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CLIENT ALERT

The Month in International Trade – March 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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OFAC Begins to Solidify Long-Awaited Guidance on Expected Elements for Compliance Programs

The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is known for imposing hefty penalties for violations of U.S. economic sanctions, with individual violations amounting to up to U.S. $295,141 or twice the value of the transaction, whichever is greater, per prohibited transaction, and overall penalties sometimes running into the hundreds of millions, or even billions, of dollars.

Despite this, OFAC historically has not provided much guidance for companies on the expected elements of an effective OFAC compliance program. OFAC regulations do not specifically require a sanctions compliance program, but OFAC's Enforcement Guidelines provide that OFAC will take into account the "existence, nature, and adequacy" of a company's "risk-based" sanctions compliance program in deciding whether to impose a penalty and, if so, the amount of such a penalty. Treasury has provided limited guidance directed specifically to financial institutions, but industry often found itself reading between the lines of OFAC's enforcement actions for guidance.

That has changed in recent months. In December 2018, Treasury Under Secretary for Terrorism and Financial Intelligence, Sigal Mandelkar, gave public remarks detailing specific elements that Treasury expects to see in an effective sanctions compliance program for all U.S. companies. These include:

1. Ensuring **senior management commitment** to compliance.
2. Conducting **frequent risk assessments** to identify and mitigate sanctions-specific risks within an institution and its products, services, and customers.
3. Developing and deploying **internal controls**, including policies and procedures, in order to identify, interdict, escalate, report, and maintain records pertaining to activity prohibited by OFAC's regulations.
4. Engaging in **testing and auditing**, both on specific elements of a sanctions compliance program and across the organization, to identify and correct weaknesses and deficiencies.
5. Ensuring all relevant personnel, particularly those in high-risk areas or business units, are provided tailored **training** on OFAC obligations and authorities in general and the compliance program in particular.

Under Secretary Mandelkar promised that OFAC would be providing further information on the expected elements of sanctions compliance programs, including as a feature of future OFAC settlement agreements. In accordance with this promise, OFAC in recent enforcement actions has raised and elaborated on these elements. For example, in its December 2018 settlement with Zoltek Companies, Inc., OFAC explained that "[e]ffective sanctions compliance programs have policies, procedures, and controls designed to identify prospective and in-process transactions, as well as customers and counter-parties, for potential OFAC issues, as well as mechanisms designed to adequately respond to warning signs and raise sanctions-related issues to a sanctions compliance officer or point-of-contact." Zoltek also agreed to various undertakings organized around the specific elements identified above. As part of its "Management Commitment" obligations, for example, Zoltek agreed to provide appropriate human capital, information technology, and other resources to its OFAC compliance program, and to expand a Director of Global Compliance position to include U.S. sanctions issues.

Likewise, in its March 2019 settlement with Stanley Black & Decker, Inc. and a Chinese subsidiary, Black & Decker committed, in accordance with the elements above, to: (1) senior management establishing a "culture of compliance" that empowered sanctions compliance personnel; (2) conduct regular risk assessments to ensure that its internal controls appropriately mitigate

the entity's sanctions-related risks; (3) conduct regularized audits; and (4) provide ongoing sanctions compliance training. OFAC also noted that foreign acquisitions pose "unique risks," and explained its expectation that U.S. companies will conduct substantive sanctions-related diligence before and after mergers and acquisitions, including "appropriate steps to audit, monitor, and verify newly acquired subsidiaries and affiliates for OFAC compliance." OFAC in particular encouraged U.S. companies to consider "[t]esting of compliance procedures and timely auditing of subsidiaries" to mitigate sanctions risks from such events.

OFAC's articulation of specific elements it expects to see in OFAC compliance programs for all U.S. companies, not merely U.S. financial institutions, is consistent with another trend that emerges from its enforcement over the past few years: an increasing focus on actions against non-financial companies. All of 2019's five enforcement actions to date have been against non-financial institutions, more than 70 percent of 2018's and 2019's were against non-financial institutions, and the largest aggregate sanctions-related penalty in the last three years was assessed against a non-financial institution.

Practical Considerations

All U.S. companies, and non-U.S. companies with any form of U.S. exposure, should be considering whether they have a comprehensive program for compliance with OFAC sanctions and whether it contains the specific elements OFAC has said it expects. This is especially important for non-financial companies which in the past have had less guidance for their programs and faced less enforcement but now increasingly are the subject of enforcement.

OFAC's recent actions also point to the need for an enterprise-wide approach to sanctions compliance, one that addresses not only U.S. affiliates but also the activities of non-U.S. affiliates and recently acquired subsidiaries. In particular, more than half of OFAC's enforcement actions in 2019 have involved activity undertaken by a recently acquired affiliate. OFAC expects that acquiring companies not only will conduct sufficient due diligence to identify potential sanctions exposure prior to acquisition, but, critically, that they will implement a post-closing control framework—including policies, training, and audits—that ensures that any problematic activity has in fact stopped. This requires the sanctions compliance team to be treated as an active part of the acquisition diligence team and to be given the resources necessary to immediately bring a new acquisition up to the same enterprise-wide risk management standards.

For more information, contact: Carlton Greene, Cari Stinebower, Dj Wolff, Dainia Jabaji

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U.S. Court of International Trade Holds Section 232 Duties on Aluminum and Steel to be Constitutional

On March 25, 2019, the U.S. Court of International Trade (CIT) in *American Institute for International Steel, Inc., Sim-Tex, LP and Kurt Orban Partners, LLC v. United States*, held that Section 232 duties imposed on certain steel and aluminum imports by President Trump were constitutional. The three-judge panel denied the American Institute for International Steel's challenge to the Section 232 duties.

In its decision, the Court held it was bound by the Supreme Court precedent in *Algonquin* that section 232 does not violate the delegation of powers. The Court expressed concern that section 232 allows for a "gray area" with respect to the separation of powers. Still, it acknowledged that "the broad guideposts of subsections (c) and (d) of section 232 bestow flexibility on the

president and seem to invite the president to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach." Unlike government agencies, the president is not subject to the Administrative Procedure Act (APA). The Court explained that "the judicial review would allow neither an inquiry into the president's motives nor a review of his fact-finding". As a result, the Court found that "such concerns are beyond the court's power to address, given the Supreme Court's decision in *Algonquin*."

In a rarely used move, Judge Katzmann issued a "dubitante" opinion (which concurred with the majority's conclusion while suggesting an alternative view), and expressed "grave doubts" that section 232 "passes constitutional muster." Judge Katzmann joined the majority in light of the binding precedent in *Algonquin*, but calls for a revisit of the issue because section 232 "provides virtually unbridled discretion to the president with respect to the power over trade that is reserved by the Constitution to Congress."

Plaintiff American Institute for International Steel immediately announced that it intends to appeal this decision. The case was a second lawsuit against the president's section 232 tariffs. In an earlier case, the Court denied Severstal Export Gmbh's challenge for a preliminary injunction that would have stopped the president's 232 tariff from being imposed.

For more information, contact: Frances Hadfield, Yun Gao

Supreme Court Limits the Immunity of International Organizations

The Supreme Court issued an opinion in *Jam v. International Finance Corp.*, that open the door to claims against international organizations by holding that international organizations are not entitled to absolute immunity from suit in U.S. courts, but are instead entitled to only the same limited immunity currently granted to foreign governments.

The decision revives the claims of certain farmers, fisherman, and villagers who live near a power plant in Gujarat, India and who brought suit against the International Finance Corporation (IFC), an international development bank and member of the World Bank Group, for financing a power plant that they allege polluted the surrounding air, land, and water. The IFC asserted that it was completely immune from suit under the International Organizations Immunities Act of 1945 (IOIA), which provides that international organizations "shall enjoy the same immunity from suit . . . as is enjoyed by foreign governments." 28 U.S.C. § 288a(b).

The District Court and the D.C. Circuit had previously concluded that the IFC was immune because "the IOIA grants international organizations the virtually absolute immunity that foreign governments enjoyed when the IOIA was enacted" back in 1945. *Jam*, 586 U.S. ____ (2019). Chief Justice Roberts, writing for the seven-Justice majority, referred to the "reference" canon of statutory interpretation to conclude that the IOIA should be read to refer to the law of foreign sovereign immunity as it exists at the time the question under the IOIA arises, not as it existed in some sort of time capsule when the IOIA was enacted back in 1945. Accordingly, an international organization's immunity is not absolute, but must be decided with reference to the current law of foreign sovereign immunity.

The current law of foreign sovereign immunity is embodied in the Foreign Sovereign Immunities Act (FSIA), which provides certain exceptions to sovereign immunity. The *Jam* opinion discusses the possible application of one of these exceptions, the

commercial activity exception, which would allow suits based on an international organization's commercial activity if there is a sufficient nexus to the United States. The FSIA contains other exceptions as well that may also provide the basis for suits against international organizations – such as potentially allowing suit for torts committed by international organizations or their employees.

The Supreme Court's decision affects not only the IFC, but other World Bank organizations, (such as the International Bank for Reconstruction and Development, the International Development Association, and the Multilateral Investment Guarantee Agency), as well as numerous other international organizations, including the United Nations, the World Health Organization, the Inter-American Development Bank and its private-sector arm, IDB Invest, and the Organization for Economic Cooperation and Development. This decision may make it possible to bring claims against such international organizations, but because many such international organizations have their own immunity agreements with the United States, knowledge of the IOIA, the FSIA, and international law will be crucial to the success of such claims.

For more information, contact: John Murino, David Baron, David B. Robbins, Emily Alban

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Customs Rulings of the Week

- April 5 Classification of a Balance Ball Chair
- March 29: Classification of an OREO Cookies & Creme Candy Bar
- March 20: Classification of "Moby Dick Bath Time Essentials" Kit
- March 15: Classification of Unisex Cycling Shoes

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

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CROWELL & MORING WINS

Crowell & Moring Secures Customs Classification Victory for Irwin Tool Vise® Grips Hand Tool at U.S. Court of Appeals for the Federal Circuit

Crowell & Moring represented Irwin Tools in a dispute over whether the company should have to pay increased duties on its Vise Grip® brand imported hand tools. The International Trade Group had previously won two rounds of summary judgment briefing and the government's motion for reconsideration at the U.S. Court of International Trade. The government then appealed their loss to the U.S. Court of Appeals for the Federal Circuit.

On April 9, 2019, the Federal Circuit affirmed the U.S. Court of International Trade's decision for Appellee Irwin Tools on the challenged hand tool products and determined that they were pliers and not wrenches. The precedential decision may be found here. The challenged hand tool products were: large jaw, curved jaw, long nose with wire cutter, curved jaw with wire cutter, and straight jaw.

The three judge panel rejected U.S. Customs and Border Protection's (CBP) proposed historical classification, which had been used by the agency for more than 30 years, classifying the products as wrenches dutiable at 9 percent *ad valorem*. Instead, it agreed with Irwin that the Vise Grip® products were properly classified as pliers, dutiable at 12 cents/dozen + 5.5 percent *ad valorem*. The case was argued by Frances Hadfield.

CROWELL & MORING SPEAKS

Dan Cannistra spoke at the American Fuel & Petrochemical Manufacturers (AFPM) annual meeting in Washington, DC on March 19, 2019. He was on a panel entitled, "Trade Agenda 2019".

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

On April 24 , Crowell & Moring's Frances Hadfield will speak at the Sports & Fitness Industry Association's (SFIA) Business & Risk Management Summit. Frances will provide best practices and strategic advice for sports industry retailers who are struggling to protect their products and businesses from increased manufacturing costs overseas. Her presentation, "Trade, Tariffs & Trump" will explore some of today's most pressing trade issues, including:

- China tariffs, MTB and GSP bills
- How to protect yourself in today's unpredictable trade environment
- Compliance issues

Click here for more information about the event or to register.

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

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