

# NONCOMPREHENSIVE SANCTIONS: VENEZUELA, GLOBAL MAGNITSKY, HONG KONG

30 SEPTEMBER 2020 • ARTICLE



**This is the third of a seven-part series on the application of US sanctions to the shipping community.**

This article will focus on “noncomprehensive sanctions,” which target “Specially Designated Nationals” (SDNs), but otherwise do not prohibit most trade between the US and the target country (if any). While there are multiple noncomprehensive sanctions programs, we will focus on three: Venezuela (which can be thought of as quasi-comprehensive), Global Magnitsky (human rights) and Hong Kong. Russia also has a substantial noncomprehensive sanctions program, which we will address in a later article.

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## NONCOMPREHENSIVE SANCTIONS PROGRAMS: IN GENERAL

The US Office of Foreign Assets Control (OFAC) maintains approximately 30 noncomprehensive sanctions programs. Some sanctions programs target specific countries, such as Lebanon and Yemen. Other sanctions programs target specific activities, such as terrorism, drug trafficking and human rights violations.

In contrast to comprehensive sanctions, which target most transactions with the targeted country, noncomprehensive sanctions generally only prohibit US persons from dealing with “Specially Designated Nationals” (SDNs). SDNs are sometimes referred to as “blocked persons” or “sanctioned persons.” In addition, under the “50% rule,” the same sanctions apply to any entity that is owned 50% or more by

one or more SDN.

Some but not all noncomprehensive sanctions programs have a “secondary sanctions” component, which applies to target non-US persons dealing with an SDN. Typically, the biggest risk is that an entity, individual or ship may itself become designated as an SDN. Even in those cases where it is clear that there is no secondary sanctions risk, so that non-US persons can legally deal with the SDN, an SDN listing should usually be thought of as a significant red flag. It is generally illegal to involve US persons or US dollars (which are cleared through the US financial system) in dealing with SDNs, so this constitutes a significant impediment to trade.

The SDN list is massive, with tens of thousands of listings. OFAC maintains a searchable listing of SDNs on its website, and paid subscription services provide expanded search options. Parties generally should screen their counterparts to determine whether they are SDNs.

Because noncomprehensive sanctions programs target transactions with SDNs but not the broader targeted country, in a sense, it can be misleading to focus on the individual sanctions program, since an SDN can be located anywhere, not just in the targeted country. For example, the fact that Lebanon has a designated sanctions program does not necessarily mean that doing business with Lebanon will result in a greater or lesser risk of a sanctions violation than doing business with a similarly situated non-sanctioned country. At the same time, there *are* important distinctions between certain sanctions programs. In addition, it can be helpful to understand the background of a sanctions program in order to predict what activities are likely to result in being added to the SDN list. Therefore, each noncomprehensive sanctions program should be evaluated on its own merits.

## VENEZUELA

The Venezuela sanctions program is a noncomprehensive sanctions program, in that both US and non-US persons can generally enter into transactions with Venezuela without violating US sanctions, so long as they avoid prohibited persons and prohibited sectors. The problem is that almost the entire Venezuelan economy involves such persons and sectors. Therefore, the Venezuela sanctions program can be thought of as “quasi-comprehensive.”

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The Venezuela sanctions program began in March 2015, when former President Obama imposed targeted sanctions on certain Venezuelan officials using violence against anti-government protestors. These sanctions targeted only the officials, not the country or government at large, and therefore were clearly noncomprehensive in nature. In August 2017, President Trump imposed significant additional sanctions, generally prohibiting US persons from providing financing to the Government of Venezuela and Petr leos de Venezuela, S.A. (PdVSA), the state-owned oil company. For this purpose, a trade receivable with a tenor longer than 90 days (for PdVSA) or 30 days (for the Government of Venezuela) generally constituted a “financing.” These sanctions were in some ways similar to the “sectoral sanctions” on Russia (which we will address in a later article). Additional sanctions in 2018 generally prohibited US persons from using the *petro*, the Venezuelan cryptocurrency, and further targeting the Government of Venezuela’s ability to raise funds. These sanctions imposed significant barriers on the ability of the shipping community to deal with PdVSA and Venezuelan oil and petrochemicals; specifically, US persons had to ensure that payments were collected within the relevant deadline to avoid an accidental financing, and Venezuelan law required port fees to be paid in *petros*, setting up a conflict between US and Venezuelan law (although reports suggest that the cryptocurrency is rife with fraud, and it is not clear whether payments in *petros* were actually made). Accordingly, by the end of 2018, both US and non-US persons could still generally do business with PdVSA and the Government of Venezuela, albeit subject to significant hurdles.

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All this changed in January 2019, when President Trump designated PdVSA as an SDN, and designated Venezuela's oil sector as subject to sanctions. As a result, US persons were generally banned from transactions with PdVSA or dealing with Venezuela's oil sector altogether, and non-US persons who dealt in PdVSA oil were subject to secondary sanctions risk. The sanctions were further tightened in August 2019 when the Government of Venezuela was itself designated as a sanctioned entity. OFAC issued various general licenses permitting the wind-down of certain transactions with the Government of Venezuela and PdVSA, but these have mostly expired (a general license permitting five specific companies to perform limited maintenance of their operations in Venezuela is scheduled to expire December 1, 2020). The risk to non-US persons was made clear when several ships and shipowners were sanctioned for trading Venezuelan oil first in April 2019, and then in June 2020 (several of the ships were removed from the sanctions list after fierce lobbying and promises to refrain from further business with Venezuela). The US also designated two trading affiliates of Russian oil giant Rosneft for dealing with PdVSA.

Currently, US persons are generally banned from all transactions with the Government of Venezuela, PdVSA and their subsidiaries, and non-US persons who deal with the Government of Venezuela or PdVSA, or otherwise operate in the Venezuelan oil, gold, financial or defense and security sectors run the risk of being targeted by secondary sanctions. Both US and non-US persons can continue to engage in legitimate trade with Venezuela, so long as such trade does not involve the Government of Venezuela or its subsidiaries, or Venezuela's oil sector or other prohibited sectors. Parties are generally permitted to pay port fees and import duties for ships engaged in legitimate trade to or from Venezuela, (although bribes would likely be prohibited, and the use of *petros* remains forbidden to US persons). However, the transportation of oil or any other products involving the Government of Venezuela or PdVSA remains subject to primary and secondary sanctions.

The Venezuela sanctions were aimed at toppling the regime of ruling president Nicolás Maduro in favor of Juan Guaidó, who is recognized by the US and several other countries as the legitimate president of Venezuela. Guaidó attempted to claim the presidency in January 2019, but has so far been unsuccessful in realizing his claim. In March 2020, the Trump Administration made overtures to Maduro, suggesting that he and Guaidó both step down in favor of a bipartisan transition government, but Maduro has rejected this proposal. Democratic presidential candidate Joe Biden has signaled his opposition to Maduro and general support for Venezuela sanctions, although it is far from clear what would be his policy if he is elected in the November 2020 US Presidential Election. Barring significant changes to Venezuela's government and/or US policy, it seems likely that the current sanctions regime will continue at least in the near future.

## GLOBAL MAGNITSKY

The Global Magnitsky Human Rights Accountability Act was enacted in 2016, and generally targets government officials implicated in human rights abuses anywhere in the world. The Global Magnitsky Act builds on and expands upon the original Magnitsky Act (named after Sergei Magnitsky, a Russian lawyer who was imprisoned in Russia allegedly for political reasons, and died in 2009 allegedly due to abuse), which was enacted in 2012 to target human rights abuses specifically in Russia. The US has imposed sanctions on officials and related parties in a wide variety of countries, including US sanctions targets such as Russia and Nicaragua, but also US allies such as Saudi Arabia. Many sanctioned parties are also the target of a parallel sanctions program.

**"The Global Magnitsky sanctions target the designated SDNs and any entities in which they own a 50% or greater interest."**

Like many US sanctions programs in the past few years, the Global Magnitsky sanctions can be thought of as having a secondary sanctions component, in that they apply to non-US persons determined "to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of" parties sanctioned under the Global Magnitsky regime. Therefore, non-US persons dealing with such SDNs are potentially at risk of themselves being sanctioned.

The Global Magnitsky sanctions target the designated SDNs and any entities in which they own a 50% or greater interest. Designated officials are sanctioned both in their personal and their professional capacity; i.e., a US person generally cannot deal with such an SDN in any way. At the same time, the fact that an official may have control over a governmental agency does not mean that the agency itself is sanctioned.

## HONG KONG

The Hong Kong sanctions program is the newest US sanctions program, having been established in July 2020 in response to China's crackdown on pro-democracy advocates and civil liberties in Hong Kong. The sanctions program targets Hong Kong officials and others involved in the suppression of democracy in Hong Kong and similar activities. Like the Global Magnitsky sanctions, the sanctions also target non-US persons determined "to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of," a sanctioned Hong Kong official. Therefore, the sanctions can be considered as secondary sanctions, in that non-US persons engaging in transactions with the sanctioned individuals are themselves at risk of becoming sanctioned. Complicating matters, Hong Kong has issued guidance and legislation to the effect that the sanctions are not binding, and suggesting that Hong Kong financial institutions and other entities may be liable under Hong Kong law if they comply with the sanctions (although the scope of this guidance and legislation is not entirely clear). Therefore, parties within Hong Kong may find themselves in a difficult position, required by US law to comply with US sanctions and by Hong Kong law to refrain from complying with US sanctions.

For now, the Hong Kong sanctions remain limited in scope. Carrie Lam, the Chief Executive of the Hong Kong Special Administrative Region and a small number of other officials have been designated as SDNs, so US persons, and non-US persons wishing to avoid US sanctions risk, should avoid dealing with these individuals, as well as any companies that they may own. But otherwise, there is currently no general prohibition on dealing with Hong Kong, so both US and non-US shipowners, charterers and others can continue to trade with Hong Kong. The future of the Hong Kong sanctions program will likely depend on political events both in Hong Kong and the US.

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For more information on the effects of these sanctions in Hong Kong, see our article [here](#), or click [here](#) to see our article on the US withdrawal from the Hong Kong Shipping Tax Treaty.

## FREQUENTLY ASKED QUESTIONS

**Q: Can you explain the 50% rule where there is complex ownership (such as multiple classes of shares, or different distribution rights)?**

A: OFAC is adamant that 50% means ownership, not control. Unfortunately, any additional guidance has been limited. Most practitioners would typically think of "ownership" as a value determination. For example, if a corporation has Class A shares and Class B shares that have the same dividend rights but the Class B shares have more voting rights, we would typically consider all the shares equally in making the 50% calculation, although there remains some uncertainty. More complex are

issues like a limited partnership or limited liability company (or similar) with a staggered "waterfall," in which the "value" of interests can vary depending on the partnership's or company's operations.

**Q: What if a company has an SDN as its CEO, or a majority of its board of directors are SDNs? Does this mean the company is an SDN?**

A: No. The test is ownership, not control. That said, transactions between the SDN and US persons remain prohibited. For example, if a US person enters into a contract with such a company and the CEO signs the contract, this would likely be considered a prohibited transaction with an SDN (even though the actual party to the contract was the company, not the CEO).

**Q: What if a governmental agency is managed by an SDN? Is the agency an SDN?**

A: No. As in the previous example, only the SDN government official is sanctioned. Also, some (but not all) sanctions programs have a general license permitting US persons to pay required taxes and port duties, even when the recipient is an SDN.

**Q: If a country has a noncomprehensive sanctions program, does that mean that there is a greater sanctions risk in dealing with that country?**

A: It's hard to say. On one hand, SDNs can reside anywhere, whether or not in the targeted country, so in that sense, you run a risk of dealing with an SDN anywhere in the world. At the same time, the fact that a country is a sanctions target (albeit in a limited capacity) means that it is "on OFAC's radar," and at least some caution is recommended.

**Q: Can I trade my ship to a country with a noncomprehensive sanctions program?**

A: Yes, as long as you avoid dealing with sanctioned parties or in sanctioned activities (which, at least in the case of Venezuela, can be very difficult), whether or not you are a US person.

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