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CLIENT ALERT

The Month in International Trade — July 2017

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In this issue:

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

U.S. NAFTA NEGOTIATING OBJECTIVES: WHAT COMPANIES NEED TO KNOW

Background

On July 17, the Office of the U.S. Trade Representative (USTR) issued the summary of negotiating objectives for the renegotiation of NAFTA, as required under the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (Trade Promotion Authority). The release of the objectives paves the way for formal negotiations to begin on August 16 in Washington, D.C.

In Congress, leading Republicans praised the administration overall for the release of the objectives while reserving space to provide additional input on specific issue areas, whereas many Democrats criticized the objectives for being vague relative to the objectives mandated by Trade Promotion Authority.

The document provides an overview of the outcomes that the USTR will seek during negotiations with Canada and Mexico. The objectives cover the full range of chapters incorporated in recent U.S. trade agreements, including trade in goods, sanitary and phytosanitary (control of plant disease and pests in agricultural crops) measures, technical barriers to trade, and intellectual property. Based on the objectives, the negotiations are likely to be broad in scope, at least initially. However, with the NAFTA parties ambitiously aiming to conclude negotiations by December 2017, it remains to be seen if a comprehensive agreement will prove sustainable as negotiations proceed.

Ironically, a number of the objectives outlined are broadly consistent with measures negotiated in the Trans Pacific Partnership (TPP)—from which the U.S. withdrew in January 2017—including objectives in areas such as digital trade, state-owned enterprises, and updated provisions on labor and the environment. It is also true that some objectives are based on principles consistent with the Trump administration's focus on enhancing U.S. manufacturing exports and overall economic sovereignty—such as an emphasis on reducing the trade deficit, tightening certain rules of origin, and maintaining strong trade remedies.

Notable Objectives

- **Trade in Goods**: The U.S. will seek to maintain existing tariff benefits under the current NAFTA for both agricultural and industrial goods while expanding market access opportunities for agricultural goods. This stated goal would appear to provide additional reassurance that the U.S. will not seek to disrupt North American supply chains by unilaterally withdrawing from the current NAFTA.
    - However, the U.S. will also seek to"improve the U.S. trade balance and reduce the trade deficit with the NAFTA countries." Though the Trump administration has clearly made addressing trade deficits a priority, it remains unclear what specific measures USTR will seek in the NAFTA renegotiation to address its respective trade deficits with Canada and Mexico.
- **Rules of origin**: The U.S. will seek to update the rules "to ensure that the benefits of NAFTA go to products genuinely made" in the U.S. and North America and "incentivize the sourcing" of goods from the U.S. and within North America. This could mean that the administration will seek to tighten the rules of origin for goods to require more U.S. or North American content in order for goods to qualify for NAFTA tariff benefits, which would have major consequences for existing supply chains. However, such an approach requires a fine balance. If companies find that using the NAFTA becomes too onerous and burdensome, they may be incentivized to pay the duties rather than incur additional costs to adjust their supply chains and set up compliance mechanisms.

- **Digital trade**: The U.S. will seek commitments "not to impose customs duties on digital products" and "establish rules to ensure that NAFTA countries do not impose measures that restrict cross-border data flows," nor "require the use or installation of local computing facilities."
- **Financial Services**: In a slight variation from language in the digital trade objectives, for financial services the U.S. will seek commitments for NAFTA countries to "*refrain* from imposing measures" (emphasis added) that "restrict cross-border data flows or that require the use or installation of local computing facilities." The distinction may be to allow some flexibility for federal and state financial regulators to maintain authority to require certain records to be held in the United States. On the other hand, as occurred during TPP discussions, the financial services sector has consistently raised high-level concerns about such differential treatment, relative to other sectors. USTR may have to find a narrow fix that satisfies the financial services industry over the course of negotiations.
- **Customs and Trade Facilitation**: The U.S. will seek a commitment from Canada and Mexico to increase their *de minimis* (minimum) shipment value to one "comparable" to the U.S. *de minimis* shipment value of $800. The *de minimis* values allow shipments below the specified value to enter duty free through relaxed customs procedures. Securing these commitments will benefit small and medium-sized U.S. companies, who would face fewer barriers when exporting to Canada and Mexico.
- **Sanitary and Phytosanitary (SPS) Measures**: The U.S. will seek to "establish a mechanism to resolve expeditiously unwanted barriers that block the export of U.S. food and agricultural products." The U.S. will also seek to "provide for a mechanism for improved dialogue and cooperation to address SPS issues and facilitate trade where appropriate and possible."
- **Investment**: The U.S. will seek to establish rules that will eliminate barriers to U.S. investment "in all sectors" in the NAFTA countries, while ensuring that "NAFTA country investors in the United States are not accorded greater substantive rights than domestic investors." This largely tracks language included in the Trade Promotion Authority legislation, which allows the administration flexibility in determining its approach on investment.
- **Intellectual Property**: The objectives track the Trade Promotion Authority statute calling for provisions that "reflect a standard of protection similar to that found in U.S. law." This leaves open the politically sensitive issue of the term of data protection for biologic medicines, which was a major issue for key Members of Congress during the TPP negotiations. Currently, U.S. law provides 12 years of data protection for biologics, Canadian law provides 8 years, and Mexican law provides no protection. Mexico will likely seek to extract concessions from the United States in order to raise its data protection terms.
    - In the area of *copyright*, the objectives do not refer to seeking an appropriate "balance" or other fair use exceptions and limitations to copyright protections, as were included in TPP. This omission may ease concerns for content-creating industries, while increasing concerns for technology companies, which were the main advocates for "balance."
- **Trade Remedies**: The U.S. will seek to eliminate the NAFTA "global safeguard exclusion" and "eliminate the Chapter 19 dispute settlement mechanism" for trade remedies contained in the existing NAFTA text. The safeguard exclusion prevents the U.S. from imposing safeguard remedies such as tariffs or quotas on Canadian and Mexican imports for "seriously injured" industries, as it can for other trading partners, unless Canada and/or Mexico are found to be contributing importantly to the global injury determination.
    - The Chapter 19 dispute settlement mechanism provides for settlement of U.S. trade remedy disputes via a special NAFTA panel rather than through U.S. courts. The Trump Administration has signaled that it would like

to apply U.S. trade remedy laws more aggressively, including on Canadian and Mexican imports, but is limited by these provisions. The elimination of the Chapter 19 dispute settlement procedures would be a major point of contention for Canada, which has won key victories against the United States (most importantly on softwood lumber exports) using this mechanism.

- **Government Procurement**: The U.S. will seek to maintain certain domestic preferential purchasing provisions (such as "Buy America" requirements), and exclude sub-federal procurement commitments from coverage under the agreement's government procurement provisions, while increasing opportunities for U.S. firms to sell products to the Canadian and Mexican governments.
- **Currency**:The U.S. will seek an "appropriate mechanism" to "ensure that NAFTA countries avoid manipulating exchange rates" in order to "prevent effective balance of payments adjustment or gain unfair advantage." As with the TPP negotiations, a tension exists between the flexibility on monetary policy the U.S. Federal Reserve would like to maintain, and the enforceability that some industries are seeking for imposing discipline on unfair currency interventions. Since little noise has been made by industry regarding currency interventions by Mexico or Canada, such provisions would serve primarily as models for future trade agreements.
- **Environment and labor:** The U.S. will seek to bring labor and environment provisions into the text of the trade agreement, rather than as side agreements, as in the current NAFTA. Specific objectives outlined for environment and labor are similar to those negotiated in TPP.

For more information, contact: Robert Holleyman, Melissa Morris, Evan Yu

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LOOKING PAST THE U.S.-CHINA 100-DAY PLAN

The long awaited U.S.-China Comprehensive Economic Dialogue (CED), which marked the end of the 100-Day Plan launched by President Trump and Chinese President Xi in Mar-a-Lago, took place on July 19. In an anti-climactic fashion, the talks did not yield any deliverables despite Commerce Secretary Ross' statement in May touting the plan as accomplishing "more than has been done in the whole history of U.S.-China relations on trade," when the "early harvest" of deliverables was released.

No Big Wins

There were no notable "wins" announced from the highly anticipated talks, and signs that the talks were faltering emerged early. The scheduled press conferences by the White House and the Chinese delegation were cancelled in the morning. In the afternoon, it was reported there would not be a joint statement, indicating no agreed outcomes from the talks. The U.S. and Chinese statements issued at the end of the CED showed some overlap in themes: both noted how reducing the trade deficit was a shared objective, though there was little substantive information beyond that. The Chinese called the talks a good "framework" for future bilateral economic cooperation, and Secretary Ross called the 100-Day plan a "work in progress," noting that the bilateral process was moving into more in-depth issues that were inherently harder to solve.

Top Issues Raised: Export Controls and Reducing Overcapacity

The breakdown in talks was not surprising. Secretary Ross stated before the July 19 CED that the 100-Day plan focused on "low-hanging fruit." Indeed, many issues in the initial results list had been agreed to in previous Strategic and Economic Dialogue sessions held under the Obama administration.

The priority issues identified by both sides during the CED provided little room for compromise. China's top priority was export controls. This is an area where the Chinese know well the United States has little flexibility, and pushing on it may have indicated China's unwillingness to move on the talks in general. There has been speculation that the stall also may have been due to political pressures from China, given the upcoming 19th Party Congress scheduled for late October/early November.

Meanwhile, the United States focused on reducing overcapacity, particularly on steel, and lifting restrictions on cloud computing and foreign equity caps on financial services and other services. The concern over restrictive cloud computing was especially a focus for industry after China released its latest cyber security law containing vague but highly restrictive rules for the sector.

The impasse that occurred in the CED on July 19 has carried over into the Trump administration's subsequent debates on U.S.-China policy. The Chinese have implied that both sides are working on a one-year work program as a follow-on to the 100-Day Plan; U.S. officials deny this is the case. They will confirm only that "discussions continue" on where the U.S.-China relationship is headed next. Similarly, China would like to re-engage in negotiations on a bilateral investment treaty (BIT), a process the Trump administration has suspended. U.S. officials will only say that the administration has made no decision regarding the future of the BIT.

From Friend to Foe?

Since the Mar-a-Lago meeting, President Trump has praised Chinese President Xi Jinping, tying collaborative trade talks to China's efforts to address North Korean aggression. However, after North Korea's latest provocative long-range ballistic missile test, President Trump's rhetoric has shifted. The President has blamed China for only talking and "doing NOTHING for us with North Korea." China responded by saying that "the North Korea nuclear issue and China-U.S. trade ... aren't related. They should not be discussed together."

Given the Trump administration's willingness to employ all of the tools in the policy toolbox, speculation is growing that the White House may seek to impose additional economic actions against China in the weeks ahead. Options could include more trade cases being self-initiated by the U.S. Government against U.S. imports from China, or broadening economic sanctions in response to China's alleged inaction against North Korea.

For more information, contact: Melissa Morris, Tracy Huang

U.K. MODERN SLAVERY ACT (MSA) 2015 – TIME FOR COMPLIANCE

Companies are paying increased attention to the Transparency in Supply Chains provision contained in the U.K. MSA, which is aimed at requiring companies to root out modern slavery. Those obligated to comply must prepare and publish a slavery and

human trafficking statement for each financial year. 2017 is the first year when all organisations to which it applies must publish a statement.

The Transparency in Supply Chains provision in the U.K. MSA applies to any commercial organisation in any sector, which supplies goods or services, and carries on a business or part of a business in the U.K., with a total annual turnover of £36 million or more. As such, any company or partnership that does business in the U.K., even if established outside the U.K., must publish a compliant modern slavery and human trafficking statement this year.

The requirement to publish a statement commenced on 29 October 2015, however, pursuant to the MSA's transitional provisions, businesses with a year-end between 29 October 2015 and 30 March 2016 were not required to publish a statement for that financial year. Businesses with a year-end of 31 March 2016 were the first businesses required to publish a statement for their 2015-16 financial year.

This year is the first year when all companies or partnerships to which the MSA applies must publish a statement, and while there is no specified deadline for publishing a statement within the MSA, the Government guidance states that it expects organisations to publish their statements "as soon as reasonably practicable after the end of each financial year in which they are producing the statement."

What are the Legal Requirements?

The MSA requires that:

1. Statements must be published on the organisation's U.K. website with a link in a prominent place on the U.K. homepage.
2. Statements should be approved by the board of directors (or equivalent management body) and signed by a director (or equivalent).

The statement must also include "the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place *in any of its supply chains, and in any part of its own business."* If the organisation has taken no steps, the statement should say so.

The MSA also states that the statement ***may*** include information about:

a. The organisation's structure, its business, and its supply chains.
b. Its policies in relation to slavery and human trafficking.
c. Its due diligence processes in relation to slavery and human trafficking in its business and supply chains.
d. The parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk.
e. Its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate.
f. The training about slavery and human trafficking available to its staff.

The U.K. Government has produced guidance to accompany the legislation, which provides further details on how it expects organisations to develop a credible and accurate slavery and human trafficking statement.

What are the Penalties for Non-Compliance?

If an organisation fails to publish a statement for the financial year, the U.K. Secretary of State may seek an injunction requiring compliance. Failure to comply with that injunction could result in an unlimited fine; however, the real purpose behind the Transparency in Supply Chains provision is to increase transparency by ensuring the public, consumers, employees, and investors know what steps an organisation is taking to tackle modern slavery. As such, the true impact of failing to comply is more likely to be reputational with the consequential adverse implications for consumer and investor goodwill.

Final Thoughts

Analysis of many of the Statements published pursuant to the MSA has revealed that a large number of companies are non-compliant. Some statements are not signed; some are not published in a prominent position on the organisation's website, and others fail to state what steps have been taken to identify and eradicate modern slavery in its own organisation or supply chains. Most only provide information on the optional requirements that the MSA suggests might also be included.

It appears that some organisations have simply rushed to produce some sort of statement and have not carried out any particular due diligence on their supply chains or even on their own businesses. As the former Home Secretary, and now Prime Minister, Theresa May stated in the foreword to the Government guidance on the MSA "it is simply not acceptable for any organisation to say, in the twenty-first century, that they did not know. It is not acceptable for organisations to ignore the issue because it is difficult or complex. And it is certainly not acceptable for organisations to put profit above the welfare and well-being of its employees and those working on its behalf."

Recently, a bill sought to amend the MSA by proposing that companies that were not sufficiently transparent about their efforts to protect human rights and, in particular, failed to publish a compliant Statement, be barred from receiving Government business. This has stalled on its way through parliament. However, there remains a degree of government support for some form of amendment in this regard.

Given the potential reputational risks, our advice is that companies not only publish the legally required statements, but also ensure that they have taken concrete steps to assess and address the modern slavery risks within their own businesses and supply chains.

Crowell & Moring lawyers have experience in assisting companies with MSA compliance, and more broadly in auditing and reviewing supply chains for compliance with a range of legal obligations.

For more information contact: Michelle Linderman, Jeff Snyder, Jana del-Cerro, Gordon McAllister

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SEE YOU IN COURT: EXXONMOBIL CHALLENGES OFAC ON SCOPE OF SDN RESTRICTIONS

On July 20, the Office of Foreign Assets Control announced a $2 million penalty against ExxonMobil for violations related to eight documents, a contract extension and seven "Completion Deeds," that ExxonMobil subsidiaries executed with the Russian state-owned company Rosneft in May 2014 on which Rosneft's Chairman, Igor Sechin, was a signatory. That same day, ExxonMobil

filed suit in the Northern District of Texas challenging OFAC's action under the Administrative Procedure Act and on constitutional due process grounds.

Such direct legal challenges to an OFAC enforcement action by a major U.S. company are rare. Assuming neither side blinks, the case could have far-reaching compliance implications going forward by illuminating the scope of what it means to do business with SDN employees of non-blocked enterprises. Should ExxonMobil prevail, the decision could bring more clarity to the application of OFAC's sanctions regulations and undermine OFAC's practice of regulating via interpretive guidance and issuance of FAQs. Should OFAC prevail, companies will be faced with increasing uncertainty and pressure to identify and screen counterparty employees and agents that may have some ministerial role in connection with a non-blocked company.

Already, the case has provided new insights, for ExxonMobil appended to its complaint the detailed penalty letter that OFAC issued privately to ExxonMobil in conjunction with its public web notice. The penalty letter, undoubtedly drafted knowing ExxonMobil intended to challenge it in court, sheds light on arguments OFAC is likely going to use in defending its enforcement action and could use again in the future, if successful:

- **Cross-Applicability of Guidance Among Sanctions Programs**: Among its arguments, ExxonMobil has emphasized that at the time of the conduct at issue in May 2014, OFAC had not definitively announced an interpretation that an SDN's "involvement" in a transaction with an non-blocked entity (*e.g.*,by executing a contract) constituted a prohibited dealing in the "property or interests" of the SDN. OFAC has since made such guidance explicit for all OFAC sanctions programs in FAQs 398 and 400 on the OFAC website. In response to ExxonMobil's argument, OFAC noted that an earlier FAQ 285, which only concerned interactions with SDNs designated under the Burma Sanctions Regulations, had been issued prior to May 2014 and that ExxonMobil should have taken that guidance into account in interpreting the scope of prohibited activity involving SDNs designated under the Ukraine-Related Sanctions Regulations. Significantly, this OFAC position, as ExxonMobil points out in its complaint, is inconsistent with longstanding OFAC policy set forth in Subpart A of each of its sanctions programs, which generally state that "[d]iffering foreign policy and national security circumstances may result in differing interpretations of similar language among the parts of this chapter." In short, OFAC appears to be applying a heads I win, tails you lose approach when it comes to reliance on its interpretative guidance.
- **Assessing the Harm to Sanctions Programs Caused by Violations:** Seemingly abandoning the concept of all persons being equal under the law, OFAC's penalty letter makes explicit what practitioners have long suspected and experienced. In assessing the harm to the sanctions program objectives, as required under the Enforcement Guidelines, OFAC will consider the public profile of both the company committing the violation and the SDN with whom the company dealt. Specifically, OFAC emphasizes that ExxonMobil's actions "given its public profile and sophistication, directly undercut Treasury's efforts to isolate Sechin, thereby alleviating the intended pressure on the Russian government and its interlocutors." And, despite numerous public administration statements that the sanctions on Sechin were on him personally and not on his employer Rosneft, OFAC argues that one of the reasons it considered ExxonMobil's conduct to be egregious was that the company "dealt in the services of a high-profile SDN, designated as an official of the Government of the Russian Federation, at a sensitive period during the crisis in Ukraine."

  Taken together, these statements suggest a view by OFAC that not all violations are created equal, and that a company with a less substantial public profile might be able to argue that its violations do not cause substantial harm to OFAC's policy objectives, particularly if they also involve lower profile sanctions programs or SDNs.

- **What Counts as "Cooperation" with OFAC:** In its penalty letter,OFAC rejects ExxonMobil's argument that its penalty should be mitigated due to the company's cooperation with OFAC's inquiry. In doing so, OFAC expresses its view that merely complying with a subpoena issued by OFAC does not count as cooperation. Moreover, OFAC indicated that briefings that were provided to the agency at a company's request—ExxonMobil held a series of such briefings—also did not indicate cooperation, apparently considering irrelevant ExxonMobil's information and arguments as to why a blocked person's signature on behalf of a non-blocked entity that the blocked person does not control, whether on a contract or a performance acknowledgement, cannot be considered receipt of a "service" from the blocked person or otherwise a transaction involving the blocked person's property or interest in property.

As the litigation proceeds, it will likely yield a number of insights on these and other issues raised by the parties. Its outcome will be of interest to sanctions practitioners and compliance officials alike, given the effect it could have on a number of OFAC's enforcement authorities.

For more information, contact: Jeffrey Snyder, Alan Gourley, Cari Stinebower, Carlton Greene, Dj Wolff, J.J. Saulino

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PRESIDENT TRUMP SIGNS SUBSTANTIAL EXPANSION OF SANCTIONS ON RUSSIA, IRAN, AND NORTH KOREA

On August 2, President Trump signed into law the Countering America's Adversaries Through Sanctions Act of 2017 (CAATSA), which imposes new sanctions on Russia, Iran, and North Korea.

While President Trump noted his view that the legislation was "significantly flawed", its passage represents the successful culmination of months of Congressional negotiations and its provisions will have an immediate and material impact, particularly on companies undertaking transactions in Russia.

CAATSA represents, in effect, the combination of three separate pieces of legislation imposing new sanctions on Russia, Iran, and North Korea. Each piece of the legislation contains a series of new restrictions, but several key highlights are summarized below:

- **Russia: New Primary Sanction Authorities**: CAATSA provides the President with new authorities to sanction (1) persons knowingly engaging in significant activities undermining cybersecurity on behalf of the Russian Government; (2) non-U.S. persons who evade existing Russia-related sanctions; (3) non-U.S. persons responsible for, complicit in, or otherwise directing, the commission of serious human rights abuses in Russia; and (4) non-U.S. persons who provide significant support that materially contributes to the ability of the Government of Syria to acquire chemical, biological, or nuclear weapons, ballistic missiles, or other similar items (e.g., those on the U.S. Munitions List). The Legislation does not itself designate any persons
- **Russia: Sectoral Sanctions – Reduced Payment Terms and New Sectors**: The Legislation modifies existing restrictions by reducing permissible maturity periods under Directive 1 and Directive 2 (from 30 and 90 days to 14 and 60 days, respectively) and expanding the territorial scope of Directive 4 to certain types of oil exploration and production activities globally, not just in Russia. Second, it also authorizes the expansion of sectoral sanctions to state-owned enterprises in Russia's mining, metals, and railway sectors.

- **Russia: Secondary Sanctions on Defense, Intelligence, and Export Pipelines Sectors**: The Legislation imposes several new mandatory and discretionary "secondary" sanctions. These include (1) mandatory secondary sanctions on persons conducting "significant" transactions with Russia's defense or intelligence sectors (or persons operating in that sector); (2) discretionary secondary sanctions on non-U.S. persons undertaking an investment or providing goods, services, or support for the construction of Russian energy export pipelines; (3) mandatory secondary sanctions on persons making an investment in excess of certain thresholds in the privatization of Russian state-owned assets in a way that unjustly benefits Russian officials or their families; and (4) modifies, to make mandatory, existing secondary sanctions on non-U.S. persons undertaking significant transactions in support of exploration or production of oil from shale, arctic offshore, or deep-water locations in Russia.
- **Russia: Codification of Existing Sanctions**: The Legislation also codifies all of the existing Executive Orders on Russia (both those related to Ukraine and to Cyber activities) as well as the existing designations as of August 2, 2017. While the President retains discretion to relax the provisions, the Legislation requires that he provide advance notice and written justification for any such relaxations, and then allow Congress at least 30 days to potentially object to the relaxation.
- **North Korea**: The Legislation imposes a series of new designation authorities for the President, which broadly relate to persons that are in violation of existing U.S. and United Nations sanctions on North Korea. CAATSA also imposes new obligations on U.S. financial institutions to cut-off correspondent account access for non-U.S. financial institutions that might indirectly be benefiting North Korea. Finally, it calls on the administration to consider re-designating North Korea as a state sponsor of terrorism.
- **Iran**: Similarly, the Iran-related aspects of the Legislation primarily focuses on providing the President with a series of new designation-related authorities that focus on Iran's non-nuclear related activities (e.g., ballistic missile testing, support to terrorism, and enforcing arms embargoes).
- **National Strategy To Combat Terrorism Finance**: Finally, the Legislation calls for the development of a national strategy to combat terrorism finance and it opens the opportunity for private sector engagement in the development of that strategy.

CAATSA's passage has already provoked immediate responses from not only its targets – Russia has requested the removal of several hundred U.S. diplomatic personnel and threatened additional retaliation while Iran has accused the United States of violating the nuclear deal – but U.S. allies, including Germany and Austria who have called CAATSA's provisions "unacceptable" and indicate they will not "tolerate" sanctions being imposed on their companies pursuant to its provisions.

For more information, contact: Jeffrey Snyder, Cari Stinebower, Carlton Greene, Dj Wolff, J.J. Saulino

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OFAC UPDATES ITS CUBA FAQs REGARDING PRESIDENT TRUMP'S POLICY PIVOT

On July 25, OFAC updated its Frequently Asked Questions ("FAQs") on President Trump's Cuba Announcement. The revised FAQs generally maintain the same tone and reiterate certain aspects of the new U.S.-Cuba policy.

However, as we develop below, there is an important subtle change: OFAC has included explicit language stating that existing

specific licenses may be affected if it is explicitly noted in the forthcoming regulations. The changes in the guidance can be divided into three categories:

Prior Business in Cuba Will Not Be Affected (unless otherwise stated!)

- The key change in these FAQs relates to the potential effect of any amended regulations on existing licenses. In the first version issued on June 16, OFAC stated that new regulations will be forthcoming and will not affect specific licenses previously granted. In the revised FAQs, OFAC modified this position to note that existing licenses will not be affected "unless explicitly noted". (See FAQ 12).
- OFAC includes an example explaining that U.S. businesses will be permitted to continue with prior transactions with entities related to the Cuban military, intelligence, or security service, when those transactions were outlined in contingent or other contractual arrangements agreed prior to the issuance of the forthcoming regulations. (See FAQ 9).

Reminder about the New Definition of "Prohibited Official"

- OFAC specifically states that while remittances remain authorized, the new definition of Cuban prohibited official may exclude certain Cubans from receiving remittances. (See FAQ 11).
- Group people-to-people travel will still be authorized; however, OFAC now notes that U.S. persons cannot deal with Cuban prohibited officials for a predominant portion of their activities in Cuba when travelling under such general license. (See FAQ 3).

Travel Provisions

- The State Department previously indicated it would be publishing a list of entities that are owned or controlled by the Cuban military. OFAC's new FAQs reiterate that previously scheduled travel arrangements involving entities that are subsequently identified on the State Department list will remain authorized, provided that the arrangements have been made prior to the publication of the list (See FAQ 4, 5, 7, 8.). The new FAQs reiterate that no new transactions with listed entities will be authorized after publication of the list.
- Finally, for the first time, the new FAQs indicate that additional categories of currently authorized travel may be affected by the upcoming changes. Specifically, beyond "people-to-people" travel, OFAC notes that travel for (a) education or (b) 'support for the Cuban people' may be impacted by the upcoming regulations. (See FAQ 6).

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U.S. IMPOSES SANCTIONS ON VENEZUELAN PRESIDENT AND 13 OTHER GOVERNMENT OFFICIALS

On July 31, OFAC designated Venezuelan President Nicolas Maduro as a Specially Designated National (SDN) under the Venezuela Sanctions Program, pursuant to Executive Order (E.O.) 13692.

Earlier, on July 26, OFAC added 13 other top Venezuelan officials to its SDN List. These newly designated individuals are linked

with numerous branches and agencies of the Venezuelan government, including the ombudsman, the military and intelligence service, PDVSA (Venezuela's state-owned oil and natural gas company), CENCOEX (Venezuela's exchange controls agency), and the electoral council, among others. The individuals are:

1. Rocco Albissinni Serrano – President of CENCOEX.
2. Alejandro Fleming Cabrera – Ministry of Foreign Affairs and former President of CENCOEX.
3. Franklin Garcia Duque – Former National Director of Venezuela's National Police.
4. Elias Jaua – Head of Venezuela's Presidential Commission for the Constituent Assembly and Minister of Education.
5. Tibisay Lucena – President of Venezuela's National Electoral Council.
6. Carlos Malpica Flores – Former National Treasurer of Venezuela and former Vice President of Finance for PDVSA.
7. Carlos Pérez Ampueda – National Director of Venezuela's National Police.
8. Nestor Reverol Torres – Venezuela's Minister of Interior and Justice.
9. Sergio Rivero Marcano – Commander General of Venezuela's National Guard.
10. Tarek William Saab – Venezuela's Ombudsman.
11. Jesus Suárez Chourio – General Commander of Venezuela's Army.
12. Iris Varela – Member of Venezuela's Presidential Commission for the Constituent Assembly and former Minister of the Penitentiary Service.
13. Simon Alejandro Zerpa – Vice President of Finance for PDVSA, president of Venezuela's Economic and Social Development Bank (BANDES), president of Venezuela's National Development Fund (FONDEN).

Pursuant to OFAC guidance, the designation of an official of the government of Venezuela does not mean that the government itself is also blocked. However, OFAC has stressed that U.S. persons should be cautious in any dealings with the Venezuelan government—or any other entity whose leadership includes sanctioned parties—to ensure that they are not engaged in transactions or dealings, directly or indirectly, with any SDNs.

For more details on the Venezuela Sanctions Program, please see Crowell & Moring's previous Client Alerts on the E.O. issued by President Obama in March 2015, and the Venezuela Sanctions Regulations issued by OFAC in July 2015.

For more information, contact: Cari Stinebower, Jeff Snyder, Dj Wolff, and J.J. Saulino

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TRUMP ADMINISTRATION ANNOUNCES NORTH KOREA TRAVEL RESTRICTIONS

The State Department published a Federal Register notice on August 2 announcing new passport restrictions for U.S. persons seeking to travel to North Korea. Beginning September 1, U.S. passports will be invalid for travel to North Korea.

Persons seeking to travel to or through North Korea using a U.S. passport must first seek a special passport validation from the State Department, which can be granted at the Department's discretion for travel for journalistic or humanitarian purposes.

The new measures are significant because moves by the U.S. government to restrict U.S. person travel as a sanctions measure have been rare in recent years. Cuba is currently the only U.S. sanctions program that includes restrictions on travel by U.S. persons to the sanctioned country. For all sanctions programs authorized under the International Emergency Economic Powers Act, such travel-related restrictions have been prohibited since 1994.

Rather than seek new legislative authority for a travel-related sanctions measure, the administration chose to impose the new restrictions on travel to North Korea via existing authority to restrict the use of U.S. passports where it determines there is imminent danger to the public health or physical safety of United States travelers.

For more information, contact: Cari Stinebower, Carlton Greene, Jeff Snyder, Dj Wolff, J.J. Saulino

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ENFORCEMENT ACTIONS FROM BIS and FinCEN

Bureau of Industry and Security (BIS)

- On July 25, BIS entered into a Settlement Agreement with Harold Rinko, doing business as Global Parts Supply of Hallstead, Pennsylvania (also known as Rinko/Global Parts Supply) to settle a charge of one alleged violation of the Export Administration Regulations (EAR). The company was assessed a $100,000 civil penalty and a denial of export privileges for ten years. Both are suspended so long as the company makes quarterly reports to BIS.
    - Between 2007 and 2011, Rinko/Global Parts conspired and/or acted in concert with others to procure U.S.-origin goods, subject to the EAR, from suppliers in the U.S. to Syria without a license. These included items specifically identified on the Commerce Control List (CCL) or designated as EAR99. For example, in 2008, the company prepared false sales invoices for a multi-gas scanner, used in the detection of chemical warfare agents, and accessories, knowing the items would be transshipped to Syria.

Financial Crimes Enforcement Network (FinCEN)

- On July 26, Treasury took its first action against a foreign-located money service business, assessing a $110 million civil monetary penalty against BTC-e, a/k/a Canton Business Corporation for willfully violating U.S. anti-money laundering (AML) laws. One of BTC-e's operators, Russian national Alexander Vinnik, was arrested in Greece, as well. FinCEN assessed a $12 million penalty against him for his role in the violations.
    - BTC-e exchanges fiat currency as well as different convertible virtual currencies, such as Bitcoin. It is one of the largest virtual currency exchanges by volume in the world. BTC-e facilitated transactions involving ransomware, computer hacking, identity theft, tax refund fraud schemes, public corruption, and drug trafficking.

For more information, contact: Jeff Snyder, Edward Goetz

SUPPLY CHAIN CORNER: BLOCKCHAIN FOR YOUR SUPPLY CHAIN, U.S. FORCED LABOR UPDATE, AND NORTH KOREA AND FORCED LABOR

Blockchain and Your Supply Chain

Since our previous Client Alert, distributed ledger technology (DLT), also known as "blockchain," has continued to find new applications in supply chain security and documentation. DLT provides an "append only" chain of transaction documentation that can be shared widely or narrowly to provide a strong record for import and export supply chain records. A number of high profile announcements illustrate the resources being devoted to DLT and supply chains.

Creating a blockchain is something that is theoretically possible on a large scale (see https://azure.microsoft.com/en-us/solutions/blockchain/). The question is, is it right for you?

Many supply chain documentation issues can be addressed through DLT; just as ERP software programs such as SAP and Oracle brought enterprise-related transactions into a new era, DLT offers to transform additional aspects of the documentation related to import and export. Expectations must be managed, however.

DLT is a robust digital record, but as trade agencies begin to rely on blockchain for their operations, importers and exporters must also consider whether to transition their supply chain documentation to DLT. Blockchain is essentially the creation of a strong digital record of both digital (such as signatures) and analog (real world) events. If an importer uses blockchain for declarations to CBP, for instance, the importer will have an advantage in demonstrating the strength of the links in the supply chain, but the underlying analog events remain subject to audit and verification. DLT cannot eliminate fraud in the documents that are appended to the blockchain, so self-audits are still required. But, the DLT can reduce the amount of time and effort that goes into such audits.

Crowell & Moring's "Blockchain Gang" has been involved in the assessment and development of supply chain applications. Please click here to read about the firm's recent success in helping establish the world's largest investment in DLT.

For further information, please contact Jeff Snyder, Jenny Cieplak, Jana del-Cerro

U.S. Forced Labor Update

The most recent Department of Labor report on Goods Produced by Child Labor or Forced Labor lists 139 goods from 79 countries; industries include: agriculture, fisheries, construction, apparel, textiles, footwear, furnishings, and minerals, among others. NGOs are also investigating and reporting on labor trafficking.

Following the amendments to section 307 made by the Trade Facilitation and Trade Enforcement Act (please click here for Crowell & Moring's Client Alert), CBP made conforming amendments to its regulations. Its website provides the following guidance: "CBP encourages stakeholders in the trade community to closely examine their supply chains to ensure goods imported into the United States are not mined, produced or manufactured, wholly or in part, with prohibited forms of labor, *i.e.*, slave, convict, indentured, forced or indentured child labor." CBP Guidance on importer due diligence can be found here.

Importers are undergoing investigations now that have not yet reached the "withhold release order" level; now is the time to consider supply chain audits. Crowell & Moring lawyers have experience with supply chain audits and assisting importers undergoing such investigations.

For further information, please contact John Brew, Jeff Snyder, Frances Hadfield, Aaron Marx

North Korea and Forced Labor

Overshadowed by the Russia portion of the new sanctions law, and buried in the North Korea section of the "Countering America's Adversaries Through Sanctions Act (CAATSA)" legislation, is a provision that creates a rebuttable presumption that most items from North Korea are prohibited because of the use of forced labor. It reads:

> ''(a) IN GENERAL.—Except as provided in subsection 10 (b), any significant goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part by the labor of North Korean nationals or citizens shall be deemed to be prohibited under section 307 of the Tariff Act of 1930 (19 U.S.C. 1307) and shall not be entitled to entry at any of the ports of the United States.
>
> ''(b) EXCEPTION.—The prohibition described in subsection (a) shall not apply if the Commissioner of U.S. Customs and Border Protection finds, by clear and convincing evidence, that the goods, wares, articles, or merchandise described in such paragraph were not produced with convict labor, forced labor, or indentured labor under penal sanctions.

Key terms remain undefined. Although the impact may be negligible given the low volume of imports from North Korea and the existing sanctions, this formulation presents an example of how Congress might use this tool to address imports from other countries.

For further information, please contact Jeff Snyder

PODCAST: U.S. OBJECTIVES FOR NEGOTIATING NAFTA – C&M's TRUMP: THE FIRST YEAR SERIES

The U.S. released its negotiating objectives for NAFTA on July 17. In the latest podcast for Crowell & Moring's "Trump: The First Year" series, Robert Holleyman and John Brew, both partners in the firm's International Trade Group, discuss the objectives and the key takeaways. Robert previously served as Deputy U.S. Trade Representative and as a counsel for the U.S. Senate. John's practice focuses on customs, and he has extensive experience in import and export trade regulation.

Discussed in this 17-minute podcast:

- An overview of NAFTA.
- What the U.S. hopes to accomplish in areas such as trade in goods, digital trade, intellectual property, procurement, currency and others.

- The high stakes around the rules of origin and how revisions may impact the region.
- How trade remedies will play into NAFTA and what the fate of Chapter 19 dispute resolution might look like.
- What businesses with operations or trade interests in Mexico and Canada should do now.

Click below to listen via the embedded player or access from one of these links:
PodBean | SoundCloud | iTunes

CROWELL WELCOMES

Cherie Walterman is a senior international trade analyst based in Crowell & Moring's Washington, DC office. As a trade compliance professional, Cherie will support clients with trade remedy matters pending primarily before the U.S. Department of Commerce and the U.S. International Trade Commission.

Cherie has extensive experience conducting economic analyses of company issues and assisting attorneys and multi-national corporations on trade remedies, entry-and-clearing of goods into the U.S., and customs compliance cases. She also has unique experience compiling data in connection with WTO dispute settlements regarding export restrictions for manufacturing, energy, and national security goods.

Prior to joining Crowell & Moring, Cherie was a research specialist in the international trade group of a Washington, DC-based firm. Before that, she completed three internships related to international affairs. Cherie worked as an outbound investment consultancy intern at Paragon Partners Asia in Shanghai, China; as a government affairs and external relations intern at the Organization for International Investment in Washington, DC; and as a market research analyst at Penn Schoen Berland, also in Washington.

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Should you wish to contact Cherie directly, please see below for her contact details.

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CROWELL & MORING SPEAKS

John Brew will be speaking at the American Conference Institute's Annual Forum on Customs and Trade Enforcement, to be held September 26-27 in Washington, DC. He will be interviewing three CBP Center of Excellence and Expertise (CEE) Directors. In addition to a Q&A session with the audience, John will be focusing on:

- How to work effectively with the CEEs;
- An update on account-based processing: How this will lead to a smoother process when working with your CEE;
- How to deal with overlap when your product(s) are covered by multiple CEEs; and
- Engagement with other agencies, including the FDA.

Crowell & Moring clients or contacts may obtain a 10 percent discount by registering as a guest of Crowell & Moring.

Chris Monahan will be speaking at the ICPA's Annual Fall Conference and One Day Valuation Seminar in Grapevine, Texas, scheduled for October 23-25. His topic is "Understanding Commodity Jurisdictions (State vs. BIS)."

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

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