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CLIENT ALERT

The Month in International Trade – December 2018

Jan.10.2019

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This news bulletin is provided by the International Trade Group of Crowell & Moring. If you have questions or need assistance on trade law matters, please contact Jeff Snyder or any member of the International Trade Group.

Top Trade Developments

Latest U.S. Trade Actions/Tariffs and Other Countries Retaliatory Measures

Finding it hard to stay on top of the latest in tariff increases?

Please click here anytime for the latest actions, covered products rate increases, and effective dates.

For more information, contact: Dan Cannistra, Robert Holleyman, Bob LaFrankie, Spencer Toubia, Ru Xiao-Graham, Cherie Walterman

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First Section 301 List 1 Product Exclusions Published in Federal Register

On December 28, 2018, USTR published in the Federal Register the first Section 301 List 1 Product Exclusions. The exclusions apply as of the July 6, 2018 effective date of "List 1," and will extend for one year after the publication of this notice.

The Products were originally published on the USTR's "List 1" which included $34 Billion worth of imports from China. The USTR granted 984 individual exclusion requests involving 21 separate HTS codes. An index of all "List 1" exclusion requests and their status in the review process was also released by the USTR.

Exclusions were granted in two ways.

1) Exclusions that apply to the following 8 individual 10 digit HTS codes regardless of product descriptions noted in exclusion requests:

(i) 8412.21.0075
(ii) 8418.69.0120
(iii) 8480.71.8045
(iv) 8482.10.5044
(v) 8482.10.5048
(vi) 8482.10.5052
(vii) 8525.60.1010

2) Products that meet 24 separate product descriptions sourced from language in exclusion requests.

CBP Posts Notice on Section 301 Product Exclusions

On December 31, 2018, U.S. Customs and Border Protection posted a notice on the Section 301 Product Exclusions.

The notice provided the following guidance regarding exclusions granted by USTR:

- On December 28, 2018, the U.S. Trade Representative published Federal Register Notice 83 FR 67463 announcing the decision to grant certain exclusion requests from the 25 percent duty assessed on goods of China with an annual trade value of approximately $34 billion (Tranche 1), as part of the action in the Section 301 investigation of China's acts, policies, and practices related to technology transfer, intellectual property, and innovation. The product exclusions announced in this notice will apply as of the July 6, 2018 effective date of the $34 billion action (see Federal Register 83 FR 28710), and will extend for one year after the publication of this notice.
- At the conclusion of the government funding hiatus, CBP will issue instructions on entry guidance and implementation. Any updates to the Automated Customs Environment (ACE) will be implemented 10 business days after the shutdown has concluded. Until these updates are completed, entry and entry summaries must be submitted without the Chapter 99 product exclusion number referenced in 83 FR 67463. Entry and entry summaries will be rejected by ACE if the Chapter 99 product exclusion number referenced in 83 FR 67463 is transmitted.
- Once CBP issues guidance and implements ACE enhancements, a Post Summary Correction (PSC) or a Protest may be submitted for a refund.

All questions related to Section 301 entry filing requirements should be emailed to traderemedy@cbp.dhs.gov. After the funding hiatus, questions from the importing community concerning ACE rejections should be referred to their ABI Client Representative.

For more information, contact: John Brew, Alexander Schaefer, Spencer Toubia

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USTR Announces Special Review under Section 301 – Hearing Set for February 27

The USTR published a Federal Register Notice announcing its yearly "special review" to identify countries that deny adequate and effective protection of intellectual property rights (IPR) or deny fair and equitable market access to U.S. persons who rely on intellectual property protection under Section 301 of the Trade Act of 1974 (Section 301). Based on this review, the USTR will determine whether to identify "Priority Foreign Countries" defined under Section 182 of the Trade Act of 1974.

Priority Foreign Countries are countries for which the USTR can implement an investigation pursuant to Section 301 to determine whether certain trade measures are appropriate to address a country's restrictions on trade and intellectual property rights. The most recent investigation under Section 301 occurred in 2017 and 2018 and resulted in the USTR implementing tariffs on approximately $250 billion of imports from China.

The USTR requested that interested parties provide written comments to identify "countries whose acts, policies, or practices deny adequate and effective protection for intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection." The Special 301 provisions also require the Trade Representative to identify any act, policy, or practice of Canada that affects cultural industries, was adopted or expanded after December 17, 1992, and is actionable under Article 2106 of the North American Free Trade Agreement (NAFTA).

The USTR requested that interested parties file written comments that identify acts, policies, or practices that may form the basis of a country's identification as a Priority Foreign Country or placement on the Priority Watch List or Watch List by February 7, 2019. USTR also requests that parties file notices of intent to appear at the public hearing by February 21, 2019. The public hearing will be held on February 27, 2019. Parties who testified at the hearing must submit posthearing written comments by March 5, 2019. The USTR indicated that it will publish the 2019 Special 301 Report on or around April 26, 2016.

For more information, contact: Alexander Schaefer, Spencer Toubia, Melissa Morris

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New Law Puts Nicaragua in the Cross Hairs of Potential U.S. Financial Restrictions and Possible Additional Sanctions

On December 20, 2018, President Trump signed the Nicaraguan Investment Conditionality Act (NICA Act) into law. The NICA Act sanctions are supplementary to, and would be implemented in parallel with, the recent Nicaragua sanctions program announced by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), pursuant to Executive Order (E.O.) 13851. A full summary of E.O. 13851 is provided below.

The NICA Act provides a series of new authorities. First, it requires U.S. members of the various international financial institutions (IFIs), such as the World Bank and Inter-American Bank to use their "voice, vote and influence" to oppose the extension of loans and financial or technical assistance for projects related to Nicaragua, except those intended to address basic human needs or to promote democracy in Nicaragua.

Second, it provides OFAC with new designation authorities, which generally require the designation as a specially designated national (SDN) of any person determined by the Secretary of the Treasury to be involved in (a) significant acts of violence or serious human rights abuses, (b) significant actions or policies undermining democratic processes or institutions, (c) acts of significant corruption, or (d) the arrest of prosecution of any person for exercise of freedom of speech, assembly, or press. The authorities in (a) through (c) closely parallel those provided in E.O. 13851.

The NICA Act does provide the President with two waiver authorities, which the President can exercise if he either (a) certifies that the Government of Nicaragua is taking effective steps on a range of pro-democratic and civil rights measures or (b) certifies that the waiver is in the national interest of the United States.

These new sanctions are already affecting Nicaragua, even if indirectly. According to published reports in Nicaragua, major U.S. banks including but not limited to Wells Fargo and Bank of America that have operated as correspondent banks for Nicaraguan financial institutions have notified their Nicaraguan correspondent banks that that they will be closing their accounts and ceasing their operations in and with Nicaragua. These banks are reportedly taking these steps as a result of the higher risks recently associated with the country.

These new sanctions imposed by the United States (described below) may lead other businesses to also cease or diminish their commercial relations with Nicaragua. At a minimum, Nicaragua is "high risk" for business transactions.

Executive Order 13851 Announced on November 27, 2018

On November 27, President Trump issued Executive Order (E.O) 13851, "Blocking Property of Certain Persons Contributing to the Situation in Nicaragua". The E.O. establishes criteria for blocking property and interests of property that are or hereafter come within the possession or control of any U.S. person (including U.S. persons such as foreign branches located outside the United States) of persons determined by OFAC to be responsible for or complicit in—*inter alia*—serious human rights abuse or corruption in Nicaragua, as well as actions or policies that undermine democratic processes or institutions or that threaten the peace, security, or stability of Nicaragua.

Consistent with other Orders promulgated pursuant to the International Emergency Economic Powers Act (IEEPA), the new E.O. specifically prohibits:

- Receiving and contributing funds, goods, or services by or to benefit any person designated by the E.O.
- Any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set in this E.O.Pursuant to this E.O., OFAC added two individuals associated with the Government of Nicaragua to its Specially Designated Nationals (SDN) List:
    - Rosario Murillo de Ortega (also known as "La Chayo") – Vice-President and First Lady of Nicaragua.
    - Nestor Moncada Lau (also known as "Chema") – National Security Advisor and private Secretary of President Daniel Ortega

Global Magnitsky Sanctions Issued on July 5th, 2018

These recently issued sanctions build upon the previously announced Global Magnitsky Sanctions designations of the following three individuals who were identified for their close relationships to the Nicaraguan regime for human rights abuses and acts of corruption:

- Francisco Javier Diaz Madriz – Current Acting Director General of the National Police (was a commissioner at the time these sanctions were issued).
- Fidel Antonio Moreno Briones – Leader of the government-controlled Sandinista Youth.
- Jose Francisco Lopez Centeno – Vice-President of ALBANISA (51 percent owned by Venezuela's state-owned PDVSA), and President of Petronic (Nicaragua's state-owned oil company).

The E.O. also authorizes future designations of any person that has been an official of the government of Nicaragua since January 10, 2007 and is determined to have engaged or attempted to engage in:

- Serious human rights abuse in Nicaragua.
- Actions or policies that undermine democratic processes or institutions in Nicaragua.
- Actions or policies that threaten the peace, security, or stability of Nicaragua.
- Any transaction or series of transactions involving deceptive practices or corruption by, on behalf of, or otherwise related to the Government of Nicaragua, such as the misappropriation of public assets or expropriation of private assets for personal gain or political purposes, corruption related to government contracts, or bribery.

The E.O. defines the term "Government of Nicaragua" as any political subdivision, agency, or instrumentality thereof, including the Central Bank of Nicaragua, and any person owned or controlled by, or acting for or on behalf of, the Government of Nicaragua. This definition bears a resemblance to recent sanctions targeting Venezuela – but without the general licenses.

Companies doing business in Nicaragua must exercise caution when engaging in any transactions with any entity that may be owned (50 percent or more) by any of the newly sanctioned Nicaraguan officials, as the link to these individuals may not be obvious. Consistent with past approaches, it appears that an individual high risk for corruption risk is also high risk for sanctions exposure. Compliance programs for businesses continuing ties to Nicaragua should continue to include robust beneficial ownership due diligence, supply chain transparency, record keeping, and, potentially, audits of counter parties to ensure the same high standards apply throughout the transaction chain.

Crowell & Moring will continue to monitor the situation in Nicaragua, including any potential effects of any upcoming sanction(s) or legislation.

For more information, contact: Cari Stinebower, David Baron, Eduardo Mathison, Alexandra Solorzano

FinCEN and Federal Banking Agencies Encourage Innovative Approaches to BSA/AML Compliance

On December 3, 2018, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Financial Crimes Enforcement Network (FinCEN), the National Credit Union Administration, and the Office of the Comptroller of the Currency (together "the agencies"), issued a joint statement encouraging banks to test and implement innovative approaches to meeting their Bank Secrecy Act/Anti-Money Laundering (BSA/AML) obligations. The agencies hope to harness private sector innovation to better protect the financial system from financial crime and to allow financial institutions to make better use of limited compliance resources. In particular, the agencies point to customer identification, transaction monitoring, and suspicious activity reporting as obligations that can benefit from innovation. They also identify internal financial intelligence units, artificial intelligence, and digital identity technologies as innovations that can help advance AML programs.

To foster innovation without fear of criticism, the agencies have laid out policies for how they will interact with banks piloting new technologies.

- First, while the agencies may provide feedback, banks that pilot innovative technologies should not be subject to supervisory criticism for any failures in such pilot programs.
- Second, "pilot programs that expose gaps in current BSA/AML compliance programs will not necessarily lead to supervisory action." For example, "when banks test or implement artificial intelligence-based transaction monitoring systems and identify suspicious activity that would not otherwise have been identified under existing processes, the agencies will not automatically assume that banks' existing processes are deficient."
- Third, the implementation of innovative approaches in banks' BSA/AML programs "will not result in additional regulatory expectations."
- Fourth, FinCEN will consider requests for exceptive relief under 31 C.F.R. § 1010.970 to promote the testing of new technologies, provided that banks maintain the overall effectiveness of their AML programs.

The agencies' joint statement did make clear, though, that while innovation is critical to continued protection against money laundering and other financial crime actors, it is not an excuse to fail to comply with current BSA/AML requirements. Banks "must continue to meet their BSA/AML compliance obligations, as well as ensure the safety and soundness of the bank, when developing pilot programs and other innovative approaches." In making such determinations, "bank management should prudently evaluate whether, and at what point, innovative approaches may be considered sufficiently developed to replace or augment existing BSA/AML processes." Such a decision should also address other factors like third-party risk management, compliance with other applicable laws and regulations, and issues of customer privacy. Banks also are encouraged to engage early with regulators regarding such programs to promote the agencies' understandings of these programs and as "a means to discuss expectations regarding compliance and risk management." Each of the agencies has committed to establishing projects or offices to support engagement on the implementation of such innovations.

The joint statement comes against a backdrop of continued increases for many banks in the costs of operating compliant AML programs, and continued enforcement – such as the recent $598 million settlement with federal regulators of alleged AML violations by US Bank -- emphasizing the need for greater resourcing of AML programs. This has led many banks to consider innovations that might make compliance more efficient and reduce costs, but also has led Congress to consider other measures, such as changing BSA reporting thresholds. The new statement appears to be an effort by the agencies to resolve this resource

tension by favoring innovation. It complements another recent guidance document from the same agencies encouraging smaller banks to share compliance resources where possible.

Practical Considerations

A number of new products and services offer real opportunities for banks to improve their transaction monitoring and other AML processes, resulting in stronger programs and reduced cost. However, banks should ensure that pilot projects and other innovations do not compromise their ability to effectively operate their current BSA/AML compliance programs. One way this can happen is migrating from previous methods to new technologies before the latter have been properly tested. For example, money transmitter MoneyGram International recently was required to pay an additional $125 million penalty, and had its deferred prosecution agreement extended, for AML program failures that occurred after it transitioned to a new fraud interdiction system that turned out to be ineffective. Another way this can happen is if the resources needed to administer a pilot project take away from resources needed to operate existing aspects of an AML program. The agencies have made clear that while they will not necessarily subject any failed pilot programs to supervisory criticism, they will continue to scrutinize banks' current processes for any deficiencies, and expect them to remain compliant while testing new methods.

For more information, contact: Carlton Greene, Allegra Flamm

FinCEN Issues Revised GTOs including Lower Purchase Thresholds and Virtual Currencies

On November 15, 2018, FinCEN issued revised Geographic Targeting Orders (GTOs), once more expanding its scrutiny of "all-cash" purchases (*i.e.*, those without bank loans or other external financing) in the luxury residential real estate market. FinCEN broadened the geographic scope of the orders, lowered the purchase amount threshold for each covered area, and added purchases that involve virtual currencies to the mandatory reporting list. Along with the GTOs, FinCEN also released frequently asked questions to clarify, among other things, the methods of payment covered and requirements for verification of beneficial ownership information.

The New GTOs

The new GTOs apply to title insurance companies, and any of their subsidiaries and agents, engaging in a "Covered Transaction." A Covered Transaction is one in which a legal entity purchases residential real property:

- In the amount of $300,000 or more.
- Without a bank loan or other similar form of external financing.
- Using in part currency or a cashier's check, a certified check, a traveler's check, a personal check, a business check, a money order in any form, a funds transfer, or virtual currency.
- In the following covered areas:
    - The Texas counties of Bexar, Tarrant, or Dallas.
    - The Florida counties of Miami-Dade, Broward, or Palm Beach.
    - The Boroughs of Brooklyn, Queens, Bronx, Staten Island, or Manhattan in New York City.
    - The California counties of San Diego, Los Angeles, San Francisco, San Mateo or Santa Clara.

- The city and county of Honolulu in Hawaii.
- The Nevada county of Clark.
- The Washington county of King.
- The Massachusetts counties of Suffolk or Middlesex.
- The Illinois county of Cook.

The new, uniform $300,000 reporting threshold is significantly lower than the thresholds in previous GTOs and also eliminates a previous practice of varying the thresholds by covered location.

Insurance companies that engage in the above listed activities must report the Covered Transaction to FinCEN by filing a FinCEN Currency Transaction Report. The report must be filed within 30 days of the closing of the Covered Transaction through the Bank Secrecy Act (BSA) E-Filing system. The insurance company must provide certain information in its report, such as information about the identity of the individual responsible for representing the Legal Entity and information about the identity of the Beneficial Owner(s) of the Legal Entity. A Beneficial Owner is defined for the purpose of these reports as an individual "who, directly or indirectly, owns 25 percent or more of the equity interests of the Legal Entity purchasing real property in the Covered Transaction." Once the Beneficial Owner has been identified, the insurance company must obtain and record a copy of the Beneficial Owner's driver's license, passport, or other similar identifying documentation. The GTOs also require the insurance company to retain all records relating to compliance with the order for five years from the last day that the order is effective. These records must be stored in a reasonably accessible manner and must be made available to FinCEN upon request. This order is effective beginning November 17, 2018 and continues until May 15, 2019.

Along with the new orders, FinCEN also issued new frequently asked questions (FAQs). These clarify for the first time that, in identifying beneficial owners, a title insurance company may reasonably rely on information provided by third parties involved in the transaction.

The Likelihood of Rulemaking

In the past, FinCEN has hinted that the information collected through the GTOs could lead to the creation of regulations in this sector. Most recently, in the press release accompanying the newest GTOs, FinCEN remarked that these GTOs will further assist in tracking illicit funds and inform its future regulatory efforts in this area. This time it seems that FinCEN could actually be moving forward with regulations. Earlier in November, FinCEN announced through the Office of Management and Budget that it will issue an Advance Notice of Proposed Rule Making (ANPRM) "soliciting information regarding various businesses and professions, including real estate brokers that could be covered by the BSA as persons involved in real estate closings and settlements." FinCEN previously considered regulation of "persons involved in real estate closings and settlements" in a 2003 ANPRM, but never issued a final rule. FinCEN's repeated extension and expansion of its GTOs suggests it may be collecting the data to support another try at regulations for such persons.

Practical Considerations

FinCEN's clarification that title insurers may reasonably rely on the representations of third parties about who their beneficial owners are is a helpful limitation on the risk title insurers face in complying with their obligations. They still must ensure though, in order for reliance to be reasonable, that they are not aware of information that contradicts the assertions of who has the requisite beneficial ownership.

One practical consideration for banks that we have identified before is that FinCEN, in an August 22, 2017 advisory, has encouraged real estate brokers, escrow agents, title insurers, and other real estate professionals—to voluntarily file SARs to report any suspicious transactions relating to real estate. Banks and other BSA-regulated financial institutions should be aware of this when considering whether to file SARs for any part of such transactions that touches them, to avoid situations where such parties file SARs but the regulated financial institution fails to do so.

For more information, contact: Carlton Greene, Allegra Flamm

CROWELL & MORING SPEAKS

John Brew will be a speaker at The International Surface Event in Las Vegas, NV on January 22-25, 2019. He will be discussing "The Impact of International Trade on the Surface Industry". John will examine the current state of affairs on how government actions are impacting the global supply chains of the surface industry, including a review of the US dispute with China under Section 301, unfair trade proceedings, the USCMA, and other free trade agreements.

Chris Monahan will be speaking at the International Compliance Professionals Association's 2019 Annual Conference on March 25, 2019 in Orlando, FL. His topic is "Anatomy of an Internal Investigation."

David Stepp and Frances Hadfield will be speaking at the Federal Bar Association's 2019 Fashion Law Conference on February 8, 2019 in New York City. Both David and Frances will be discussing "Trade Wars with China: Analysis of Outcome."

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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