asset freezes against those involved in human rights violations and non-respect for democracy or the rule of law.

The Council specified that “*these measures will be used in a gradual and flexible manner*”<sup>111</sup> and could be extended depending on the evolution of the situation in the country: holding of credible and meaningful negotiations, respect for democratic institutions, adoption of a full electoral calendar and the liberation of all political prisoners. It concludes by stating that these measures can be reversed.

Pursuant to Council Regulation 2017/2063 concerning restrictive measures against Venezuela, on January 22, 2018, the Council put seven individuals holding official positions under restrictive measures with immediate effect through a Council Decision 2018/90 and a Council Imple-

menting Regulation 2018/88. These individuals are deemed to be involved in the violation of democratic principles, the rule of law or human rights.

On February 8, 2018, the European Parliament adopted Resolution 2018/2559, broadening the list of individuals subject to restrictive measures in Nicolas Maduro’s entourage.

On May 28, 2018, the Council adopted conclusions to impose additional sanctions against targeted individuals in Venezuela. This occurred on June 25, 2018, when the Council adopted Council Decision 2018/901 and Council Implementing Regulation 2018/899, adding 11 people that hold “official positions” to its targeted Venezuela sanctions list. This decision was a direct follow-up to the Council conclusions adopted on May 28, 2018, which called for additional targeted and reversible restrictive measures that do not harm the Venezuelan population in response to the recent presidential elections held in Venezuela.

### 2. Implementation of the Venezuela-Related Sanctions Program

#### 2.1. The arms and related materials embargo

EU sanctions impose an arms and related materials embargo in Venezuela. Council Decision 2017/2074 and Council Regulation 2017/2063 prohibit the sale, supply, and transfer of arms and related materials to Venezuela by nationals of Member States or from the territories of Member States or using their flag vessels to aircraft.<sup>112</sup> The prohibited goods and technology are listed in the EU Common List of Military Equipment. Specifically, the following is prohibited:

- providing, directly or indirectly, technical assistance, brokering services and other activities related to military goods and activities as well as the provision, manufacture, maintenance and use of arms and related materials to any person or entity in Venezuela,<sup>113</sup> and
- providing, directly or indirectly, financing or financial assistance related to military goods and activities, including grants, loans and export credit insurance, as well as insurance and reinsurance to any person or entity in Venezuela.<sup>114</sup>

However, the prohibition does not apply for the execution of contracts concluded before November 13, 2017.<sup>115</sup>

#### 2.2. Restriction on equipment that might be used for internal repression

Council Decision 2017/2074 and Council Regulation 2017/2063 prohibit the sale, supply, transfer or export, directly or indirectly, of equipment which might be used for internal repression in Venezuela as well as financial assistance relating to such equipment and the provision of related services such as technical assistance.<sup>116</sup> Annex 1 of

105 - See The White House, Statement from President Donald J. Trump on the Maduro Regime in Venezuela (May 21, 2018).

106 - Krauss, supra note 102.

107 - U.N. High Commissioner for Human Rights, Human rights violations and abuses in the context of protests in the Bolivarian Republic of Venezuela from 1 April to 31 July 2017, Report (Aug. 31, 2017), [https://www.ohchr.org/Documents/Countries/VE/HCHRreportVenezuela\\_1April-31July2017\\_EN.pdf](https://www.ohchr.org/Documents/Countries/VE/HCHRreportVenezuela_1April-31July2017_EN.pdf).

108 - Council of the European Union Press Release 643/17, *Venezuela: EU adopts conclusions and targeted sanctions* (Nov. 13, 2017), <http://www.consilium.europa.eu/en/press/press-releases/2017/11/13/venezuela-eu-adopts-conclusions-and-targeted-sanctions/>.

109 - Council Decision 2017/2074, 2017 O.J. (L 295) 60 (EU).

110 - Council Regulation 2017/2063, 2017 O.J. (L 295) 21 (EU).

111 - Council of the European Union Press Release 643/17, supra note 108.

112 - Council Decision 2017/2074, art. 1(1), 2017 O.J. (L 295) 60, 61 (EU).

113 - Council Decision 2017/2074, art. 1(2)(a), 2017 O.J. (L 295) 60, 61 (EU); Council Regulation 2017/2063, art. 2(1), 2017 O.J. (L 295) 21, 23 (EU).

114 - Council Decision 2017/2074, art. 1, 2017 O.J. (L 295) 60, 61 (EU); Council Regulation 2017/2063, art. 2(2), 2017 O.J. (L 295) 21, 23.

115 - Council Regulation 2017/2063, art. 2(2), 2017 O.J. (L 295) 21, 23 (EU).

116 - Council Decision 2017/2074, art. 3, 2017 O.J. (L 295) 60, 61 (EU); Council Regulation 2017/2063, art. 3, 2017 O.J. (L 295) 21, 23 (EU).

Council Regulation 2017/2063 lists the equipment that might be used for internal repression.

### 2.3. Restriction on equipment, technology or software intended primarily for use in telecommunications monitoring or interception

Council Decision 2017/2074 and Council Regulation 2017/2063 also prohibit the sale, supply, transfer or export of equipment or software intended primarily for use in the monitoring or interception by, or on behalf of, the Venezuelan regime of the internet and of telephone communications on mobile or fixed networks in Venezuela, as well as financial or technical assistance to install, operate or update such equipment, technology or software.<sup>117</sup> Annex II of Council Regulation 2017/2063 identifies the equipment, technology and software in question.

### 2.4. List-Based Sanctions

On November 13, 2017, the Council adopted a legal framework to impose restrictive measures targeting individuals who are considered to be responsible for (i) serious human rights violations and (ii) the repression of civil society and democratic opposition in Venezuela or (iii) actions, policies or activities that otherwise undermine democracy or the rule of law in Venezuela. They consist in travel bans from the European Union and asset freezes.<sup>118</sup>

Under the EU asset freeze, all funds and economic resources belonging to, or controlled by, the listed parties and that fall under EU jurisdiction (e.g., are held by EU banks) are frozen. No funds or economic resources may be made available – directly or indirectly – to or for the benefit of the listed persons by parties falling under EU jurisdiction.

Pursuant to Council Regulation 2017/2063, on January 22, 2018, Council Decision 2018/90<sup>119</sup> and Council Implementing Regulation 2018/88<sup>120</sup> introduced asset-freezing measures on 7 individuals holding official positions and deemed to be involved in the violation of human rights, democratic principles and the rule of law.

The EU designations followed US sanctions that were already in place since August 2017. All but one listed individual (i.e., Diosdado Cabello Rondón) are also covered under U.S. sanctions. However, unlike under E.O. 13808,<sup>121</sup> the EU has chosen for now not to target the Government of Venezuela or restrict the state-owned oil company PdVSA's ability to raise capital in EU markets.

On February 8, 2018, the European Parliament adopted Resolution 2018/2559<sup>122</sup> regarding the situation in Venezuela. It acknowledges the legitimacy of measures taken by the EU in response to the breaches of human rights and democracy in Venezuela but calls for these measures to “*be extended against those mainly responsible for the increased political, social, economic and humanitarian crisis, namely*

117 - Council Decision 2017/2074, art. 5(1), 2017 O.J. (L 295) 60, 62 (EU); Council Regulation 2017/2063, art. 6, 2017 O.J. (L 295) 21, 24 (EU).

118 - Council Decision 2017/2074, arts. 6 & 7, 2017 O.J. (L 295) 60, 62-63 (EU); Council Regulation 2017/2063, art. 8, 2017 O.J. (L 295) 21, 25 (EU).

119 - Council Decision 2018/90, 2018 O.J. (L 161) 14 (EU).

120 - Council Implementing Regulation 2018/88, 2018 O.J. (L 161) 6 (EU).

121 - Exec. Order No. 13808, 82 Fed. Reg. 41155 (Aug. 29, 2017).

122 - European Parliament resolution of 8 February 2018 on the situation in Venezuela (2018/2559(RSP)).

*the President, the Vice-President, the Minister of Defense, members of the high military command, and members of their inner circles, including family members.”* It also states that if the situation does not improve in the country, sanctions will be imposed on PdVSA.

Responding to the European Parliament Resolution and following the re-election of President Maduro on May 20, 2018, the Council adopted new conclusions on May 28, 2018 considering imposing additional sanctions and new measures against targeted individuals in Venezuela on June 25, 2018.<sup>123</sup>

Finally, on June 25, 2018, the Council decided to add 11 individuals holding official positions under restrictive measures.<sup>124</sup> Again, the persons listed are considered to be responsible for human rights violations and for undermining democracy and the rule of law in Venezuela<sup>125</sup> and the measures include a travel ban and an asset freeze.

### 2.5. Derogations and Exemptions

The U.S. and the EU's approach to issuing licenses, which permit otherwise prohibited transactions under their respective sanctions programs, differ significantly. On the one hand, OFAC typically issues broad prohibitions under its sanctions programs while carving out exceptions, including by issuing licenses, either concurrently or subsequently. In the EU sanctions against Venezuela, on the other hand, Council Regulation 2017/2063 and Council Decision 2017/2074 already contain a set of derogations and exemptions permitting otherwise prohibited transactions.

Both Council Regulation 2017/2063 and Council Decision 2017/2074 allow the following transactions, which are otherwise prohibited by the arms and related materials embargo:

- Contracts concluded before November 13, 2017.<sup>126</sup>
- The sale, supply, transfer, export, and financial or technical assistance related to demining equipment and non-lethal military equipment intended for humanitarian use or crises-management operations by the United Nations (“UN”), the EU, EU Member States or a regional or sub-regional organization.<sup>127</sup>
- Protective clothing, including flak jackets and military helmets, temporarily exported to Venezuela by personnel of the UN, the EU, EU Member States, aid workers or members of the media for their personal use.<sup>128</sup>

123 - Council of the European Union Press Release 302/18, *Venezuela: Council adopts conclusions* (May 28, 2018), <http://www.consilium.europa.eu/en/press/press-releases/2018/05/28/venezuela-council-adopts-conclusions/>.

124 - Council Decision 2018/901, 2018 O.J. (L 1601) 12 (EU); Council Implementing Regulation 2018/899, 2018 O.J. (L 1601) 5 (EU).

125 - Council of the European Union Press Release 364/18, *Venezuela: EU adds 11 officials to sanctions list* (June 25, 2018), <http://www.consilium.europa.eu/en/press/press-releases/2018/06/25/venezuela-eu-adds-11-officials-to-sanctions-list>.

126 - Council Decision 2017/2074, art. 2, 2017 O.J. (L 295) 60, 61 (EU); Council Regulation 2017/2063, art. 2(2), 2017 O.J. (L 295) 21, 23 (EU).

127 - Council Decision 2017/2074, art. 4(1), 2017 O.J. (L 295) 60, 62 (EU); Council Regulation 2017/2063, art. 4, 2017 O.J. (L 295) 21, 24 (EU). The provision of financial and technical assistance requires the authorization of competent authorities in each Member State. Annex III of the Council Regulation indicates how to contact the competent authority of each Member State.

128 - Council Decision 2017/2074, art. 4(2), 2017 O.J. (L 295) 60, 62 (EU); Council Regulation 2017/2063, art. 5, 2017 O.J. (L 295) 21, 24 (EU).

- The competent authority of the relevant Member State may authorize the sale, supply, transfer or export, and related financial or technical assistance, of equipment, technology or software intended primarily for telecommunication or internet monitoring and interception “if they have reasonable grounds to determine that the equipment, technology or software would not be used for internal repression by Venezuela’s government, public bodies, corporations or agencies, or any person or entity acting on their behalf or at their direction.”<sup>129</sup>

Council Decision 2017/2074 also prohibits persons responsible for human rights violations or abuses, the repression of civil society and democratic opposition, or whose actions otherwise undermine democracy or the rule of law in Venezuela from travelling through the territories of the EU Member States.<sup>130</sup> The following derogations, however, may apply:

- Member States are not obliged to refuse their nationals entrance into their territory.<sup>131</sup>
- Member States may exempt the travel ban “where travel is justified on the grounds of urgent humanitarian need, or on grounds of attending intergovernmental meetings and meetings promoted by the Union, or hosted by a Member State holding the chairmanship in office of the OSCE, where a political dialogue is conducted that directly promotes democracy, human rights and the rule of law in Venezuela.”<sup>132</sup>

Finally, Council Regulation 2017/2063 and Council Decision 2017/2074 contain derogations authorizing competent authorities of the relevant Member State to release certain frozen funds or economic resources, which are otherwise prohibited, if they determine that the funds are for:

- the basic needs of the natural or legal persons, entities and bodies referred to in Annex IV and V of Council Regulation 2017/2063,<sup>133</sup> and their dependent family members, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums and public utility charges;<sup>134</sup>
- payment of fees or reimbursement of incurred expenses associated with the provision of legal services;<sup>135</sup>
- payment of fees or service charges for maintenance of frozen funds or economic resources;<sup>136</sup>
- extraordinary expenses, as determined by the relevant competent EU Member State;<sup>137</sup> or
- official purposes of a diplomatic or consular mission or international organization.<sup>138</sup>

129 - Council Decision 2017/2074, art. 5(2), 2017 O.J. (L 295) 60, 62 (EU); Council Regulation (EU) 2017/2063, art. 6(2), 2017 O.J. (L 295) 21, 24 (EU).

130 - Council Decision 2017/2074, art. 6(1), 2017 O.J. (L 295) 60, 62-63 (EU).

131 - Council Decision 2017/2074, art. 6(2), 2017 O.J. (L 295) 60, 63 (EU).

132 - Council Decision 2017/2074, art. 6(6), 2017 O.J. (L 295) 60, 63 (EU).

133 - This refers to natural and legal persons responsible for human rights violations or abuses, the repression of civil society and democratic opposition, or whose actions otherwise undermine democracy or the rule of law in Venezuela.

134 - Council Decision 2017/2074, art. 7(4)(a), 2017 O.J. (L 295) 60, 64 (EU).

135 - Council Decision 2017/2074, art. 7(4)(b), 2017 O.J. (L 295) 60, 64 (EU).

136 - Council Decision 2017/2074, art. 7(4)(c), 2017 O.J. (L 295) 60, 64 (EU).

137 - Council Decision 2017/2074, art. 7(4)(d), 2017 O.J. (L 295) 60, 64 (EU).

138 - Council Decision 2017/2074, art. 7(4)(e), 2017 O.J. (L 295) 60, 64 (EU).

The competent authorities of the relevant Member States may also release funds or economic resources subject to an arbitral decision rendered before the date on which the natural or legal person, entity or body in question was included in Annex IV or V of Council Regulation 2017/2063.<sup>139</sup> Alternatively, the relevant Member States may also release funds or economic resources subject to a judicial or administrative decision rendered in the Union or a judicial decision enforceable in the Member State concerned rendered prior to, on, or after the aforementioned date. The funds or economic resources must be used exclusively to satisfy the claims secured by such a decision and within the limits set by the applicable laws and regulations governing the rights of persons having such claims. Also, the decision may not be for the benefit of a natural or legal person, entity or body listed in Annex IV or V of Council Regulation 2017/2063. Finally, recognizing the decision may not be contrary to public policy in the Member State concerned.<sup>140</sup>

Finally, financial or credit institutions may credit frozen accounts if they receive funds transferred by third parties to the account of a listed natural or legal person, entity or body, provided that any additions to such accounts will also be frozen. This shall not apply, however, to:

- “interest or other earnings on those accounts;
- “payments due under contracts, agreements or obligations that were concluded or arose before the date on which the natural or legal person, entity or body referred to in Article 8 was included in Annex IV or V”; or “payments due under judicial, administrative or arbitral decisions rendered in a Member State or enforceable in the Member State concerned.”<sup>141</sup>

## IV. Compliance Challenges

The U.S. and EU sanctions regimes in Venezuela impose significant compliance challenges. Due to the Government of Venezuela’s involvement in the oil, gas and natural resources industries, companies involved in those sectors are especially at risk.<sup>142</sup> Moreover, given the nature of both U.S. and EU Venezuela-related sanctions, parties pursuing restructuring of Venezuelan sovereign debt and transactions in military equipment are also at risk.

The U.S. Venezuela-related sanctions program forbids U.S. persons from engaging, directly or indirectly, in transactions involving the interests of blocked persons (*i.e.*, anyone on OFAC’s List of SDNs and Blocked Persons) or blocked legal entities (*i.e.*, legal entities owned 50 % or more by one or more blocked persons). Moreover the U.S. Venezuela-related sanctions program forbids U.S. persons from partic-

139 - This refers to natural and legal persons responsible for human rights violations or abuses, the repression of civil society and democratic opposition, or whose actions otherwise undermine democracy or the rule of law in Venezuela.

140 - Council Regulation (EU) 2017/2063, art. 10(1)(a-d), 2017 O.J. (L 295) 21, 26 (EU).

141 - Council Regulation 2017/2063, art. 11(4)(b)-(c), 2017 O.J. (L 295) 21, 26-27 (EU); Council Decision 2017/2074, art. 7(6-7), 2017 O.J. (L 295) 60, 64 (EU).

142 - Seetha Ramachandran et al., *Venezuela Sanctions Complicate Compliance For Cos.*, LAW360 (June 25, 2018, 4:49 PM), <https://www.law360.com/articles/1056742>.

ipating in certain transactions relating to certain types of Government of Venezuela debt and equity.<sup>143</sup>

The EU, on the other hand, imposed sectoral-type sanctions targeting arms sales, and equipment, technology or software intended primarily for use in telecommunications monitoring or interception by the Venezuelan regime.<sup>144</sup> Also, the EU introduced asset-freezing measures on individuals holding official positions and deemed to be involved in the violation of human rights, democratic principles and the rule of law. As of June 25, 2018, the EU had targeted 18 such individuals.<sup>145</sup>

Starting with E.O. 13808 in August 2017, the debt-related sanctions President Trump imposed have perhaps posed the biggest challenge from a compliance perspective. By prohibiting access to a set of bonds overnight, these sanctions have forced many financial institutions to reconfigure their compliance programs. Moreover, except as authorized by license, the sanctions forbid U.S. persons from participating in certain transactions relating to certain types of Government of Venezuela<sup>146</sup> debt and equity. This requires significant due diligence resources to identify prohibited dealings with the Government of Venezuela.<sup>147</sup> Much confusion remains over which activities are covered, and what transactions are permitted in regards to particular individuals or companies associated with the Government of Venezuela.<sup>148</sup>

Companies can work to mitigate these risks and ensure that they are not engaging in prohibited transactions by having an effective sanctions compliance program and team in place.

To comply with either the U.S. or EU sanctions programs, companies must first determine whether the transaction(s) in question contain a jurisdictional nexus to the EU<sup>149</sup> or the U.S.<sup>150</sup> territory and whether a sanctioned party is

involved.<sup>151</sup> Companies must try to identify whether the commercial activity in question is prohibited under the sanctions regimes, and whether any licenses are applicable.<sup>152</sup>

Companies should also perform due diligence on their clients and counterparties, projects and the transactions they perform and underwrite.<sup>153</sup> Similarly, companies must understand who owns or controls one's customers and who they are doing business with (e.g., knowing what a large loan amount is being used for). In so doing, companies should consider whether their customers do business in the Latin America region, deal with goods coming from Venezuela or are linked to major Venezuelan industries and exports including oil, gas, natural resources, mining and exploration industries.<sup>154</sup>

Note that it may be difficult to perform due diligence and scrutinize companies that buy and sell securities, especially those dealing with complex commercial transactions, because the interest of a sanctioned party in such transactions may not be obvious.<sup>155</sup> Where possible, commercial parties may require counterparties to provide adequate representations and warranties regarding sanctions compliance in transaction documents. This may include obtaining representations from the counterparty that (i) it understands that the firm is bound by U.S. sanctions, EU sanctions, or both, (ii) that it acknowledges the type of activities that are prohibited, and (iii) that a proposed transaction will not cause the firm to take any action that would violate the sanctions.<sup>156</sup>

The compliance program should include up-to-date tailored sanctions compliance policies and procedures, in line with evolving risks and management's risk appetite, training for relevant employees, and clearly defined roles and responsibilities from the top to the bottom of the business organization chain.<sup>157</sup> Companies should also implement an automated transaction filtering process to screen for key terms in the sanctions (e.g. "Government of Venezuela" or names of people on the SDN list).

As previously mentioned, the Government of Venezuela is attempting to create its own state-sponsored virtual currency (i.e., cryptocurrency) called "Petro", which could potentially help it evade sanctions by establishing a financial infrastructure outside the control of any central authority.<sup>158</sup> Thus, U.S. persons dealing in the prospective Venezuelan cryptocurrency may be in violation of E.O. 13808.<sup>159</sup>



143 - Anna Sayre, *Deciphering Multi-Faceted Venezuelan Sanctions – Top Ten Practical Tips to Stay Compliant*, SanctionsAlert.com (Jan. 24, 2018), <http://sanctionsalert.com/deciphering-multi-faceted-venezuelan-sanctions-top-ten-practical-tips-to-stay-compliant/>.

144 - Council Decision 2017/2074, art. 5(1), 2017 O.J. (L 295) 60, 62 (EU); Council Regulation 2017/2063, art. 6, 2017 O.J. (L 295) 21, 24 (EU).

145 - Council Decision 2018/90, 2018 O.J. (L 161) 14 (EU); Council Implementing Regulation 2018/88, 2018 O.J. (L 161) 6 (EU); Council Decision 2018/901, 2018 O.J. (L 161) 12 (EU).

146 - The Executive Orders issued by OFAC under the Trump administration (i.e., 13808, 13827 and 13835) define the "Government of Venezuela" as "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 of Venezuela."

147 - Jeremy Paner, *Increased Sanctions on Venezuela Place Heavy Burden on Compliance Programs at Financial Institutions*, Holland & Hart: Trade Sanctions Blog (Aug. 28, 2017), <https://www.tradesanctions.com/increased-sanctions-venezuela-place-heavy-burden-compliance-programs-financial-institutions/>.

148 - Sayre, supra note 143.

149 - EU sanctions apply (i) within the territory of the EU (including its airspace); (ii) on board any aircraft or vessel under the jurisdiction of an EU member state; (iii) to any person who is a national of an EU member state regardless of whether they are inside or outside the territory of the EU; (iv) to any legal person, entity or body inside or outside the territory of the EU that is incorporated or constituted under the Law of an EU Member State (including branches of EU companies in countries outside of the EU); and (v) to any legal person, entity or body in respect of any business done in part or in whole within the EU.

150 - U.S. sanctions apply to any transaction involving a U.S. person, including a U.S. financial person, or U.S. origin goods. A U.S. person means any U.S. citizen, lawful permanent resident alien, entity organized under the laws of a U.S. jurisdiction, or any person that is



physically located in the U.S. including US. Branches of non-U.S. banks. Also, a U.S. person can risk OFAC sanctions violations for doing business with a third country entity that does a predominant share of its business with a sanctioned person. Sanctioned parties can include persons identified on sanctions lists as well as persons owned or controlled by those listed persons.

151 - Sidne Koenigsberg & Gregory Vianesi, *The EU and U.S. Russia and Ukraine Sanctions Programs: Comparisons and Perspectives*, *Chronique*, RTDF n° 1 (2018), at 78.

152 - Sayre, supra note 143.

153 - Koenigsberg & Vianesi, supra note 151.

154 - Sayre, supra note 143.

155 - Ramachandran et al., supra note 142.

156 - Id.

157 - Koenigsberg & Vianesi, supra note 151, at 78, 79.

158 - Sayre, supra note 143.

159 - Id.

Examining preceding sanctions regimes, such as those imposed on North Korea and Russia, may provide guidance on how OFAC, and relevant authorities in EU Member States, will interpret the Venezuela-related sanctions.<sup>160</sup> International companies active in both the U.S. and the EU should harmonize their sanctions compliance programs across the corporate group to efficiently comply with both regimes.

Companies should stay alert regarding Venezuela-related sanctions regimes in other jurisdictions including Canada,<sup>161</sup> non-EU third countries,<sup>162</sup> and the United Kingdom,<sup>163</sup> which, as noted above, have also imposed sanctions regulations on Venezuela.

Note that the United Nations has thus far not implemented any Venezuela-related sanctions. In fact, the United Nations Human Rights Council adopted a resolution condemning U.S., E.U., Canada and their allies' sanctions against Venezuela and reminding all states that "such measures prevent the full realization of economic and social development of nations."<sup>164</sup>

As the U.S. and the EU's approaches to enforcing sanctions differ significantly, compliance with Venezuela sanctions requires an understanding of these differences, and the different enforcement risks in each jurisdiction. In the U.S., OFAC is the single agency responsible for administering the U.S.'s Venezuela sanctions and issuing related licenses and interpretative guidance. In the EU, on the other hand, all 28 EU Member States must consent before amending or extending the terms of existing sanctions.<sup>165</sup> Moreover, the relevant authorities in each Member State are responsible for enforcing the EU's Venezuela-related sanctions program. For instance, the competent authority in each Member State determines the applicable penalties and statute of limitations and whether certain exemptions and derogations stipulated in Council Regulation 2017/2063 and Council Decision 2017/2074 apply. Another major difference in the two jurisdictions' enforcement approaches is that sanctions are generally based on a strict liability regime in the U.S., but do not apply in the EU unless the person knew or had reasonable cause to suspect that their actions would violate the EU sanctions.<sup>166</sup> Finally, there is less legal certainty surrounding the EU's Venezuela-related sanctions program given that less interpretive guidance is available and that the EU's history of sanctions enforcement is more limited.

160 - Id.

161 - Gov't of Can., Canadian Sanctions Related to Venezuela, GLOBAL AFFAIRS CANADA (May 30, 2018), [http://www.international.gc.ca/sanctions/countries-pays/venezuela.aspx?lang=eng&\\_ga=2.75492178.1902258282.1533198447-726214112.1533198447](http://www.international.gc.ca/sanctions/countries-pays/venezuela.aspx?lang=eng&_ga=2.75492178.1902258282.1533198447-726214112.1533198447); see also Gov't of Can., *Canada imposes further sanctions on Maduro regime in Venezuela*, GLOBAL AFFAIRS CANADA (May 30, 2018), <https://www.canada.ca/en/global-affairs/news/2018/05/canada-imposes-further-sanctions-on-maduro-regime-in-venezuela.html>.

162 - Maya Lester QC, *Third countries align with EU Venezuela sanctions*, European Sanctions Blog (Feb. 15, 2018), <https://europeansanctions.com/2018/02/15/third-countries-align-with-eu-venezuela-sanctions/>.

163 - The Export Control (Venezuela Sanctions) Order 2018, No. 108 (UK); see also Maya Lester QC, *UK extends EU Venezuela sanctions to overseas territories*, European Sanctions Blog (Feb. 16, 2018), <https://europeansanctions.com/2018/02/16/uk-extends-eu-venezuela-sanctions-to-overseas-territories/>.

164 - Human Rights Council Res. 37/21, U.N. Doc. A/HRC/37/L.34, at 3 (Mar. 19, 2018).

165 - Koenigsberg & Vianesi, *supra* note 151, at 79.

166 - Id. at 78.

Finally, companies may also need to consider other non-sanctions compliance risks, including anticorruption and anti-money laundering enforcement risks, when dealing with Venezuela, and specifically PdVSA.<sup>167</sup>

167 - See Richard L. Cassin, *Feds make another FCPA arrest in PDVSA bribery case*, FCPA BLOG (Aug. 1, 2018, 6:18 PM), <http://www.fcpa.blog.com/blog/2018/8/1/feds-make-another-fcpa-arrest-in-pdvsa-bribery-case.html>. The U.S. Department of Justice has charged a total of 17 individuals in a pending PdVSA case, including former PdVSA officials, in connection with anti-corruption and anti-money laundering-related violations. For example, on August 1, 2018, a dual U.S.-Venezuelan citizen, charged with bribing a former PdVSA official, was arrested in Miami for allegedly paying \$629,000 or more in bribes in exchange for contracts with the PdVSA.