



# THE INVESTIGATIONS REVIEW OF THE AMERICAS 2019

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# **The Investigations Review of the Americas 2019**

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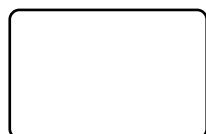
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# Preface

**Global Investigations Review** is the hub of the international investigations community, bringing practitioners together through our journalists' daily news, GIR Insight resources and GIR Live events. GIR gives our subscribers – mainly in-house counsel, private practice lawyers, government enforcement agencies and forensics advisers – the most readable explanation of all the cross-border developments that matter, allowing them to stay (even more) on top of their game. Over the past 12 months, our reporters have conducted roundtables on the cost of investigations and on the future of investigations firms, interviewed government enforcers, refreshed our surveys showcasing Women in Investigations and the top firms in investigations (the *GIR100*) and – after a successful court decision – obliged the US Department of Justice to release the names of unsuccessful candidates for FCPA monitorships.

Complementing our journalists' original work, this annual report gives readers the 'front-line' view from selected practitioners. Each is invited to reflect on the complex issues that they – and their in-house clients – face in internal and government investigations every day. Some have focused on enforcement areas, such as sanctions and cyber breach – whereas others have taken a thematic approach (eg, looking at the mechanisms which enforcers use to interact, and how those can impact a cross-border investigation). We are also indebted to our jurisdictional rapporteurs across the region for giving us their perspective on the key trends locally. Rounding out the content, the publication also includes overviews from the World Bank and the Brazilian CGU, providing insight from the 'enforcer' point of view. All authors are leaders in their field and we are grateful to them all for their time and energy: we encourage readers and co-authors to share feedback and comments.

If you'd like to get involved in future editions or have thoughts for us, please contact [edward.perugia@globalinvestigationsreview.com](mailto:edward.perugia@globalinvestigationsreview.com).

We hope you enjoy reading *The Investigations Review of the Americas 2019*.

**Global Investigations Review**

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# Economic Sanctions Enforcement and Investigations

Elizabeth Davy, Eric Kadel, Jr, Adam Szubin and Kathryn Collard  
Sullivan & Cromwell LLP

This past year saw significant changes in economic sanctions programmes, with major implications for both US and non-US firms. The Trump administration reversed US sanctions relief that had been provided under the Iran Joint Comprehensive Plan of Action and significantly augmented sanctions under the Russia and Venezuela sanctions programmes, both expanding the scope of prohibited activities and designating new individuals and entities pursuant to existing authorities. In addition, the US Congress enacted legislation crystallising and strengthening existing elements of US sanctions programmes on Iran and North Korea (and with the effect of binding the administration's discretion to ease sanctions, in the case of Russia).

While the Treasury Department's Office of Foreign Assets Control (OFAC) has been aggressively promulgating new sanctions designations and guidance, the past year has been quieter on OFAC's enforcement front. From 1 August 2017 to 1 July 2018, there have been eight OFAC enforcement actions published, and only one has carried a settlement or penalty of over US\$1 million. That said, senior Treasury Department officials have made clear that they intend to take an aggressive posture when it comes to enforcement. Beyond OFAC enforcement, prosecutors continue to bring select but high-profile sanctions criminal enforcement cases.

## New investigative and civil enforcement developments

OFAC has expanded its staff significantly over the past year to track its growth in mandate and responsibilities. US sanctions attorneys report an uptick in the issuance of OFAC administrative subpoenas, which could indicate that OFAC is ramping up its investigative efforts in search of sanctions violators.

In addition, OFAC has recently made clear that, going forward, it will require all parties seeking to settle enforcement cases to implement a remediation programme to address the vulnerabilities that gave rise to the violations. Large settlements and enforcement cases had typically included such a remediation component in the past, but the extension of this component to all cases – large and small – is new.

## New sanctions programme developments

### Iran

On 8 May 2018, President Trump announced that the United States was withdrawing from the Joint Comprehensive Plan of Action (JCPOA) and would re-impose the US nuclear-related sanctions relating to Iran that had been relieved under the JCPOA. In conjunction with this announcement, the president issued a National Security Presidential Memorandum (NSPM) directing the Secretary of State and the Secretary of the Treasury to prepare immediately for the re-imposition of all of the US sanctions lifted or waived in connection with the JCPOA, to be accomplished as expeditiously as possible and in no case later than 4 November 2018. On 27 June 2018, OFAC took actions to implement the president's decision by terminating certain licences and amending OFAC's Iranian

Transactions and Sanctions Regulations (ITSR, 31 CFR section 560). With this action, the licences that had permitted the sale of airplanes and civil aviation equipment to Iran and lifted certain of the sanctions covering foreign subsidiaries of US parents have been withdrawn, although OFAC put in place allowances for wind-down activities for a limited time.

The return of these sanctions will primarily affect non-US persons, as the JCPOA had not significantly altered the sanctions landscape for US persons. Non-US persons will face the return of 'secondary sanctions', namely, sanctions that can result from transactions with no nexus to the United States or US persons.

The Treasury's accompanying guidance provided a wind-down but no grace period – in other words, as of 8 May, any newly initiated business may be subject to the returning sanctions. Business that predates 8 May 2018 will be subject to a wind-down period of 90 days or 180 days (depending on the type of business) following which parties will be exposed to the risk of sanctions or an enforcement action under US law.

Accordingly, as of 4 November 2018, it is expected that the full panoply of US nuclear-related sanctions that had been lifted under the JCPOA – with respect to the banking, shipping, petroleum, petrochemical, automotive, and metal and mineral sectors – will be restored to full effect. In addition, since the withdrawal announcement, OFAC has designated new Iranian individuals and entities, including Iranian government officials, a private Iranian airline and Iranian telecommunication companies, as Specially Designated Nationals due to their role in facilitating human rights abuses or terrorist activities. As has been the case throughout the JCPOA period, any significant transactions with such Iranian-related designated persons can expose non-US persons to secondary sanctions.

President Trump's JCPOA withdrawal was widely opposed by the other parties to the JCPOA agreement and by other governments and companies in jurisdictions that have traditionally traded with Iran. Accordingly, US attempts to change the behaviour of companies and banks trading with Iran could run counter to those entities' domestic policies and, in some cases, laws. It remains to be seen whether the Treasury and state departments will threaten and actually levy secondary sanctions against prominent companies in a manner than was not witnessed in the 2010–2013 period.

### Russia

The Treasury Department has continued to broaden and intensify sanctions against Russia in response to Russia's continued occupation of Crimea, intervention in eastern Ukraine, interference in US and western elections, support to the Assad regime in Syria and other conduct deemed contrary to US interests. In January 2018, OFAC designated 21 individuals and nine entities as Specially Designated Nationals because of their connection to Russia's occupation of Crimea. The individuals included various self-declared officials of Donetsk and Luhansk in eastern Ukraine as well as corporations that have engaged in commerce with these entities. Of note,



Technopromexport, which transferred power turbines to Crimea, and PJSC Power Machines, which manufactured these turbines, were both designated for operating and conducting business in Crimea.

Of greater commercial impact was OFAC's action in April 2018 against seven prominent Russian oligarchs and 12 companies under those oligarchs' control, including GAZ Group (Russia's leading manufacturer of commercial vehicles) and RUSAL (a manufacturer responsible for 7 per cent of the world's aluminium production). The April action targeted a number of large and publicly listed companies, not only inflicting hundreds of millions of dollars of damage on oligarch holdings and companies, but also impacting international metals markets and the holdings of major US and European companies and investors. The impact of these sanctions continues to play out, as transactions with GAZ Group and RUSAL are subject to wind-down licences effective until 23 October 2018.

OFAC has also imposed sanctions on targets linked to Russia's cyber-interference with the 2016 US elections and various cyber-attacks on American and foreign infrastructure, military and corporate targets. Specifically, on 15 March 2018, OFAC designated 19 individuals, including senior intelligence officials in Russia's military and five entities connected to these activities, as Specially Designated Nationals.

The US Congress has also taken action against Russia. On 2 August 2017, President Trump signed into law the Countering America's Adversaries Through Sanctions Act (CAATSA). CAATSA strengthens the primary and secondary sanctions framework targeting Russia's oil and energy sectors, its financial services industry, defence industry, cyber activities and other activities. CAATSA expands primary sanctions by, among other things, prohibiting US persons from providing goods or services to energy projects located anywhere in the world in which a designated Russian energy company has a majority voting interest or at least a 33 percent ownership interest in the project. CAATSA also strengthens secondary sanctions by, among other things, requiring the president to impose sanctions on non-US individuals who knowingly facilitate significant transactions with any person subject to sanctions imposed by the United States with respect to Russia. Several of the recently designated individuals and entities mentioned above were designated under the authority of, or consistent with, CAATSA. In addition, CAATSA codifies a range of large and small sanctions decisions which had previously been under the administration's discretion to license.

CAATSA's focus on particular sectors of the Russian economy increases the risk of secondary sanctions for:

- firms that make a significant investment in Russia's advanced energy projects, such as deep water, Arctic and shale exploration;
- firms that invest in or facilitate the expansion of Russian energy export pipelines;
- persons who knowingly engage in significant transactions with the defence and intelligence sectors of the Russian government; and
- persons who deal with Russia-related SDNs and, in certain cases, their family members.

## North Korea

Recent talks between North Korean leader Kim Jong-un and President Trump represent the highest level engagement between the two countries in decades. Although Kim restated his commitment to ultimate denuclearisation of the Korean peninsula, and President Trump unofficially announced a freeze on any new sanctions against North Korea, much of the difficult diplomatic work remains ahead, and the future for the talks is uncertain.

In its first 18 months, the Trump administration tightened sanctions against North Korea and put in place secondary sanctions against third-country enablers of North Korea. On 20 September 2017, President Trump issued an executive order authorising the Treasury Department to sanction individuals connected to North Korean construction, energy, financial services, transportation, manufacturing, medical and other industries. The order further authorises the Treasury Department to designate any person who engages in any importation or exportation of a North Korean good or service. Furthermore, over the past year, OFAC has actively used its authorities to designate both North Korean individuals and entities ranging from government officials to financial institutions and non-North Korean entities engaging with North Korea. Of particular note is OFAC's designation on 23 February 2018 of 56 third-country shipping and trading companies that conducted business with North Korea.

Given the concentration of North Korean trade and financial activity in China, there has been especially sharp focus on how US secondary sanctions might be applied against Chinese banks and companies. Some China-based actors have already faced sanctions, including Shangdong, a China-based global shipping company.

## Venezuela

The US administration has taken a series of steps to further cut off the Venezuelan government from US financial markets. On 24 August 2017, President Trump issued an executive order designed to limit the ability of the Venezuelan government and the state-owned oil company the Petroleos de Venezuela, SA (PdVSA) to access debt by prohibiting US persons from providing new medium- and long-term debt to the government and PdVSA. Among other things, the executive order also prohibited US persons from engaging in dealings involving dividend payments from the Venezuelan government's state-owned entities to the Venezuelan government. When the Venezuelan government attempted to evade these sanctions by issuing a digital currency, President Trump issued an executive order prohibiting transactions related to this or any other digital currency that may be issued by the Venezuelan government.

On 21 May 2018, following national elections that drew widespread international condemnation, President Trump issued an executive order prohibiting transactions involving the sale or pledging of debt owed to the Venezuelan government (such as trade receivables) and transactions in, including pledging as collateral, equity interests in companies majority-owned by the Venezuelan government. Given the trajectory over the last year, it seems likely that sanctions will continue to expand over the near- to medium-term.

## Cuba

OFAC has formally implemented through the rule-making process several of the policy changes announced by President Trump in June of 2017, including with respect to the designation of entities under control of the Cuban military, intelligence or security services and the tightening of restrictions on travel to Cuba. Otherwise, there have been few developments in the US sanctions posture toward Cuba in the past year.

## Notable recent enforcement cases

### US v Mehmet Hakan Atilla

On 3 January 2018, a jury in the Southern District of New York convicted Turkish banker Mehmet Hakan Atilla of, among other crimes, conspiracy to violate United States sanctions against Iran.

Atilla, an executive at the Turkish bank Halkbank, was found guilty of conspiring to provide Iranian entities with access to restricted oil revenues through a pattern of deceit. At the time, moving Iranian oil revenues at Halkbank outside of Turkey for anything other than food and medicine purchases could have subjected Halkbank to US secondary sanctions, including a potential cut-off from the US financial sector. To evade these measures, Atilla and other employees at Halkbank engaged in a scheme whereby Iranian oil revenues were used to purchase gold and currency in Turkey and for supposed humanitarian trade. Atilla and his co-conspirators falsified documents and lied to US government officials. In a related scheme, prosecutors alleged that other Iranian accomplices moved approximately US\$1 billion worth of Iranian funds from the UAE through banks in New York under false documentation. Atilla was sentenced to 32 months in prison.

Atilla was found criminally liable for conspiracy to violate the International Emergency Economic Powers Act (IEEPA) and its implementing regulations under the ITSR and the Iranian Financial Sanctions Regulations (IFSR, 31 CFR section 561). Atilla's activities clearly could have exposed Halkbank to US secondary sanctions, but they do not appear to have been prohibited under US primary sanctions for jurisdictional reasons, as Halkbank and Atilla did not move funds through the US, export services from the United States or by US persons to Iran, or otherwise implicate US jurisdiction. OFAC has never stated that engaging in sanctionable conduct under secondary sanctions is prohibited under IEEPA and has never assessed a civil penalty against any non-US person for conduct that was sanctionable under secondary sanctions, but did not violate primary sanctions. Over the defendant's objections along these lines, the court held that Atilla could be held criminally liable for conspiracy to violate IEEPA and its implementing regulations because there was a sufficient nexus between Atilla's conduct and the United States, noting his false representations to US government officials and the related sanctions evasion scheme run out of the UAE, which did involve dollarising transactions in violation of US primary sanctions. Atilla appealed his conviction on 25 May 2018.

In sustaining a conviction of Atilla for financial activities that did not directly touch the US jurisdiction, the court's decision has muddled a line that previously had divided primary and secondary sanctions. Practitioners should take care to advise clients that sanctionable transactions under the Iran secondary sanctions returning to force in second half of this year – such as significant purchases of crude oil from Iran or transactions with Iran's Central Bank – may attract not only secondary sanctions from OFAC but potentially US criminal prosecution as well, depending on the facts and potential relation to other evasion schemes.



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Beth Davy is a partner in the financial services and financial services litigation and investigations groups and is co-head of the AML and sanctions enforcement and compliance group. Her practice focuses on bank regulation and supervision, regulatory enforcement matters and internal investigations. Ms Davy is widely recognised as a leading expert in the areas of anti-money laundering and Office of Foreign Assets Control sanctions compliance and enforcement. She has represented numerous financial institutions in high-profile global investigations involving multiple US government agencies, as well as public and non-public regulatory enforcement matters. Ms Davy has worked with trade associations and industry representatives on establishment of industry standards and guidelines in the anti-money laundering and sanctions compliance area and in the evolution of heightened transparency in the international payments system. Ms Davy served as a senior officer of the Federal Reserve Bank of New York's legal department and bank supervision group involved in regulatory and enforcement matters. While at the Federal Reserve, Ms Davy served as secretary to the financial markets lawyers group.



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Eric Kadel is a partner in the financial services group and is co-head of the AML and sanctions enforcement and compliance group. He counsels and represents clients on questions about US economic sanctions, including those administered by the Treasury Department's Office of Foreign Assets Control, the United States anti-boycott requirements under the Export Administration Regulations administered and enforced by the Commerce Department's Office of Anti-boycott Compliance within the Bureau of Industry and Security, Bank Secrecy Act and anti-money laundering laws, and the US Foreign Corrupt Practices Act. Mr Kadel's practice includes analysis of proposed transactions and business relationships; due diligence and design and review of compliance procedures and strategies; and internal investigations, voluntary disclosures and government enforcement actions. Mr Kadel also regularly advises clients regarding questions arising under Exon-Florio and the transaction review process administered by the Committee on Foreign Investment in the United States (CFIUS), and has represented clients before CFIUS on many national security reviews.



**Adam Szubin**  
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Adam Szubin, of counsel at Sullivan & Cromwell, focuses his practice on financial services and national security, with particular emphasis on economic sanctions, export controls, money laundering and counter terrorism.

Prior to joining Sullivan & Cromwell, Mr Szubin was Acting Treasury Department under secretary for terrorism and financial intelligence. In this capacity, he led the Department's efforts to impose sanctions, combat money laundering, and track financial intelligence. During his nearly 13-year tenure at the Treasury, Mr Szubin also served as the director of the treasury's Office of Foreign Assets Control. Earlier in his career, Mr Szubin served as counsel to the deputy attorney general at the Department of Justice and worked as a trial attorney in the Civil Division, serving as a member of the Terrorism Litigation Task Force.



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Sullivan & Cromwell's anti-money laundering (AML) and sanctions group includes leading practitioners with demonstrated expertise and extensive experience in navigating AML and Office of Foreign Assets Control (OFAC) sanctions programme challenges. Included in the group are former government officials from the Office of Foreign Assets Control of the US Department of the Treasury, the US Attorney's Office, the New York State Banking Department (now the New York Department of Financial Services), and the Board of Governors of the Federal Reserve System, as well as former officials from the Federal Reserve Bank of New York and the New York Stock Exchange (now the Financial Industry Regulatory Authority) Enforcement Division. Together, the group's unique interdisciplinary team – with lawyers whose practice area specialties range from supervision and regulation to investigations and litigation to mergers and acquisitions to congressional investigations – is prepared to assist financial institutions with any AML or OFAC sanctions enforcement or compliance challenges they may face.

Sullivan & Cromwell's AML and sanctions group practitioners have provided counsel in nearly every high-profile AML and OFAC sanctions-related regulatory enforcement action and law enforcement proceeding involving a financial institution in the last decade, making it a pre-eminent presence and force in the areas of AML and OFAC sanctions enforcement and compliance.

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