

CLIENT ALERT:

OFAC ANNOUNCES INTENTION TO REMOVE RUSAL FROM SDN LIST

January 4, 2019

Introduction

United Company Rusal PLC (“Rusal”), EN+ Group PLC (“EN+”) and JSC EuroSibEnergO (“ESE”) were all named to the U.S. Specially Designated Nationals List (“SDN List”) on April 6, 2018 by the U.S. Office of Foreign Asset Control (“OFAC”). These designations mean that U.S. persons generally cannot engage in any transactions with these entities and that foreign persons cannot engage in “significant transactions.” However, simultaneous with the April 6 designations, OFAC issued a General License, giving U.S. persons until June 5 to wind-down ongoing transactions with the entities, or with any entity in which they have a 50% or greater interest. Thereafter, OFAC has repeatedly extended the deadline for winding-down transactions with these entities, most recently until January 21, 2019.

OFAC announces intention to remove Rusal, EN+ and ESE from SDN List

On December 19, 2018 OFAC sent a lengthy letter to the U.S. Congress, advising that within 30 days it intended to remove from the SDN List Rusal, EN+ and ESE. OFAC explained that the three entities have “agreed to undertake significant restructuring and corporate governance changes to address the circumstances that led to their designation” to the SDN List. Significant changes include reducing Oleg Deripaska’s direct and indirect shareholding stake in the entities to below 50% and altering the composition of the companies’ boards of directors. Mr. Deripaska himself will remain on the SDN List and, according to the OFAC letter, “foreign persons will continue to be subject to secondary sanctions should they knowingly facilitate a significant transaction for or on behalf of Deripaska or entities in which he owns a 50% or greater interest.”

Implementation of OFAC’s Intention

If OFAC implements its intention to remove Rusal, EN+ and ESE from the SDN list within 30 days of its December 19 letter to Congress, then those entities will be off the List prior to the expiration of the current wind-down period on January 21. As of today, all three companies remain on the SDN List.

While it is assumed that OFAC will implement its intention to remove Rusal, EN+ and ESE from the SDN List within 30 days, that is not guaranteed. The OFAC letter to Congress states that “The agreement between OFAC and the Petitioners [the three companies which petitioned for removal from the SDN List] is subject to approval by a number of stakeholders.” Presumably, unless that approval is obtained, there could be a delay in the removals from the SDN List. While there was some additional initial negative political reaction to OFAC’s announcement, on the basis that it sent the wrong message to Russia with regard to its malign activities, it seems unlikely that there will be sufficient opposition in Congress to prevent OFAC’s intended action. There is, however, another potential for delay, which is the current U.S. government partial shutdown, now in its 13th day.

As of today, the OFAC call line is not operating due to the shutdown and licensing officers in OFAC’s Licensing Division have been furloughed and are not at work. At this point it is not clear whether the persons at OFAC necessary to implement the removal of Rusal, EN+ and ESE from the SDN List are working, or have been furloughed as a result of the government shutdown. The government shutdown has occurred because Congress, or at least the opposition Democratic Party in Congress, has refused to approve a budget appropriation bill necessary to continue funding government operations, which appropriation President Trump has insisted include \$5B for the commencement of the construction of a wall along the U.S. southern border. As of today, the Democratic Party assumes the majority in the House of Representatives, one of the two houses of Congress, and that sets the stage for renewed negotiations with President Trump over the appropriations bill and border security. However, at this point, no immediate solution is in sight.

Impact on non-U.S. Persons

The general licenses issued by OFAC extending the time within which to wind down transactions with Rusal, EN+ and ESE only apply directly to U.S. persons. However, the extension of the wind-down period contained in those licenses does impact non-U.S. persons. As explained in our previous Client Alerts, under Section 10 of SSIDES a non-U.S. person is subject to sanctions for engaging in a “significant transaction” with Rusal, EN+ and ESE. However, OFAC FAQs 542, 545 and 742 state that a transaction will not be considered “significant” if a U.S. person would not need a specific license from OFAC to engage in that activity. Therefore, in effect, non-U.S. persons also receive the benefit of the extension of the deadline to conclude transactions with these sanctioned entities. Similarly, when Rusal, EN+ and ESE are removed from the SDN List, non-U.S. persons will be free to engage in transactions with those entities without being subject to U.S. secondary sanctions

Summary

General Licenses issued by OFAC now give U.S. persons until January 21, 2019 to wind down their transactions with Rusal, EN+, and ESE, or with any entity in which those companies own a 50% or greater interest. Non-US persons who continue to wind-down transactions with Rusal, EN+, and ESE until January 21, 2019 will not be subject to sanctions because a U.S. person would not need a specific license to engage in such wind-down activities.

OFAC has announced its intention to remove Rusal, EN+ and ESE from the U.S. SDN list by January 18, 2019. Once removal has been accomplished, both U.S. persons and non-U.S. persons will be free to engage in transactions with those entities. We will continue to monitor the status of these entities and will send a further Alert when they have been removed from the SDN List.

Disclaimer: This Client Alert provides only a general summary of OFAC's stated intention to remove certain entities from the U.S. SDN List and is not intended to constitute comprehensive legal advice. Specific legal advice should be taken with respect to each individual inquiry regarding the designations. For additional clarification, please feel free to contact Bill Juska (juska@freehill.com), Gina Venezia (venezia@freehill.com) or Bill Pallas (pallas@freehill.com).

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