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CLIENT ALERT

This Month in International Trade — December 2016

Jan.11.2017

In this issue:

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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 John B. Brew or any member of the International Trade Group.

WEBINAR: THIS YEAR IN TRADE – WHAT'S AHEAD IN 2017?

January 18, 2017 from 11:00 am (EST) – 12:00 pm (EST)

From economic sanctions to import tariffs, the incoming Trump administration has suggested it will seek to implement almost immediately significant changes in international trade policy and enforcement. In addition to these potentially seismic shifts, technological and social developments reshaping international trade rules and global supply chains are gathering speed, from the expanding adoption of blockchain technology to increasing corporate social responsibility requirements. Join us as we step into the eye of this perfect storm to identify the international trade risks and opportunities likely to arise for your businesses in the course of 2017.

On Wednesday, January 18, 2017 at 11:00 a.m. Eastern, our Crowell & Moring team will discuss predictions for the coming year. Topics will include likely trends and issues in the U.S. and EU on:

- Sanctions in a Trump Administration: Iran, Cuba, Russia, and beyond
- Anti-Money Laundering (AML) – "de-risking" and the new normal
- Export Control Reform (ECR) here to stay? Rollbacks? What's next?
- Supply chain risk management: Corporate Social Responsibility (CSR), blockchain, conflict minerals: new actors, and public disclosure – 2017 Issue
- New tax on imports? Impact of possible border adjustment tax on your business; increased enforcement; Automated Control Environment (ACE) update
- A new sheriff in town? Expedited case decisions, retaliatory tariffs, and China, China, China.

Presenters include members of our international trade team and Crowell & Moring International based in Washington, D.C. and Brussels. We hope you can join us for this webinar.

Click here to register for this webinar.

CROWELL & MORING'S FIRST 100 DAYS SERIES

PODCAST – Trade and Jobs: What Trump Can and Can't Do in the First 100 Days

Trade with Mexico and China were top issues for the Trump campaign, and recent developments suggest corporations may be in store for significant change under a Trump Administration. Could we be looking at an entirely different economic framework after January 20? How will manufacturers be impacted? Crowell & Moring International Trade Group partners Daniel Cannistra and John Brew discuss anxiety in the marketplace and how trade could change under President Trump.

Covered in this 23 minute podcast:

- What are President-elect Trump's promises on trade and can he fulfill them? What authority does the president have to alter trade agreements? What challenges might he face?
- NAFTA and the possibility of tariffs on Mexican imports.
- What can President-elect Trump do with respect to China?
- What is the likelihood that the proposed border adjustment tax could go through?
- What is a trade war, and what might cause it?
- What agencies should large, multinational companies be looking to throughout the first 100 days to watch for trade updates?

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

For more information, contact: John Brew, Daniel Cannistra

PODCAST – Sanctions Under the Trump Administration

In the third podcast of Crowell & Moring's "First 100 Days" series, Partners Carlton Greene and Cari Stinebower sit down to discuss what sanctions might look like under President-elect Trump's new administration. Prior to joining the firm in 2015, Carlton served as chief counsel of the Treasury Department's Financial Crimes Enforcement Network (FinCEN) and also worked for the Office of Foreign Assets Control (OFAC). Cari has previously worked as an attorney advisor for the Office of the General Counsel at OFAC.

Covered in this 20 minute podcast:

- Iran sanctions – what is likely to happen with the Joint Comprehensive Plan of Action (JCPOA), how OFAC might take enforcement actions outside of the JCPOA and the implications of such, and what might happen with the Iran Sanctions Act.
- Russia/Ukraine/Crimea sanctions – how Crimea-focused sanctions might be affected by the president-elect's statements that Russia should be an ally in the fight against ISIS.
- Cuba sanctions – what the new administration might do with respect to Cuba sanctions and the Cuban Democracy Act.

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

For more information, contact: Carlton Greene, Cari Stinebower

TOP TRADE DEVELOPMENTS

Border Adjustments – A Key Component of the House Republicans' Tax Reform Plan

As President-elect Trump's Administration starts to take shape, one potential policy attracting attention is a proposed corporate income tax system that applies "border adjustments" for calculating taxable income.

Genesis of the Idea for Border Adjustments

In June 2016, House Ways and Means Committee Republicans, under the leadership of chairman Kevin Brady (R-TX), unveiled the tax reform blueprint, "A Better Way; Our Vision for a Confident America" (the Blueprint). This document sets out proposals for tax reform legislation in 2017. The Blueprint proposed a variety of reforms ranging from revamping the IRS to the elimination of estate taxes to a proposal for the largest corporate tax cut in U.S. history – from a top rate of 35 percent to a flat 20 percent rate. Included among these reforms is the proposed institution of "border adjusted" or "destination-based" cash flow taxes, a reform which could drastically change corporate taxation in the U.S.

From the perspective of the Blueprint, border adjustments remove a "self-imposed unilateral penalty" on U.S. exporting companies that arguably encourages imports. In many ways, the proposed border adjustment for imports functions like a tariff on goods produced abroad and sold in the U.S. and is aligned with the incoming Trump administration's goal of encouraging manufacturing in the U.S.

How Border Adjustments Work

The Blueprint proposes that exports of domestically produced goods be exempt from federal income tax and that importers of foreign made goods be denied a cost basis for tax purposes in such imports.

For clarity, take four simple examples:

> **Company A** sells only *domestically* produced goods to customers *in the U.S.*. Total sales are $100 with costs of goods sold of $60 resulting in a taxable profit of $40 (ignoring other payments for salaries etc.). Under the proposed corporate tax system, the $40 profit would be taxed at 20 percent resulting in a net income of $32. Under the current 35 percent tax, the company would have net income of $26.
>
> **Company B** sells only *imported* goods to customers *in the U.S.* Total sales are $100 with costs of goods sold of $60. *However*, Company B has no tax basis in its imports. Taxable "profits" are therefore equal to total sales at $100 (again, ignoring other payments for salaries etc.). At a 20 percent tax rate, Company B pays $20 in taxes, resulting in a net income of $20. Under the current 35 percent tax, the company would have net income of $26.
>
> **Company C** sells only *domestically* produced goods to customers *outside the U.S.* Total sales are $100 with costs of goods of $60. Under the proposed corporate tax system, the $100 of export revenue would not be taxed, resulting

in a net income of $40. This would presumably also result in a $60 loss for tax purposes (*i.e.*, the unrecovered tax basis in the goods). Under the current 35 percent tax, the company would have net income of $26.

Company D imports goods for $40 and adds $20 of value in the U.S.-based manufacturing process, selling the final goods to customers *outside the U.S.* for $100. The revenue from the exports is nontaxable. Hence, no U.S. corporate income tax is paid on such revenues. The U.S. component of costs of goods sold is $20, which would presumably result in a $20 loss for tax purposes. It will be noted that the results for Company D are similar to the results for Company C. The only difference is the size of the taxable loss.

Company A sells 100 percent domestically produced goods to customers in the United States	
Revenue	$100
Costs of Goods Sold	$60
Pre-tax Profit	$40
Taxable Profit	$40
Net After-tax Income with proposed 20 percent tax of $8 (20 percent of $40)	$32
Net After-tax Income under current 35 percent tax of $14 (35 percent of $40)	$26

Company B sells 100 percent imported goods to customers in the United States	
Revenue	$100
Costs of Goods Sold	$60
Pre-tax Profit	$40
Taxable Profit	$100
Net After-tax Income with proposed 20 percent tax of $20 (20 percent of $100)	$20
Net After-tax Income under current 35 percent tax of $14 (35 percent of $40)	$26

Company C sells 100 percent domestically produced goods to customers outside the United States	
Revenue	$100
Costs of Goods Sold	$60
Pre-tax Profit	$40
Taxable Loss	$60
Net Income with proposed 20 percent tax of $0 (exports of domestically produced goods exempt from federal income tax)	$40
Net After-tax Income under current 35 percent tax of $14 (35 percent of $40)	$26

Company D imports $40 in goods, adds $20 of value in the manufacturing process, and sells the finished goods for $100 to customers outside the United States	
Revenue	$100
Costs of Goods Sold	$60
Pre-tax Profit	$40
Taxable Loss	$20
Net Income with proposed 20 percent tax of $0 (exports of domestically produced goods exempt from federal income tax)	$40
Net After-tax Income under current 35 percent tax of $14 (35 percent of $40)	$26

Implications for Companies

These simplified examples show how border adjustments could reduce the net after-tax incomes of U.S. firms reliant upon imports for their supply. Note that these examples are static, in the sense that it is assumed that prices would not be renegotiated with suppliers and that prices to consumers would stay the same. Moreover, many related issues, such as state income taxes, are ignored. Some analysts believe that the sectors that may be the most affected, in addition to retail, include automotive, primary metals, furniture, and electrical equipment. ***The "Better Way" proposal is conceptual and does not include draft legislative language, so predictions about the impact on individual companies are speculative at this point***.

Initial Reaction on Capitol Hill

Despite some opposition and concern from sectors of the business community, particularly retailers, the House GOP has voiced strong support for the border adjustment proposal. At the House Ways & Means Republicans' policy retreat, Chairman Kevin Brady (R-TX) called border adjustments a key aspect of the Blueprint.

Senator Ron Wyden (D-OR) on the Senate Finance Committee has stated his wariness of the proposed tax plan. A December 8th memo to the Senate Finance Committee's Democratic tax staff members stated:

> "The key feature of the business side of the plan -- a destination-based cash flow corporate income tax with 'border adjustments' -- is confusing, untested, leads to bizarre results, and is possibly illegal under WTO rules [...] At minimum, these aspects of the system could violate WTO rules on measures affecting trade in goods as well as rules prohibiting export subsidies."

Potential Implications Under Trade Rules

The potential for conflicts with WTO rules arises from the questions of how border adjustments would favor domestic production over imports, and how such a tax would compare with the WTO's "national treatment" obligations in respect of domestic taxation under Article III of the General Agreement on Tariffs and Trade (GATT). On the export side, border adjustment could also raise issues of consistency with the prohibition on export subsidies under Article 3 of the Agreement on Subsidies and Countervailing Measures (ASCM).

If border adjustments are imposed in a way that exceeds equivalent taxes on domestic producers, then it could be argued that taxation of import-dependent firms violates the obligation to treat imported and domestic products alike for purposes of domestic taxation. Depending on how the border adjustments are calculated, the potential to violate this GATT rule is notable. Similarly, if the border adjustments provide a benefit to exporters in the form of fiscal incentives (*i.e.*, revenues otherwise due are foregone by the U.S. Government), then a case for the violation of the ASCM could also be made.

Outlook

The Blueprint has drawn praise and criticism from both sides of the aisle and the business community. The border adjustments proposal is one of the more prominent points of contention. While little is known about the precise form such tax adjustments could take, it is likely to appear in some form in proposed legislation given the current sentiment towards trade policy and domestic production. As the new Congress continues work on a tax reform package, border adjustments will likely become an increasing area of focus and discussion, both in the United States and abroad.

For more information, contact: Patricia Wu, Jeffrey Snyder, John Brew, Charles Hwang, Charles De Jager

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From Russia with Love – U.S. Sanctions Russian Intelligence Entities for Alleged Hacking in Presidential Election

On December 29, 2016, the President issued an Executive Order, "Taking Additional Steps To Address The National Emergency With Respect To Significant Malicious Cyber-Enabled Activities." This amended Executive Order (EO) 13694, "Blocking the

Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities," increasing its scope to allow for the "imposition of sanctions on individuals and entities determined to be responsible for tampering, altering, or causing the misappropriation of information with the purpose or effect of interfering with or undermining election processes or institutions."

Sanctioned under the amended EO were six Russian individuals and five entities, including Russia's Federal Security Service (a.k.a. the FSB), its Main Intelligence Directorate (a.k.a. the GRU), and four persons linked to the GRU. Additionally, the President expelled 35 suspected Russian spies from the U.S.

On January 6, 2017, after briefing both President Obama and President-elect Trump, U.S. intelligence officials released a declassified version of its report, "Assessing Russian Intentions and Activities in Recent US Elections: The Analytic Process and Cyber Incident Attribution."

Interference in EU Member States' National Elections in 2017?

The developments in the U.S. have sparked fears of Russian interference in the French presidential election this spring and, perhaps more importantly, in the German general election in the fall of this year. In France, the two leading candidates on the right, François Fillion of the Republican Party and Marine Le Pen of the National Front, are both clearly supportive of closer ties with Russia.

The election of either may lead to the unraveling of the EU consensus on maintaining sanctions and a tough overall stance against Russia. German Chancellor Angela Merkel has been instrumental in ensuring this EU consensus, such that Russia may stand to gain most if her bid for re-election were unsuccessful. Accordingly, German security services are reported to monitor closely the danger of Russia trying to turn a European election.

For more information, contact: Carlton Greene, Cari Stinebower, Charles De Jager, Dj Wolff

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U.K. Office of Financial Sanctions Implementation Publishes Draft Guidance on Monetary Penalties

On December 1, 2016, the U.K. Office of Financial Sanctions Implementation (OFSI) published its draft guidance on the process of imposing monetary penalties for breaches of financial sanctions. The draft guidance is now open for comments from stakeholders in the context of a public consultation launched by OFSI.

By way of background, OFSI was established on March 31, 2016 within Her Majesty's Treasury, with a remit to help "ensure that financial sanctions are properly understood, implemented and enforced in the United Kingdom." The Policing and Crime Bill, which has been working its way through the UK Parliament, is likely to receive royal assent in 2017. Once enacted, the Policing and Crime Act 2017 (the Act) will confer on OFSI the power to impose monetary penalties under civil law for financial sanctions violations. Information on the Policing and Crime Bill, and its passage through parliament is available here.

The draft guidance provides detailed information in order for stakeholders to comment on the powers to be granted to OFSI by the Act, the amount of monetary penalties that can be imposed, and the procedure for their imposition and the rights of interested parties. Below is a summary of some key elements of the draft guidance and of the Act:

- **Circumstances in which monetary penalties can be imposed** – pursuant to the Act, OFSI may impose penalties "if it is satisfied, on the balance of probabilities, that — (a) the person has breached a prohibition, or failed to comply with an obligation, that is imposed by or under financial sanctions legislation, and (b) the person knew, or had reasonable cause to suspect, that the person was in breach of the prohibition or (as the case may be) had failed to comply with the obligation."
- **Maximum amount of monetary penalties permitted** – if the breach relates to funds or economic resources the value of which can be estimated precisely, the maximum penalty will be the greater of £1 million or 50% of the estimated value of the funds or resources. In all other cases the maximum penalty permitted will be £1 million.
- **Serious violations** – OFSI will enjoy some discretion in deciding whether or not to impose a monetary penalty. The imposition of a penalty is thus more likely for serious violations. According to OFSI, examples of violations likely to lead to a penalty are: (a) cases in which the breach has involved funds or economic resources being made available directly to a designated person; (b) circumvention of financial sanctions; (c) cases in which aggravating factors are present (*e.g.*, repeated, persistent or extended breaches, violations involving large sums of money, or the existence of professional facilitation by advisors of financial institutions); and (d) failures to comply with OFSI requests to provide information. In the event of very serious violations, OFSI may decide to refer a case for criminal investigation to the National Crime Agency.
- **Advantages of voluntary disclosure** – voluntary disclosure of financial sanctions violations may lead to a reduction of up to 50 percent of the monetary penalty (or up to 30 percent in the event of very serious violations). Voluntary disclosures must be made in good faith, be complete and made within a reasonable period of time from the discovery of the breach. The submission of an incomplete disclosure, for reasons other than simple error or the emergence of new facts, will normally lead to the imposition of a penalty.
- **Procedure and rights of defense** – before imposing a monetary penalty, OFSI will have to inform the individual concerned of its intention to do so. That person will then be able to make legal and factual representations responsive to the determination made by OFSI, and any relevant aspect of the case. OFSI's final decision will follow a review of such representations. This decision will be appealable before the competent Minister and subsequently before the Upper Tribunal.

All stakeholders are invited to participate in the public consultation by replying to a set of questions on the draft guidance. The replies must be received by OFSIConsultation@HMTreasury.gsi.gov.uk no later than January 26, 2016.

For more information, contact: Charles De Jager, Gordon McAllister, Lorenzo Di Masi

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President Obama Blocks Chinese Acquisition of German Semiconductor Company for "National Security" Reasons

For only the third time, the parties to a transaction sought the President's review of a Committee on Foreign Investment in the United States (CFIUS) recommendation that a transaction be blocked, and unsurprisingly, the President upheld the CFIUS position preventing a Chinese investor's bid to buy a German semiconductor company, Aixtron, with significant business and technology in the U.S.

Although CFIUS does not generally reveal the specific national security concerns at issue, a statement from the Department of the Treasury called out Aixtron's use of "Metal-Organic Chemical Vapor Deposition (MOCVD) systems to build semiconductor materials," and the potential "military applications of the overall technical body of knowledge and experience of Aixtron, a producer and innovator of semiconductor manufacturing equipment and technology."

Although CFIUS has previously blocked other Chinese companies from acquiring U.S. companies in the semiconductor space, this transaction highlights the extraterritorial reach of the foreign investment review process. Interestingly, the press reported that while the German merger authorities had originally approved the transaction, that approval was subsequently rescinded and the German review re-opened. CFIUS additionally noted that Aixtron's U.S. business contributed to the body of knowledge of concern to the Committee.

For more information, contact: Alan W.H. Gourley

Dutiability of Royalty Payments under EU and U.S. Customs

The new European Union Customs Code (UCC) provisions concerning the dutiability of royalties mirror the principles set forth on this subject matter by the WTO Customs Valuation Agreement (CVA). Royalty payments are to be added to the price of imported goods to the extent (i) they were not already included in such price; (ii) they are related to the goods being valued; and (iii) the buyer must pay them as a condition of the sale.

The implementing provisions of the UCC concerning the concept of "condition of sale" indicate that royalties and license fees are considered to be paid as a condition of sale for imported goods not only (i) when the buyer is requested by the seller or a person related to the seller to make the payment, but also (ii) when the buyer makes a payment to satisfy an obligation of the seller, in accordance with contractual obligations, and (iii) when the goods cannot be sold to the buyer unless a payment of the royalties to the licensor is made. This approach is similar to that which was previously applicable under the Community Customs Code (CCC).

However, compared to those of the CCC, the new implementing provisions of the UCC are likely to broaden the scope of application of the concept of "condition of sale." In principle, customs duties may now be levied on the royalties paid for trademarks because the rules previously allowing for the exemption of trademarks from dutiability under certain conditions are no longer applicable. An interpretation of the new UCC implementing provisions based on the mere wording of such provisions risks unduly restricting the concept of "condition of sale" as set forth in the CVA and the UCC, both higher legal sources.

Although the Court of Justice of the European Union (CJEU) is due to deliver an important judgment in this context in the GE Healthcare Case (C-173/15), each case should be assessed based on the entirety of its facts, including the underlying contractual obligations and communications among the parties. The CJEU has reiterated that the context in which a transaction takes place is of primary importance in all areas of EU law, including EU customs law. The importance of assessing the context of transactions is also clearly underlined by the WCO General Commentary on third party royalties and licence fees.

The reading of certain national customs circulars suggests that, as always, there may be great differences in the interpretation of these provisions among various EU Member States' customs agencies. Some agencies may not take for granted the expanded dutiability of royalties under the UCC, while others may be more prone to a literal interpretation of the UCC implementing provisions. Therefore, an accurate (re-)drafting of licence agreements, as well as applying for a customs decisions on this specific matter as now allowed by the UCC, are among the possible strategies companies may pursue for more predictability and less dutiability.

From the U.S. Customs standpoint, royalties may be dutiable contingent on the circumstances surrounding the imported product. Customs employs various methods in determining the import value. The preferred method of appraisement is transaction value and is defined as the price actually paid or payable for the merchandise sold for exportation to the U.S. Additions such as royalty or license fees can be included in the dutiable value.

In a recent Customs ruling, H233376 (September 19, 2016), CBP provided clarification on when a royalty might be properly included in the dutiable value. In the ruling, the importer contracted a foreign manufacturer to produce certain products under a patented process for import into the U.S. The royalty payment for use of the patent was paid by the importer to a third party. The importer claimed the royalty fees are not dutiable since the payment was not made to the benefit of the seller.

Customs asserted the importer was required to obtain the rights to manufacture and import the goods before the start of production. Without the license to use the patented process, the product would not have existed. In addition, Customs recognized royalty payments made to a third party does not preclude it as an addition to the dutiable value. The relevant issue is determining if the patent was necessary for the production and sale of the imported merchandise. Customs determined the royalty paid for the right to use a patented process is a dutiable addition to import value.

For more information, contact: John Brew, Charles De Jager, Wing Cheung

Prepared as part of our occasional collaboration with Laura Beretta and Davide Rovetta, Grayston & Co., Brussels.

Advocate General's Opinion in EU-Singapore FTA Case Confirms Shared External Competence

Following the initiation of the EU-Singapore Free Trade Agreement (EUSFTA), the European Commission sought an Opinion from the Court of Justice of the European Union (CJEU) on the allocation of competence between the EU and its Member States regarding the Agreement. The EUSFTA provides that it is to be concluded as an agreement between the EU and Singapore without the Member States' participation. However, in her recently published Opinion, CJEU Advocate General Eleanor Sharpston concluded that the EUSFTA can only be concluded by the European Union and the Member States acting jointly.

AG Sharpston reviewed the areas of the agreement for which the EU enjoys exclusive external competence and those for which it shares external competence with the Member States. Among the latter areas are certain transport services and related government procurement, the non-commercial aspects of intellectual property rights, fundamental labor and environmental standards, and dispute settlement, mediation and transparency mechanisms applicable in the areas of shared competence. Because these parts of the EUSFTA do not fall within the EU's exclusive competence, AG Sharpston concluded that the Agreement cannot be concluded without the Member States' participation. She further concluded that the EU has no external competence to agree to be bound by the part of the Agreement terminating bilateral agreements between certain Member States and Singapore.

In accordance with CJEU procedures, the Opinion of the Advocate General is delivered ahead of the CJEU's decision, which is expected later in 2017 and is likely to follow largely AG Sharpston's Opinion. A more detailed review of the issues will be provided in a future issue on the basis of the CJEU's decision. The ultimate decision of the CJEU may have a significant impact on the EU's ability in the future to conclude comprehensive free trade agreements with third countries.

For more information, contact: John Brew, Charles De Jager

U.S. and UN Take Strong Action Against North Korea

The months of November and December saw major steps by both the U.S. and the United Nations targeting the Democratic People's Republic of Korea's (DPRK) nuclear and ballistic missile programs. First, on November 9, the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) published a final rule imposing correspondent banking restrictions on U.S. financial institutions in an effort to wall off North Korean banks from the U.S. financial system.

Citing ongoing concerns over the DPRK's ability "to access the international financial system to support its WMD and conventional weapons programs," the rule exercises FinCEN's authority under Section 311 of the USA PATRIOT Act to impose so-called "special measures," requiring covered financial institutions to both prevent North Korean banks from opening correspondent accounts and to take steps to ensure that North Korean banks do not indirectly make use of their correspondent relationships with other foreign financial institutions.

For more information, please see Crowell's Client Alert.

For more information, contact: Carlton Greene, Cari Stinebower, Charles De Jager, J.J. Saulino, Joel Mallord

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CROWELL & MORING'S FIRST 100 DAYS SERIES CONT.

PODCAST – Aviation and the FAA: Unmanned Aircraft Systems

As part of Crowell & Moring's "First 100 Days" podcast series, Marc Warren, chair of the firm's Aviation Group, and Steve Seiden, counsel in the group, sit down to discuss how the Trump Administration might affect the regulatory climate for commercial drones. Marc previously served as the deputy chief counsel of the Federal Aviation Administration, and Steve also served the FAA in various capacities, including a one-year assignment as special counsel to the agency's chief counsel.

Discussed in this 18 minute podcast:

- Why Unmanned Aircraft Systems (UAS) are the next big thing, their potential, and industry and business applications.

- Current state of regulatory play – pilot requirements, when and where drones can be flown, and the waiver process.
- Opportunities and challenges for the Trump Administration.
- Near-term issues (a forthcoming notice of proposed rulemaking on microdrones).
- What's next? (large drones, operations over people, and fully autonomous drones).
- Other issues worth tracking (Federal preemption, potential conflicts with state laws, and privacy issues).

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

For more information, contact: Marc Warren, Steven Seiden

PODCAST – Common Misperceptions about Undoing a Prior Administration's Executive Actions

In the latest podcast for Crowell & Moring's "First 100 Days" series, Dan Wolff, chair of the firm's Administrative Law & Regulatory Practice, and Tom Lorenzen, partner in the firm's Environment & Natural Resources Group and former assistant chief with the DOJ's Environment & Natural Resources Division, sit down with Jim Flood, chair of Crowell & Moring's Government Affairs Group to discuss the possibility of President-elect Trump's administration repealing, replacing, or eliminating prior executive actions, regulatory actions, or other policies.

Common misperceptions that will be addressed in this 15 minute podcast:

- A new president can easily strike all the regulations he or she does not like on day one.
- Regulations promulgated pursuant to Executive Orders can be erased simply by revoking the Executive Order.
- Congress can simply eliminate regulations under the Congressional Review Act and the new administration can start on a blank slate.
- Regulations at various stages of finalization can easily be discarded.

Click below to listen via the embedded player or access from one of these links:
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For more information, contact: James Flood, Daniel Wolff, Thomas Lorenzen

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AGENCY ENFORCEMENT ACTIONS

Financial Crimes Enforcement Network (FinCEN)

- On December 15, FinCEN assessed a $500,000 civil monetary penalty against Bethex Federal Credit Union, Bronx, New York, for significant AML violations. Among other infractions, Bethex failed to timely detect and report suspicious activity to FinCEN and did not file any Suspicious Activity Reports (SARs) from 2008 through 2011. In 2013, as a result of a mandated review of previous transactions, it late-filed 28 SARs. The majority of the suspicious activity involved high-volume, large amount transfers outside of Bethex's expected customer base by Money Services Businesses (MSB) capable of exploiting Bethex's AML weaknesses. Most of those SARs were inadequate and contained short, vague narratives encompassing a broad summary of multiple and unrelated instances of suspicious activity.

For more information, contact: Edward Goetz

OTHER AGENCY ACTIONS

Office of Foreign Assets Control (OFAC)

- On December 20, OFAC amended General License 1 pursuant to E.O. 13722 of March 15, 2016, "Blocking Property of the Government of North Korea and the Workers' Party of Korea, and Prohibiting Certain Transactions With Respect to North Korea."
  - General License 1-A no longer authorizes U.S. financial institutions to open and operate accounts for the diplomatic mission of North Korea and its employees and their families. It now requires that funds transfers to or from the mission or its employees be conducted through an account at a U.S. financial institution that has been specifically licensed by OFAC.
- On December 22, OFAC published a final rule in the Federal Register amending the Iranian Transactions and Sanctions Regulations (ITSR) to reflect OFAC's licensing policies and address inquiries from the regulated public. This final rule makes changes relating to authorized sales of agricultural commodities, medicine, and medical devices to Iran pursuant to the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA), as amended, and clarifies the definition of the terms goods of Iranian origin and Iranian-origin goods.
  - OFAC is also published a number of new and updated Frequently Asked Questions pertaining to this regulatory amendment.

State Department

- On January 3, 2017, the Directorate of Defense Trade Controls (DDTC) published a final rule in the Federal Register amending the International Traffic in Arms Regulations (ITAR) to enable U.S. Customs and Border Protection (CBP) to implement the International Trade Data System (ITDS), which will allow businesses to electronically submit the data required to import or export cargo, as provided by Executive Order 13659 and the Security and Accountability for Every Port Act of 2006 (SAFE Port Act).
  - This rule became effective on December 31, 2016.

U.S. Customs and Border Protection

- On January 19, 2017, CBP will formally implement its Centers of Excellence and Expertise (Centers), making them a permanent organizational concept of the agency and transitioning certain additional trade functions to the Centers.

- Written comments will be accepted on this interim final rule until January 19, 2017.

For more information, contact: Edward Goetz

CROWELL & MORING WINS

Federal Circuit Unanimously Affirms CIT Victory for Schlumberger

On January 9, 2017, the Federal Circuit unanimously affirmed a 2015 decision by the Court of International Trade (CIT) granting summary judgment to Crowell & Moring client Schlumberger regarding the classification of Schlumberger's imported proppants used in hydraulic fracturing.

The Federal Circuit case concerned U.S. Customs and Border Protection (CBP) and the Department of Justice's (DOJ) appeal of a 2015 CIT decision granting summary judgment in favor of Schlumberger. The CIT had rejected CBP's proposed classification of the imported bauxite-based proppants in heading 6909 within the Harmonized Tariff Schedule of the United States (HTSUS) as "ceramic wares for other technical uses," dutiable at 4 percent *ad valorem* and instead agreed with Schlumberger that the proppants were properly classified as "aluminum ores or concentrates" in Heading 2606, HTSUS, which carries no import duties.

After briefing and an oral argument before Circuit Judges O'Malley, Wallach and Taranto on December 11, 2016 at which Alex Schaefer (Partner, D.C.) argued on behalf of Schlumberger, the Federal Circuit denied DOJ's appeal on January 9, 2017. In Judge Wallach's opinion on behalf of a unanimous panel, the Federal Circuit affirmed the CIT's decision, rejected classification of the imported proppants in Chapter 69, HTSUS, and confirmed that the proppants should instead be imported duty free in Heading 2606, HTSUS.

Alex, who also argued the case in the trial court, was joined on the briefs at the Federal Circuit by John Brew (Partner, D.C.) and Dj Wolff (Counsel, D.C.). The litigation team also relied heavily on support from Joe Meadows (Counsel, DC), Frances Hadfeld (Counsel, NYC), Ade Johnson (Associate, D.C.), and Ru Xiao-Graham (Trade Analyst, D.C.).

CROWELL & MORING ANNOUNCEMENTS

Crowell and Moring's international trade group has been recognized by *Law360*as an international trade practice group of the year.

CROWELL & MORING SPEAKS

On February 1, International Trade Group Counsel Chris Monahan will be part of a panel entitled, "How to Maintain Compliance in Cloud Computing" at C5's Forum on ITAR and EAR: U.S. Trade Controls Compliance in Europe in London.

On February 6-7, International Trade Group Partner John Brew and International Trade Group Associate Aaron Marx will be speaking at "The Sports and Fitness Lawyers Team Presents: Zone Defense" program in Las Vegas. Both will be on a panel entitled, "Sports Developments in Trade Law: Impact of Potential New Border Taxes on Imports; Plus, How to Combat Infringing Imports and Comply with New Forced Labor Laws." John will be discussing Border Tax Adjustments, while Aaron will be speaking on Intellectual Property Rights.

On February 10, Intellectual Property and Environment & Natural Resources Group Associate Preetha Chakrabarti will be speaking at the Federal Bar Association's 2017 Fashion Law Conference at the Parsons School of Design in New York. Preetha will be speaking on a panel entitled: "Corporate Responsibility: Child Labor and Sustainability." This panel will provide an overview of international treaties and U.S. laws affecting child and or forced labor and environmental sustainability issues. International Trade Group Counsel Frances Hadfield will moderate this panel and is a principal organizer of this annual conference.

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