Crowell

Client Alert

The Month in International Trade – May 2020

June 11, 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.

Top Trade Developments

Coronavirus Resource Center

Crowell & Moring has a multidisciplinary working group helping clients navigate the rapidly evolving business, legal and operational challenges associated with the COVID-19 pandemic. Our group brings together lawyers and senior professionals with relevant senior government, industry, and private sector experience across a wide array of practices that intersect with the most critical issues in this unprecedented legal landscape. We are helping clients to navigate immediate issues, as well as anticipate and prepare for those that may impact them very shortly.

We have advised on more than 250 COVID-19 matters in areas, including:

- Antitrust
- Business Interruption and Commercial Contracts
- Class Actions
- Commercial Finance & Lending
- Corporate
- Education
- Employment (U.S. & International)
- Energy
- Environmental & Natural Resources
- Government Affairs
- Government Contracts
- Health Care, including Digital Health
- Insurance
- Intellectual Property
- International Dispute Resolution
- Privacy & Cybersecurity
- Products Liability
- Retail & Consumer Products
- State Attorneys General Investigations
- Supply Chains & Trade
- Tax
- U.S. and International Government and Public Affairs
- White Collar & Regulatory Enforcement

Immediate and Just Around the Corner Issues

We are counseling clients as they navigate both immediate issues, as well as those that may impact them very shortly. We are focused on helping them to understand the questions they need to ask with a view toward both the immediate and longer term business impacts and potential consequences. Some of the resources we have developed include:

- Analyses of a majority of federal, state, and municipal emergency declarations and orders. To request information for a specific jurisdiction, please email COVID-19@crowell.com.
- Webinar Series: We are hosting a webinar series called COVID-19: Immediate and Just Around the Corner Issues**.** Brief programs that will provide up to the minute information on important topics.
- Commercial Contracts Checklist: designed to assist companies when reviewing commercial contracts for provisions that are likely relevant to minimizing business disruptions and losses related to the COVID-19 pandemic.
- Workplace Guidelines: summarized the priority issues employers should be considering in the face as of COVID-19.

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.
- Hospital operations and capacity, patient safety, and medical supplies.
- Insurance questions and coverage exclusions and limitations.
- Compliance with workplace safety issues and health care law.
- 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.
- Medicare, Medicaid, and commercial reimbursement.

For access to the resource center, please click here.

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

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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Latest on Section 301 Product Exclusions

Please click here anytime for the latest actions regarding Section 301 Product Exclusions.

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

USTR Launches 301 Investigations into Digital Service Taxes

Opens Door for Potential Retaliatory Tariffs by United States

On June 2, the Office of the U.S. Trade Representative (USTR) launched a series of Section 301 trade investigations into digital services taxes (DST) adopted or under consideration by a number of United States (U.S.) trading partners – including Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey and the United Kingdom. The investigations will initially focus on whether these taxes discriminate against U.S. companies, including concerns about "retroactivity and possibly unreasonable tax policy".
The Federal Register Notice provides a complete overview of the investigations.

As proposed and in practice, the DST regimes under investigation apply primarily or exclusively to companies with global annual revenues above £500 million for the U.K. proposal, to above €750 million for most of the others. The Indian DST threshold impacts non-resident companies with global revenues of approximately $250,000 USD per year and who provide goods and services to or aimed at persons in India.

Estimates of the amount of revenue generated or likely to be generated from the DST regimes vary. Since most or all of these regimes will have a disproportionate impact on U.S. companies, with the potential to generate $USD billions in annual revenue for the taxing authorities, the scope of the investigations and potential consequences of any U.S. retaliatory action are high.
USTR is seeking comments in response to the Notice until July 15, 2020.

Section 301

Section 301 of the 1974 Trade Act gives *broad authority to investigate and respond to a foreign country's action that may be unfair or discriminatory and negatively affect U.S. commerce*. In December 2019, USTR concluded that France's digital services tax unfairly discriminated against the U.S. and proposed additional duties of up to 100% on certain products of France. However, the U.S. and France reached an agreement under which France paused the tax and the U.S. held off on imposing tariffs while the Organization of Economic Cooperation and Development (OECD) continues to negotiate a multinational DST agreement.

OECD Digital Services Tax Negotiations

Under its *Inclusive Framework on Base Erosion and Profit Shifting* (BEPS), the OECD has initiated multilateral efforts to ensure large multinational companies, including digital companies, "pay tax wherever they have significant consumer-facing activities and generate their profits." While multilateral efforts have stalled due to COVID-19, the OECD continues to push ahead on developing a multilateral consensus this year.

While some countries, including Austria, Hungary, Italy, Turkey and the U.K. are proceeding with digital services taxes, the European Union (EU) and several countries have indicated they may push for ones if the OECD talks fail. The EU Commission has estimated such digital services tax could bring in €5 billion ($6.1 billion) in revenue for the bloc's budget. The OECD released a statement in March 2020 stating it aims of reaching a "political decision on the key components of a multilateral consensus-based solution" by the time of the G20/OECD Inclusive Framework on BEPS plenary meeting in July 2020.

For more information, contact: Robert Holleyman, John Brew, Clark Jennings, Olivia Burzynska-Hernandez

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BIS Adds 33 Chinese Companies to the Entity List

Secretary of Commerce Ross announced the Entity List additions on Friday, May 22, 2020, via separate press releases, citing 24 of the entities for "represent[ing] a significant risk of supporting procurement of items for military end-use in China," and the remaining 9 entities for their complicity in human rights violations in the Xinjiang Uighur Autonomous Region (XUAR).

The addition of the 24 entities apparently supplying US commodities and technologies for military end use follows BIS' recent interim final rule amending the Export Administration Regulations (EAR) § 744.21 end user/end use requirements, and appears to arise from the same U.S. concern surrounding civil and military integration in China. The entities include governmental and commercial organizations based in China, Hong Kong, and the Cayman Islands.

The 9 entities added for their reported ties to abuses in the XUAR include the PRC Ministry of Public Security's Institute of Forensic Science, as well as eight Chinese companies, and form the second tranche of entities listed by BIS explicitly for human rights violations.

Pursuant to § 744.11(b) of the EAR, BIS may add entities to the Entity List for "which there is reasonable cause to believe, based on specific and articulable facts, that the entity has been involved, is involved, or poses a significant risk of being or becoming involved in activities that are contrary to the national security or foreign policy interests of the United States…"

Although announced on May 22, the companies were not formally added to the Entity List until June 5.

For information about the licensing policy of the newly listed entities, please click here.

For more information, contact: Jana del-Cerro, Chandler Leonard

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U.S. Senate Passes Legislation Aimed at Ending Forced Labor in Xinjiang, China

On May 14, 2020, the U.S. Senate unanimously passed the Uyghur Human Rights Policy Act of 2020 (the "Act"). Introduced by Sen. Marco Rubio (R-FL), the Act aims to direct U.S. resources to address human rights violations and abuses, including forced labor, in the Xinjiang Uyghur Autonomous Region in Northwestern China. Credible research and investigations have pointed out that more than 1,000,000 ethnic minorities, including Uyghurs, ethnic Kazakhs, Kyrgyz, and Muslim minority groups have been detained in internment camps where they face political indoctrinations, torture, beatings, food deprivation, forced labor, and other human rights abuses.

If passed by the House of Representatives and signed by the President, the Act would require the President to submit a report to Congress identifying any official of the Government of China that is responsible for the denial of human rights in the Xinjiang Uyghur Autonomous Region. Sanctions will then be imposed against each individual identified in the President's report. Such sanctions shall include blocking the property of identified individuals and denying admission to the United States. Importantly, these sanctions shall not include the authority or a requirement to impose sanctions on the importation of goods into the U.S.

In addition to sanctions, the Act would require the Secretary of State to submit a report on human rights abuses in Xinjiang Uyghur Autonomous Region to Congress. The report must include detailed information regarding the number of individuals detained in internment camps; a description of the conditions in such camps, including an assessment of methods of torture and other human rights abuses; the number of individuals in forced labor camps; methods used to reeducate detainees in the camps, including identification of government agencies in charge of reeducation; and an assessment of the use of forced labor and a description of foreign industries and companies benefitting from such labor.

The Act differs in substantial ways from a prior bill, also introduced by Sen. Rubio that was introduced in the Senate on March 12, 2020. The Uyghur Forced Labor Prevention Act would have gone further to create a rebuttable presumption that goods produced by labor occurring in Xinjiang China, or by persons working with the Region's government under poverty alleviation or mutual pairing assistance programs are prohibited for entry into the U.S. This bill would have flipped the burden of proof under Section 307 of the Tariff Act of 1930. Normally, before prohibiting entry of goods into the U.S. due to suspected use of forced labor, the U.S. Government must demonstrate that information reasonably indicates that the goods were produced using forced labor. The Forced Labor Prevention Act would flip this burden, requiring importers to demonstrate that goods produced in Xinjiang, China were not produced using forced labor before entry into the U.S. would be permitted. In addition, the Forced Labor Prevention Act would have required the imposition of sanctions as required under the Act.

Whether or not either of these bills is signed into law, it is likely that Customs and Border Protection (CBP) will be more diligent in its forced labor enforcement activity, which may have broad implications for goods imported from China and other regions suspected of using forced labor.

For more information, contact: Frances Hadfield and Brian McGrath

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The White House Establishes "Forced Labor Enforcement Task Force" Under Section 741 of USMCA Implementation Act

On May 15, 2020, President Trump issued an executive order establishing the "Forced Labor Enforcement Task Force" required by the U.S.-Mexico-Canada Agreement (USMCA) implementing bill. Section 741 of the USMCA Implementation Act requires the Department of Homeland Security the Task Force as the central hub for the U.S. government's enforcement of the prohibition on imports made through forced labor. After missing the original April 28 deadline for the Task Force creation as outlined in the USMCA implementing bill, members of the House Ways & Means Committee wrote a letter to the administration to comply with the original commitments.

The Mandate of the Task Force is to improve coordination among U.S. agencies to prohibit forced labor imports and ensure the continuation of forced labor prohibition under U.S. law. The Task Force will be chaired by the Secretary of Homeland Security and will include representatives from the Department of State, Department of the Treasury, Department of Justice, Department of Labor, and the Office of the United States Trade Representative. According to the Executive Order, the Task Force will endeavor to make all decisions under consensus but shall decide matters by a majority vote in the case of disagreement.

The Task Force will eventually establish the procedures and timelines for petitions submitted to the U.S. Customs and Border Protection regarding forced labor allegations. In addition, the Task Force will submit biannual reports to Congress summarizing governmental efforts to prohibit the importation of goods produced via forced labor. According to comments made by the Chairman of the House Ways & Means committee, the Task Force will be necessary to combat pressing forced labor problems currently facing the U.S. such as imports from the agricultural sector in Mexico and various industrial sectors in China.

For more information, contact: John Brew, Jeff Snyder, David Stepp, Frances Hadfield, Sam Boone

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U.S. State Dept. Fails to Certify Hong Kong's Autonomy: Signals Potential Change in Trade and Economic Treatment

On May 27, 2020, the U.S. Secretary of State Michael Pompeo issued a statement that Hong Kong "does not continue to warrant treatment under United States laws in the same manner as U.S. laws were applied to Hong Kong before July 1997." U.S. relations with Hong Kong are governed by the United States-Hong Kong Policy Act of 1992, which authorizes the U.S.to provide "different" treatment for Hong Kong than it accords the People's Republic of China in a variety of political, economic, trade, and other areas so long as Hong Kong remains "sufficiently autonomous."

In November 2019, President Trump signed into law the Hong Kong Human Rights and Democracy Act of 2019. Among other measures, this law requires the Secretary of State to make an annual certification about whether Hong Kong continues to merit its special treatment under U.S. law. The recent action by Secretary of State Michael Pompeo was the first time such a certification was required. The annual report to Congress on Hong

Kong was due by the end of March, but Secretary Pompeo remarked that the report's submission to Congress had been delayed "to account for any additional actions that Beijing may be contemplating in the run-up" to China's May 22 National People's Congress "that would further undermine the people of Hong Kong's autonomy." His statement anticipated action China's National People's Congress took on May 28 which empowered its standing committee to draft national security legislation for Hong Kong. The passage of such a national security law would have an impact on the fifteen enumerated factors in the statute to be considered in the annual certification.

For more information on this significant change, please click here.

For more information, contact: Robert Holleyman, Evan Chuck, Clark Jennings, Shelley Su

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BIS Creates a Special "Direct Product" Rule for Huawei

Asserting that Huawei has taken advantage of a "loophole," Secretary of Commerce Ross on Friday, March 15, 2020, announced an amendment of the direct product rule that for now applies only to Huawei and its affiliates on the Entity List.

The amendment expands the scope of the rule to capture certain foreign manufactured items, making them "subject to the EAR." Items captured under the amended rule require a BIS license prior to export, reexport, or transfer to Huawei or its listed affiliates.

For more on this amended rule, please click here.

For more information, contact: Jana del-Cerro, Alan W.H. Gourley, Jeff Snyder, Chandler Leonard

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CFIUS Expands Types of Transactions Subject to Pre-Closing Mandatory Declarations

On May 21, 2020, Treasury proposed to change its approach for identifying which foreign investment in a U.S. business will trigger the requirement for mandatory notification to the Committee on Foreign Investment in the U.S. (CFIUS).

With respect to covered transactions involving U.S. businesses which produce, design, test, manufacture fabricate or develop those "critical technologies" that are essentially export-controlled items, CFIUS will no longer focus on the nexus of such critical technologies to 27 specific industries (as defined by NAICS codes).

Rather, the proposed rule would mandate disclosure of such a covered transaction to CFIUS where U.S. regulatory authorization – without regard to most available regulatory exemptions and exceptions – would be required to export, re-export, transfer (in-country) or retransfer the critical technology to a foreign person that is a party to the transaction (including certain individuals holding a 25% voting interest in the foreign person).

Exempted from the new mandatory disclosure rule, however, would be certain covered transactions where export of the critical technology involved could be exported to the foreign person(s) involved under a few specific exceptions available under the Export Administration Regulations.

For more information, contact: Addie Cliffe, Jana del-Cerro, Alan W.H. Gourley

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Scrutiny of Foreign Ownership in the Telecommunications Sector Gains Momentum with the FCC's Issuance of Show Cause Orders and a Recent Public Notice Refreshing the Team Telecom Record and Requesting Comments

The Federal Communications Commission (FCC) continues to set pace regarding its review and authorization of licenses under which foreign-owned companies operate, especially those that are Chinese state-owned. In response to the April 4th Executive Order formalizing Team Telecom (EO), the FCC issued a Public Notice on April 27th refreshing the record of the FCC's 2016 Notice of Proposed Rulemaking (NPRM) that addresses the Executive Branch's review of license applications involving foreign ownership. Through the Public Notice, the FCC enters the EO into the record and requests comments on how the EO affects proposed rules and procedures outlined in the NPRM. Comments are due 30 days after publication of the Public Notice in the Federal Register, which is expected in the upcoming weeks.

Separately, following a recommendation by Executive Branch agencies to revoke China Telecom (Americas) Corp.'s ("China Telecom") authorizations, the FCC issued orders to show cause on April 24, 2020, to China Telecom and three other companies as to why it should not initiate a proceeding to revoke their authorizations due to national security concerns. Responses are due 30 days from the date of the orders.

For more on this important topic, please click here.

For more information, contact: Caroline Brown

New U.S. Sanctions Advisory for the Maritime Industry

On May 14, 2020, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), the U.S. Department of State, and the U.S. Coast Guard issued a long-awaited "Sanctions Advisory for the Maritime Industry, Energy and Metals Sectors, and Related Communities" (the "Advisory"). The Advisory substantially expands on previous shipping advisories that OFAC and other U.S. agencies have issued that were specific to the Iran, Syria, and North Korea programs (see our previous summary) by not only offering global guidance, but also by issuing more than a dozen pages of detailed industry-specific recommendations across 10 sectors that touch the maritime industry. In many cases, these recommendations go substantially beyond the compliance expectations that OFAC or its peers had previously articulated.

The Advisory consolidates the list of "deceptive shipping practices" that were identified in previous advisories and adds several new practices:

- Disabling or Manipulating the Automatic Identification System (AIS) on Vessels;
- Physically Altering Vessel Identification;
- Falsifying Cargo and Vessel Documents;
- Ship-to-Ship (STS) Transfers;
- (New) Voyage Irregularities;
- (New) False Flags and Flag Hopping; and
- (New) Complex Ownership or Management.

To learn how to identify these deceptive practices and mitigate risk, please click here.

For more information, contact: Dj Wolff, Michelle Linderman, Caroline Brown, Carlton Greene, Nicole Succar, Nimrah Najeeb

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Key Lessons Learned as OFSI Begins to Flex Its Muscles

On February 18, 2020, the United Kingdom's Office of Financial Sanctions Implementation (OFSI) announced a £20.47 million penalty against Standard Chartered Bank (SCB) for alleged violations of the U.K.'s Ukraine- and Russia-related sanctions. The penalty is more than 140 times larger than any of OFSI's previous penalties. It provides a number of important lessons for companies subject to U.K. jurisdiction, and suggests how the U.K. programme may evolve post-Brexit. The penalty also reflects important differences in approach from how the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) has approached enforcement.

For more on the OFSI, please click here.

For more information, contact: Michelle Linderman, Dj Wolff, Caroline Brown, Carlton Greene

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Industrial Bank of Korea Agrees to a Deferred Prosection Agreement and $86 Million in Penalties for Violations of the Bank Secrecy Act that Allowed Evasion of Sanctions on Iran

On April 20, 2020, the U.S. Attorney for the Southern District of New York (SDNY) announced that the Industrial Bank of Korea (IBK) agreed to a deferred prosecution agreement (DPA) and $51 million penalty related to a one-count felony information charging IBK with violating the Bank Secrecy Act (BSA). On the same day, the New York Department of Financial Services (DFS) announced a consent order with IBK, including a separate $35 million penalty, and the New York Attorney General (NYAG) announced a non-prosecution agreement, with respect to the same conduct.

The agreements relate to failures by IBK to administer an effective anti-money laundering program at its New York branch (IBKNY) over an extended period, during which time a U.S. citizen, Kenneth Zong, and various co-conspirators, including several Iranian nationals, allegedly were able to transfer more than $1 billion from IBK accounts through U.S. financial institutions, including IBKNY, in violation of U.S. sanctions against Iran.

The one-count information charged only a violation of the BSA, and did not charge IBK with causing a violation of, or IBKNY with violating, U.S. sanctions on Iran under the International Emergency Economic Powers Act (IEEPA).

For more information about this important case, please click here.

For more information, contact: Caroline Brown, Carlton Greene, Nicole Succar, Erik Woodhouse

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FinCEN Director Identifies Virtual Currency Compliance Risks and COVID-19 Related Issues at Consensus 2020 Conference

On May 13, 2020, the Director of the Financial Crimes Enforcement Network (FinCEN), Kenneth Blanco, delivered remarks during the first virtual Consensus Blockchain Conference. Blanco called for continued cooperation between the government and the virtual currency industry, cautioning that cybercriminals predominantly use virtual currencies to launder the proceeds of their criminal activities and to purchase the tools needed to conduct them. He stated that since 2013, FinCEN has received almost 70,000 suspicious activity reports (SARs) related to virtual currency exploitation, and financial institutions have provided additional information regarding illicit financial flows involving virtual currency. This information, he said, is critical to law enforcement and FinCEN, which use the information to identify typologies of illicit virtual currency use. FinCEN then disseminates these to industry through advisories. Blanco also highlighted two specific areas for consideration in the virtual currency space:

1. Whether companies have appropriate anti-money laundering/countering the financing of terrorism (AML/CFT) controls in place for anonymity-enhanced cryptocurrencies, or privacy coins, such as Monero, Zcash, Bitcoin, and Grin, noting that the Internal Revenue Service (IRS) is also focused on this issue; and
2. Whether "businesses located outside the United States continue to try to do business with U.S. persons without complying with" Bank Secrecy Act (BSA) rules, including "registering, maintaining a risk-based AML program, and reporting suspicious activity, among other requirements."

For more on virtual currency compliance risk, please click here.

For more information, contact: Caroline Brown, Michelle Ann Gitlitz, Carlton Greene, Jorge Pesok, Nicole Succar, Erik Woodhouse

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FinCEN's Suspicious Activity Report Renewal Notice Seeks Public Comment on SAR Burden Estimates

On May 26, 2020, the Financial Crimes Enforcement Network (FinCEN) published a notice to renew the Office of Management and Budget (OMB) control numbers assigned to Suspicious Activity Reporting (SAR) requirements. Although no changes to the requirements themselves are proposed, FinCEN notice in the Federal Register proposes to revise its estimate of the burden to financial institutions to produce SARs. FinCEN seeks comment from industry on its new "SAR burden" calculations on or before July 27, 2020.

For more information on this topic, please click here.

For more information, contact: Caroline Brown, Carlton Greene, Nicole Succar, Erik Woodhouse

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U.S. Court Dismisses Fulmen's Iran Sanctions Listing Challenge

On March 31, 2020, the U.S. District Court for the District of Columbia dismissed a complaint by Fulmen Company (Fulmen), an Iranian electronics company, challenging the Department of the Treasury's Office of Foreign Assets Control's (OFAC) decision to designate Fulmen as a Specially Designated National (SDN) pursuant to Executive Order 13382. On November 21, 2011, OFAC designated Fulmen as an SDN, stating that it had contributed to the proliferation of weapons of mass destruction by Iran through its procurement of goods for covert uranium enrichment activities in Iran from 2006 to 2008. In particular, OFAC found that Fulmen was involved in the construction of the uranium enrichment facility at Qom while it was still an undeclared site and worked with Kalaye Electric, an SDN, on construction of the Natanz Uranium Enrichment Plant.

Prior to OFAC's designation, Fulmen had been sanctioned by the European Council and then subsequently removed in late 2013. In late 2014, Fulmen requested OFAC's reconsideration of its designation, claiming that it had no link to the Iranian government and was not involved in any nuclear projects, including the Qom and Natanz sites. Fulmen emphasized that it had been removed from the EU sanctions list and argued that OFAC only designated it as an SDN because the EU had also done so. Over the next two years OFAC requested additional information from Fulmen regarding its relationship to Iranian companies and ultimately denied Fulmen's request in July, 2018, stating that it believed that Fulmen had not submitted credible arguments or evidence establishing that the circumstances surrounding its designation no longer apply. In its summary of classified information used as the basis for the designation, OFAC reported that Fulmen had worked with various other Iranian SDNs in procuring equipment and construction elements for the Qom and Natanz uranium enrichment sites.

Fulmen subsequently filed suit, alleging that OFAC violated its procedural and substantive due process rights because it failed to provide Fulmen with notice and opportunity to be heard before designating it as an SDN and further violated the Takings Clause of the Fifth Amendment by depriving Fulmen of all economically beneficial use of its name, reputation, property, and assets without just compensation. Fulmen also asserted APA claims, based on its assertion that OFAC was required to remove it from the SDN list after it was removed from the EU

sanctions list. The Government moved to dismiss Fulmen's complaint and Fulmen cross moved for summary judgment.

In granting the Government's motion, the court first held that Fulmen lacked standing to assert its constitutional claims because Fulmen is a foreign national with no established connection to the United States. Therefore, it is not entitled to any Fifth Amendment protections. In fact, in its complaint and briefing, Fulmen stated it has "*no* connections to any U.S. person or U.S. entity[,]" which the court relied on in holding that Fulmen had no Fifth Amendment rights.

In assessing its APA claims, the court held that OFAC's decision not to remove Fulmen from the SDN list was neither arbitrary nor capricious. The court cited the range of information it reviewed from its requests to Fulmen and the classified information it relied upon as a sufficient basis for Fulmen's designation. Even absent this evidence, Fulmen admitted to transacting with an SDN, which independently warranted Fulmen's designation as an SDN.

Analysis and Implications

When analyzing OFAC's actions under the APA, it is entitled to even more deference than the traditional standard which requires a court to affirm an agency's actions if the agency's findings are supported by "substantial evidence" and there is a "rational connection between the facts found and the choice made." However, since OFAC's decisions implicate national security and foreign policy, it is entitled to extreme deference when its actions are challenged. Thus, any party challenging a designation by OFAC on APA grounds faces a significantly higher burden than when other administrative challenges are brought.

Fulmen's arguments also raise novel issues surrounding the reliance of OFAC on the EU sanctions list. Fulmen argued that its removal from the EU sanctions list required OFAC to do the same. Fulmen argued that the EU designation was "the condition precedent to, and sole legal justification for" Fulmen's inclusion on the SDN List. However, E.O. 13382 includes no provision regarding reciprocity between EU and U.S. designations. And, OFAC's designation relied on significantly more factual data than that of the EU, given the substantial period of time during which OFAC requested additional information from Fulmen. Even if OFAC relied partially on the EU designation as the basis for its own designation, there is significantly more information which formed the basis of OFAC's designation apart from just the EU's decision to designate it.

Even putting this aside, OFAC's decision not to delist Fulmen derived not from its continued actions which caused its designation in the first place, but based on its later relationship with an entity already designated under E.O. 13382. It appears that even if Fulmen had mitigated and corrected its actions which initially led to its designation, OFAC still would not have delisted it. It remains to be seen whether this will discourage entities from changing their behavior in the first place if OFAC will use a different basis to maintain an entity's designation than that which originally led to its designation.

In short, any company designated by OFAC faces an uphill battle in seeking to challenge the designation in court. OFAC, and the District Courts, have been reluctant to rely on foreign jurisdiction's decisions regarding sanctions

as the basis for their own. Thus, the court make clear that OFAC's decision to sanction and deny Fulmen's request for reconsideration were made upon its own record of evidence and not in reliance on the EU record.

For more information, contact: Dj Wolff, Brian McGrath

Treasury and CBP Must Allow Drawback Refunds to Excise Taxes Pending Government Appeal

The government has lost another battle in its fight to prevent refunds of certain excise taxes paid by importers. Earlier this year, the U.S. Court of International Trade (CIT) struck down a regulation issued by the Department of the Treasury and U.S. Customs and Border Protection (Treasury and CBP, collectively the agencies) designed to limit the scope of those refunds. *Nat'l Ass'n of Mfrs. v. United States Dep't of Treasury*, No. 19-00053, slip op. at 20-09 (Ct. Int'l Trade Jan. 24, 2020). Although the CIT ruled the regulation invalid, the government sought permission to continue to apply the regulation while it appealed the court's decision. This would have allowed the government to deny refunds for the excise taxes at issue. Last week, the CIT denied the government's request. *Nat'l Ass'n of Mfrs. v. United States Dep't of Treasury*, No. 19-00053, slip op. at 20-67 (Ct. Int'l Trade May 15, 2020).

For more on this important topic, please click here.

For more information, contact: John Brew, Teresa Abney

Customs Rulings of the Week

- May 14: Classification of Laser Hair Therapy System
- May 19: Classification of the DisinfectBot
- May 28: Classification of Women's Convertible High Heel Footwear

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

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Upcoming Crowell & Moring Webinars

Introducing the *Export Controls Classroom*

We are excited to announce our *Export Controls Classroom* webinar series. This monthly series open to all will cover a range of topics from the nuts and bolts of export compliance, to in-depth analysis of emerging issues, and will be designed for those new to export controls and as well as more experienced compliance and industry professionals. Our attorneys from the International Trade practice group will team up with practitioners from

other complementary practices such as Privacy & Cyber, Government Contracts, Corporate, and Labor & Employment to provide full coverage of the issues.

To kick-off the series, our first webinar will be held Tuesday, June 23, titled "China in the Crosshairs: an Overview of the U.S. Approach to Mitigating National Security Concerns."

For more information on the webinar series, contact: Jana del-Cerro, Chandler Leonard

China in the Crosshairs: an Overview of the U.S. Approach to Mitigating National Security Concerns

Date: Tuesday, June 23, 2020
Time: 12:00 PM Eastern Daylight Time
Duration: 1 hour, 30 minutes

In the past several years, the U.S. government has issued a series of sweeping Executive Orders, policy announcements, and other regulatory and enforcement actions as part of a multi-pronged approach to protect U.S. national interests against the perceived challenges a rising China presents. To help industry contextualize these actions within the broader framework of the U.S. approach to China, and to understand the emerging trends, our C&M International trade professionals and C&M International Trade and Government Contracts attorneys will provide commentary and insight across a series of topics, including:

- Recent changes to national security reviews by the Committee on Foreign Investment in the U.S. (CFIUS) targeted at capital from China;
- The new EAR foreign-direct product rule aimed at Huawei and its affiliates, and the Military End user / End Use Rule;
- Entity List additions;
- Tariffs and Trade Remedies developments;
- Establishing the new Team Telecom;
- Securing U.S. Bulk Power Systems;
- FAR Supply Chain restrictions and implementation plans;
- The U.S. Department of State's announcement on the revocation of Hong Kong's trade status; and
- Criminal prosecution of sanctions violations and trade secret theft.

Crowell & Moring is pleased you can join us for this webinar which you can watch via your desktop web browser or by using an Android or iOS tablet or phone. Audio will be streamed via your device so please ensure you have headphones or speakers connected.

Please register your details to enter – Access will be granted 15 minutes prior to the official start time.

For the latest on Crowell COVID-19 webinars, please click here.

Recent International Trade Webinar Available On-Demand

The United States-Mexico-Canada Agreement (USMCA) — a Substantial Rewrite of NAFTA or More of the Same?

The USMCA will go into effect on July 1, 2020, and companies should immediately assess how their NAFTA compliance programs must be revised to ensure continued trade compliance. NAFTA transformed North American supply chains when it went into effect in 1993, and USMCA changes to NAFTA significantly alter rules on which companies have structured their global manufacturing and distribution of goods. Join us for this first in a series of presentations on how the new USMCA will affect your company as we move closer to the July 1st implementation date. We will cover issues such as:

- Revisions to customs processes and procedures, including certificates of origin
- Foreign trade zones and drawback
- Intellectual property, e-commerce, and the environment
- Impact of changes to specific industries:
    - Motor vehicles
    - Steel and aluminum
    - Chemicals and petroleum
    - Textiles and apparel
    - Pharmaceuticals and healthcare
    - Food and Beverage

Speakers: John Brew, Dan Cannistra, David Stepp, Frances Hadfield, Maria Vanikiotis, and Sam Boone

To view this webinar, please click here.

Crowell & Moring Speaks

On May 8, Evan Chuck, Robert Holleyman, Him Das, and Shelley Su presented a webinar for members of the American Chamber of Commerce in Shanghai on the U.S.-China relationship; the supply chain dependencies COVID-19 revealed; subsequent government actions taken; what supply chain resilience looks like; and the role of governments, international institutions, and the private sector in shaping policy outcomes.

Caroline Brown was quoted in a May 18 *ABA Risk and Compliance* article titled "Securing the Remote Bank Workforce." Caroline discussed on how federal agencies have issued guidance stating they expect financial institutions to remain vigilant against fraud and other bad actors who might take advantage of the COVID-19 pandemic.

On May 8, Caroline Brown authored an article for Bloomberg titled, "INSIGHT: 'Team Telecom' Advice to FCC to Bar China from U.S. Sets Trend."

Caroline Brown was quoted in a June 2 *Global Investigations Review* article titled "US Prosecutors send a message with blockbuster North Korea charges." Caroline commented on how recent indictments serve as useful name and shame exercises and that even if the person is beyond the reach of U.S. prosecutors, it puts the world on notice that the USG is aware of the malign activity.

On Tuesday, June 18, from 6:00 pm – 7:30 pm, Evan Chuck will be a speaker on a virtual panel sponsored by the American Bar Association entitled, "Dealing with the Asia Pacific Ring of Trade Fire." This panel, drawn from the corporate world, private practice, NGOs, and international aid agencies will provide their views together with proposals for improvement for trade in the Asia Pacific region.

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

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