CLIENT ALERT

The Month in International Trade – February 2020

March 12, 2020

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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.

Caroline Brown Joins Crowell & Moring

Former U.S. Treasury and Justice Department Lawyers Strengthens Anti-Money Laundering, Economic Sanctions, and CFIUS Practices

Crowell & Moring is bolstering its anti-money laundering, economic sanctions, and CFIUS practices with the addition of Caroline Brown, former attorney in the U.S. Department of the Treasury and the U.S. Department of Justice's National Security Division. Brown joins the firm as a partner in the International Trade and White Collar & Enforcement groups and will be based in Washington, D.C.

Brown will work with financial institutions, multinational corporations, and companies launching emerging technologies to advise clients on anti-money laundering (AML) and economic sanctions compliance and enforcement challenges. She will also help clients navigate review by the Committee on Foreign Investment in the United States (CFIUS).

"We have seen exceptionally strong growth in our AML and economic sanctions practices, and Caroline's addition is a continuation of our strategy to expand and deepen our experience in these critically important areas," said Philip T. Inglima, Crowell & Moring chair. "Caroline provides valuable insight from her experience at the Treasury and Justice Departments and can offer strategic counsel to companies investing across borders to compete in global markets governed by complex and conflicting laws and regulations."

Brown will draw on over a decade of experience in the U.S. Departments of the Treasury and Justice, in addition to her previous experience in private practice. As an attorney advisor at the Treasury Department's Financial Crimes Enforcement Network (FinCEN), Brown developed an in-depth understanding of AML regulation and enforcement and FinCEN's role in guarding the U.S. financial system against money laundering and terrorist financing. Before joining FinCEN, she served as an attorney in the Treasury Department's Office of General Counsel, Enforcement and Intelligence, which provides counsel to the Undersecretary for Terrorism and Financial Intelligence. There, Brown advised on sanctions, AML, and various other national security issues relevant to the nation's financial system. Before joining Treasury, Brown served in the National Security Division at the Justice Department, where she worked on counterterrorism, counterespionage, and cybersecurity matters, and advised senior DOJ leadership on matters under review by CFIUS and the group of U.S. government agencies known as "Team Telecom."

"Caroline's knowledge of how CFIUS reviews petitions will be especially important as the committee continues to expand its reach and examine international companies wanting to do business in the United States," said Nicole Simonian, co-chair of the firm's International Trade Group.

Brown earned her undergraduate degrees from Duke University and her law degree from the University of Michigan. She began her legal career as a law clerk for the Honorable Jon McCalla of the U.S. District Court for the Western District of Tennessee before joining the litigation group of a global law firm in Washington, D.C. She is a former term member on the Council on Foreign Relations, an Aspen Institute Socrates Scholar, a National Security Fellow at the Foundation for the Defense of Democracies, and a member of the transatlantic organization Atlantik Brücke.

"I am honored to join a firm committed to staying ahead of the rapidly evolving regulatory and enforcement regimes that directly affect companies' opportunities for growth and innovation," Brown said. "I look forward to helping clients navigate these frameworks in order to make sound business decisions and move forward."

For more information, contact: Caroline Brown

Top Trade Developments

Coronavirus Resource Center

Crowell & Moring has a multidisciplinary working group to help clients navigate the rapidly evolving business, legal and operational challenges associated with the COVID-19 outbreak. Our working group brings together lawyers with relevant senior government, industry, and private sector experience across a wide array of disciplines that intersect with this situation. Drawing on relevant experience navigating similar crises, the group is able to provide practical and proactive guidance to business leaders, boards, and legal departments. This guidance includes helping clients to understand the questions they need to ask and

the business impacts they may not yet appreciate. Our focus is helping clients to anticipate issues, to take proactive steps, to develop appropriate responses, and to execute sound legal, business and operational plans.

Areas covered by our COVID-19 group include labor and employment, worker safety, supply chain disruption, global mobility, privacy, education, insurance, government contracts, international commercial contracts, health care, crisis management and continuity, disputes and investigations, and a myriad of other areas affected by this evolving situation. The firm's deep relationships with the key regulatory agencies involved in the COVID-19 response enable us to provide real-time guidance and insight to clients. Experience of our working group members includes extensive involvement with the government's response to Ebola and Zika illnesses while serving in the Department of Homeland Security, advising clients across many industry sectors on SARS, and navigating insurance coverage issues arising after 9/11. Our COVID-19 working group takes a holistic approach, monitoring important governmental and policy developments and considering their implications as we help clients navigate the legal, commercial and operational impact of this outbreak on their business.

Areas in which we anticipate clients are facing immediate concerns include:

- Government contract performance issues in the US and abroad.
- Force majeure provisions in commercial contracts.
- Supply chain disruption and other business continuity issues.
- Insurance questions and coverage exclusions and limitations.
- Compliance with workplace safety issues.
- Privacy and data protection policies and regulations.
- Labor and employment issues, including employment mobility.
- Disruption of corporate internal and external investigations.
- Oversight of public health policy and health care system preparedness plans.

For access to the resource center, please click here.

Coronavirus Outbreak: Time to Review Force Majeure Provisions in International Commercial Contracts

The recent coronavirus outbreak in Wuhan, China (COVID-19 as described by the World Health Organization) is increasingly putting a strain on businesses. A number of manufacturing facilities and distributors in China have been shut down, and many companies based in the U.S. have also suspended or limited their operations in China.

Companies that may be affected by the outbreak should take proactive steps to mitigate their risks and prepare to address any interruption to their operations. One important step is to review their contracts to determine whether "force majeure" provisions may apply.

If contracts are governed by U.S. law:

What may be considered a "force majeure" under U.S. law will initially depend on the language provided in a specific clause, which usually covers several categories of events including natural disasters, human threats, acts of God, or acts of government. U.S. courts tend to construe force majeure clauses narrowly and will typically include events expressly listed.

Meanwhile, reliance on official announcements from government agencies or non-governmental organizations can be a basis to argue that a force majeure has occurred. Examples of this during the coronavirus outbreak are WHO's announcement, as well as the routing and screening requirements from the Department of Homeland Security.

The coronavirus outbreak presents an unusual situation in that it includes both a naturally occurring component (the virus) and a government action component (including the quarantines and other response measures put in place). **Therefore, companies should carefully review the force majeure provisions in their contracts to determine whether they apply.**

There are several best practices that companies should follow when they seek to invoke the force majeure provisions of a contract:

- Carefully review the applicable force majeure provisions in their contracts to determine what the provision allows and whether the current situation is covered.
- Obtain information regarding the timing, the number of impacted parts/facilities, and when the force majeure event is expected to conclude.
- Confirm that the notice requirements under the contract have been met. (Time limitations on reporting might also be required).

The parties should work together to evaluate the inventory on hand and whether there is a reserve of parts that can be accessed, determine if there are other manufacturing lines available at different locations, and assess the affected supplier's allocation plan. (Note: A "fair and reasonable" allocation across customers is required under UCC § 2-615(b)).

The party seeking to invoke the force majeure provision must be prepared to prove that there are no alternative means for performing under the contract.

Be aware of the other party's rights if force majeure is invoked, which may include the right to terminate and source from an alternate supplier or to terminate after a certain period of time.

If contracts are governed by PRC law:

On February 10, 2020, the Legislative Affairs Committee of the Standing Committee of National People's Congress has confirmed that the administrative action taken by the People's Republic of China (PRC) government in relation to the coronavirus outbreak should be regarded as a force majeure. According to the spokesman, the administrative actions for prevention and control (including traffic control, shutdown/postponement of production, and lockdown of cities), which make a contracting party unable to perform the contract, are unforeseeable, unavoidable, and insurmountable.

Companies should carefully review their contracts and seek guidance to determine if contract performance has become impracticable or impossible due to force majeure, such that the contractual liability obligations of the party invoking force majeure provisions could be fully or partially suspended, There may be circumstances where the parties may be required to modify the contract or postpone performance.

For companies seeking to invoke the force majeure provision, they must generally be prepared to notify the other party promptly and provide evidence of the force majeure within a reasonable period of time.

On February 5, 2020, the PRC Ministry of Commerce issued a notice encouraging the Chamber of Commerce for Import and Export to provide factual proof for foreign trade enterprises free of charge in the areas of textiles, light crafts, metal, minerals, chemicals, food and native products, medicine and healthcare products, and electrical machinery.

For international trade related contracts, a party can submit an application online to the China Council for the Promotion of International Trade (CCPIT) through http://www.rzccpit.com. CCPIT will issue a certificate stating the time, location and extension of the administrative action and overall epidemic situation of coronavirus. As an independent third party, the certificate provided by CCPIT has been recognized by government, customs, chamber of commerce, and corporations in over 200 countries and regions around the world.

As of February 13, 2020, several companies have successfully obtained a certificate from CCPIT as proof of force majeure.

For more information, contact: Evan Chuck, Yao Mou

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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Crowell & Moring Releases Regulatory Forecast 2020 — Learn How Supply Chains are Caught in the Regulatory Crossfire

Crowell & Moring has released its *Regulatory Forecast 2020: What Corporate Counsel Need to Know for the Coming Year*, a report that explores the impact of regulatory changes on the technology industry and other sectors, and provides insight into the house counsel can expect to face in the coming year.

For 2020, the *Forecast* highlights the driving forces behind the increased regulatory focus, including access to the data, online platforms, and cutting-edge technologies that define competitive advantage. It explores regulatory trends in antitrust, environment and natural resources, and public affairs.

The article focused on international trade, "Caught in the Crossfire," discusses how the current trade conflict has created a new set of challenges for companies with supply chains reliant on China. The article offers in-house counsel considerations for moving forward.

Be sure to read the full report and follow the conversation on social media with #RegulatoryForecast.

For more information, contact: Robert Holleyman, Evan Chuck, Michelle Linderman

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New Rules Combating Trafficking in Counterfeit and Pirated Goods Impact E-Commerce

On January 31, 2020, the Trump administration issued an executive order cracking down on U.S. businesses that import directly or facilitate the import of counterfeit or pirated goods, illegal narcotics and other contraband. The order, entitled "Ensuring Safe & Lawful E-Commerce for US Consumers, Business, Government Supply Chains and Intellectual Property Rights," directs various government departments and agencies to undertake a series of measures to carry out the president's effort to combat illegal imports. The initiative has far-reaching implications not only for importers and brand owners but also for e-commerce platforms, government contractors, and service providers in the global supply chain that provide warehouse, customs brokerage and transportation services. Parties that fail to comply with the new measures may be barred from participation in certain transactions involving the federal government and/or banned from importing goods into the United States. Additionally, the Department of Justice will be notified of custom violations that are actionable under the False Claims Act, thus another implication is the potential for increased civil and criminal enforcement actions.

Background & Content

This executive order is a culmination of the president's "call to action" to combat infringing goods set forth in his April 2019 "Memorandum on Combating Trafficking Counterfeit and Pirated Goods." The Memorandum outlined the impact that illicit goods are having on U.S. businesses and consumers and set in motion the administration's effort to study and establish a plan to address the issue. The Department of Commerce subsequently issued a *Federal Register* notice on July 10, 2919 (84 FR 3281), soliciting public comment from IP rights holders, online third-party marketplaces, and other interested parties. The Department of Homeland Security followed up with its recent report, "Combating Trafficking in Counterfeit and Pirated Goods" on January 24, 2020.

The DHS report provides a roadmap on how the administration will accomplish the goals set forth in the president's January 31st order. The report analyzes how e-commerce platforms, online third-party marketplaces and other parties in the global supply chain facilitate the import and sale of infringing goods. DHS states that it has devised a plan to "fundamentally realign incentive structures and thereby encourage the private sector to increase self-policing efforts" to fight the import of counterfeit and pirated goods. DHS will implement regulations to include:

- Ensuring that "all appropriate parties to import transactions are held responsible for exercising a duty of reasonable care." This effort will include extending liability to parties well beyond the traditional importer of record, including warehouses, fulfillments centers, and e-commerce platforms that handle infringing goods. DHS explicitly stated that CBP

would be charged with advising the Department of Justice on the types of customs violations that are actionable under the False Claims Act and publishing information on successful FCA claims.

- Increasing scrutiny on so-called "Section 321" import entries (entries with a value of $800 or less). E-Commerce platforms and other online vendors are responsible for the vast majority of these low-valued imports that generally have avoided government inspection when imported by express couriers and the U.S. Postal Service (USPS).
- Prohibiting non-compliant companies and individuals from participating in CBP's Importer of Record Program. This prohibition could have a lasting impact, as the government "shall consider all appropriate action" to ensure that persons or entities debarred or suspended by CBP are excluded from the Importer of Record Program. This effort will require express consignment operations, carriers, and hub facilities to verify and refuse to engage in activities requiring an importer of record number with persons or entities that have been suspended, debarred, or ineligible for the Program under the criteria to be established. There will be increased scrutiny of international mail posts and efforts to reduce the international shipment of illicit goods.
- Pursuing civil and criminal fines, penalties, and injunctive actions against third party intermediaries dealing in infringing goods. This pursuit not only addresses enforcement actions under existing laws and regulations, but also indicates that DHS will seek statutory changes to enhance its enforcement power.
- Analyzing whether the fees collected by CBP are sufficient to cover the costs associated with processing, inspecting, and collecting duties, taxes and fees for courier packages.

In the executive order, the president adopts the DHS measures and directs the appropriate government departments and agencies to begin implementation. The president states that the government will impose significant penalties on parties that fail to comply with the new measures. Any parties or person "who knowingly, or with gross negligence, imports, or facilitates the importation of, merchandise into the United States in material violation of Federal law evidences conduct of so serious and compelling a nature" will be referred to CBP to determine whether the parties should be allowed to participate in procurement and non-procurement transactions with the federal government. The order further states that CBP will be enforcing its discretionary authority to suspend and debar parties that run afoul the customs laws and ban them from importing goods into the United States.

Specific actions outlined in the order include:

- Instructing DHS to initiate a notice of proposed rulemaking establishing criteria for importers to obtain an importer of record number, and impose requirements for express couriers, hub facilities, and customs brokers to report parties that attempt to circumvent the new importer of record program.
- Directing the USPS, in conjunction with the Department of State, to extend the importer of record requirements to international postal shipments and monitor non-compliance by international posts.
- Requiring CBP and ICE to publish information about seizures of goods involving intellectual property violations, illegal drugs and other contraband, incorrect country of origin, undervaluation, and other violations of law.

Ramifications

The effect of the president's executive order will be wide ranging on e-commerce platforms, service providers, and government contractors. Up until now, the importer of record has been the primary party liable for penalties and enforcement actions

associated with infringing imported goods. CBP usually would pursue parties such as customs brokers, warehouse operators, or e-commerce platforms only if they knowingly aided or abetted an importer in the importation of illegal goods. The initiative seeks to extend liability beyond the importer of record for gross negligent actions by a service provider that "facilitated" the import of such goods, an effort that likely would require additional statutory authority. The executive order makes clear that the government will consider criminal enforcement actions where appropriate.

International Trade Supply Chain – E-Commerce Platforms and Service Providers

The administration's executive order will impact e-commerce and other online third-party platform businesses. The platform business often requires sellers to serve as the importer of record of goods sold on their platforms, thereby avoiding duty and penalty liability for illegally imported goods. The new initiative likely will impose requirements that may limit the ability of non-resident importers to serve as the importer of record, such as increased bonding requirements and more extensive information reporting requirements. More importantly, the crackdown on Section 321 shipments will slow down their entry due to increased inspections and enforcement measures by CBP, thereby delaying the fulfillment of online orders to customers.

The liability of platforms and service providers could also increase. A company other than the importer of record could face enforcement liability for infringing imports even if it is not the importer of record if it "facilitates" the imports by grossly negligent actions. It isn't a stretch to predict that CBP would find that most companies in the global supply chain – customs brokers, carriers, warehouse operators, and e-commerce platforms – facilitate the entry of goods imported by their customers. The lower level of culpability sought by the administration will increase the liability of companies and require new procedures and business structures to mitigate risk.

Government Contractors and Present Responsibility

The administration's executive order will particularly impact government contractors that are also importers of record. Those entities that have a dual role must ensure that they do not "flout the customs law," or engage in any other activity whereby they could be found not presently responsible, as such acts could lead to debarment or suspension by CBP. Such a finding is required to be published in the System for Awards Management (SAM), the electronic roster of suspended and debarred individuals or companies excluded from Federal procurement and non-procurement programs throughout the U.S. Government. Conversely a government contractor that is suspended or debarred will likely not be able to be an importer of record. This additional layer will likely require additional review to one's supply chain to ensure that the presently responsible entities can be deemed importers of record and/or be limited by the CBP as the agency considers various criteria consistent with applicable law.

Additionally, the CBP is required to develop new standards to measure efforts by foreign postal services providers to reduce counterfeit shipments. Foreign postal services that fail these standards may be subject to greater inspection of their shipments or be blocked from importing into the U.S. This could affect government contractors that ship goods through non-compliant international posts as their goods may be swept into the inspection or they may need to redirect shipments through compliant posts.

For more information, contact: John Brew, David Stepp, Lorraine Campos, Paul Rosen, Peter Eyre

Customs Rulings of the Week

- February 21: Classification of Keurig Coffee Brewer
- February 26: Classification of Glass-Doored Refrigerated Beverage Display Cases
- March 2: Classification of Biodegradable Plastic Retail Bags

For more information, contact: Frances Hadfield, Rebecca Toro Condori

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Crowell & Moring Speaks

Michelle J. Linderman and David (Dj) Wolff were quoted in two articles in the March BIMCO Bulletin. BIMCO is the world's largest shipping association. The articles were "Are you violating sanctions" and "The consequences of violating sanctions."

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

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