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CLIENT ALERT

This Month in International Trade - May 2015

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TOP TRADE DEVELOPMENTS

Trade Alert: Expansion of Requirement to Report on U.S. Investment Abroad Necessitates Extension to June 30 for All First Time Filers

BEA's decision to require all U.S. persons with direct or indirect investment in a foreign affiliate has resulted in so many questions and issues that late on May 28, 2015, BEA felt compelled to extend the reporting deadline to June 30 for all first-time filers. That was already the deadline for U.S. companies with 50 or more foreign affiliates to report, but extensions are available to July 31 (50 to 100 forms) or August 31 (over 100 forms) by submitting a request.

U.S. companies subject to the reporting requirements are required to file consolidated reports on behalf of all U.S. entities that were part of their "consolidated domestic business enterprise" for fiscal year 2014 (*i.e.*, from the top U.S. company down the ownership chain to all U.S. entities more than 50 percent controlled by the U.S. entity above it). BEA has decided not to grant authorization for companies in the domestic business enterprise to file on a deconsolidated basis, even for businesses where the parent does not typically consolidate financial information, such as private equity funds.

For more information, contact: Alan Gourley, Jana del-Cerro

Cuba off State Sponsors of Terrorism List Accelerating Normalization of Relations

The U.S. cleared another barrier to the normalization of relations with Cuba on May 29 when Cuba was officially removed from the U.S. State Sponsors of Terrorism List (SST). Although the President had already declared his intention to remove Cuba from the list, federal law requires a 45 day review period to allow Congress to oppose a country's removal. In this case, Congress did not oppose the measure. While this indicates Congressional acquiescence, it does not necessarily portend Congressional support for more robust efforts to roll-back the remaining embargo.

The removal of Cuba from the SST list does not affect the remaining embargo, which will require Congressional action to remove. It does however have two interrelated positive consequences: (1) the easing of the relations between U.S. and Cuban financial institutions, and (2) allowing for faster re-establishment of diplomatic relations by the opening of embassies.

Since February 2014, the Cuban Interests Section in Washington, D.C. had been unable to find a bank to replace M&T Bank Corp, who closed its account on March 1, 2014. While many of their transactions are legal under a license by the U.S. government, banks were unwilling to conduct any transactions with SST countries. This risk-aversion persisted even after President Obama announced Cuba's removal from the list. It was not until May 21, 2015 that a Florida bank said that it had reached an agreement with the government of Cuba to provide banking services to the Cuban Interests Section, which had been operating in cash since its account was closed.

Further, Cuba had set its removal from the list as a precondition for the reciprocal reopening of embassies. Cuba has always considered its inclusion on the list as baseless. It is now expected that both countries, unlike in their last diplomatic meeting held in May, will soon announce a more detailed plan for the opening of embassies.

Although opponents of the Cuban regime and supporters of the embargo continue to highlight Cuban human rights violations and the lack of concessions from the Cuban government in the negotiation with the U.S., U.S. corporations continue to consider business opportunities in Cuba and lobby Congress to lift the remaining embargo. Several pieces of legislation have been introduced that would remove portions (*e.g.*, the travel ban) or all of the remaining embargo. The removal of Cuba from the terrorism list is an important step forward.

Meanwhile, non-U.S. investors with well-established Cuban business relations continue to build on their competitive advantage. Delegations from several countries have been increasing official visits to Cuba to propose new business and reach agreements with the government.

For further discussion, please register for Crowell's upcoming seminar, "Cuba: An Update on the Liberalization of Trade Relations" June 18, in our New York office.

For more information, contact: Cari Stinebower, Dj Wolff and Mariana Pendas

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Supreme Court Declines to Hear Trek Leather Appeal Upholding Corporate Officer's Personal Liability for Customs Non-Compliance

Last week, the U.S. Supreme Court declined to review the U.S. Court of Appeals for the Federal Circuit's September 2014 ruling holding the president of Trek Leather Inc. personally responsible for penalties related to violations of U.S. Customs and Border Protection (CBP) laws.

The high court declined to grant Trek President Harish Shadadpuri's petition for a writ of certiorari on the *en banc* (*i.e.,* the full court instead of the typical three-judge panel) decision which unanimously backed CBP's decision to hold Shadadpuri personally and individually liable for penalties stemming from the presentation of false documentation related to imports of men's suits in 2004.

Shadadpuri argued in his petition that the *en banc* panel misread a U.S. customs law because the decision effectively nullified the portion of the statute that creates liability for those who aid and abet customs fraud. This misreading dramatically expands the list of individuals U.S. Customs and Border Protection may pursue for penalties.

U.S. v. Trek Leather, Inc. and Harish Shadadpuri established that any person engaging in negligent, grossly negligent, or fraudulent conduct in the course of importing goods into the U.S. may be subject to liability under the customs penalty statute regardless of that person's corporate status. Moreover, the holding establishes that such liability is not limited to the actual importer of record, but rather may attach more broadly to any party that causes goods to be "introduced" into the U.S.

In the wake of the ruling in *Trek Leather*, corporate personnel tasked with overseeing import and customs compliance functions have expressed a fear that the court's interpretation of the penalty statute substantially expands the scope of personal liability under the customs laws. That fear may be well-founded because the court's broad interpretation of the terms "person" and especially "introduce" suggests that such personnel may be personally liable for customs penalties based on any of a variety of pre-importation actions that violate the customs law.

Clients with questions on this case and its implications for corporate officers and compliance programs should contact one of Crowell's customs attorneys. We have extensive experience assisting clients with the development of tailored procedures to avoid customs violations and penalty liability.

For more information, contact: John Brew, Alex Schaefer

TPA Passes Senate, but Tough Fight Expected in House

After years of debate, on May 22, the Senate took the first major step to pass Trade Promotion Authority (TPA) when it passed the Trade Act of 2015 (H.R. 1314) by a vote on of the Trade Adjustment Assistance (TAA) program, which provides workers who lose their jobs due to trade with job training, job search and relocation allowances, income support, and at 62-37. The bill would grant the president authority to submit negotiated trade agreements to Congress for an up/down vote, without amendment. It also includes a six-year reauthorization assistance with healthcare premium costs.

TPA's passage in the Senate is a major step towards the White House's goal of concluding negotiations on the Trans-Pacific Partnership (TPP), though the legislation faces an uncertain future in the House.

The Senate approved two amendments to the draft legislation during its floor debate. The first was an amendment sponsored by Senate Finance Committee Chairman Orrin Hatch (R-Utah) and Ranking Member Ron Wyden (D-Oregon), which would add enforceable rules on currency manipulation as a principle negotiating objective in U.S. trade agreements. Notably, an amendment with stronger language on currency manipulation, proposed by Senators Rob Portman (R-Ohio) and Debbie Stabenow (D-Michigan) and opposed by the White House, was voted down. The second agreed amendment, proposed by Senator James Lankford (R-Oklahoma), would make religious freedom a negotiating objective.

Other amendments that were not approved included Senator Elizabeth Warren's (D-Massachusetts) amendment that would strip TPA procedures from trade agreements that include investor-state dispute settlement (ISDS), and Senator Sherrod Brown's (D-Ohio) amendment that would require further Congressional approval before negotiations are opened with new countries seeking to join TPP.

A controversial human trafficking amendment, which would disallow fast-track procedures for agreements with countries classified by the State Department as "Tier 3" violators of human-trafficking standards, was included in the final bill. Malaysia, which is currently negotiating TPP with the U.S., was classified under Tier 3 in the State Department's latest Trafficking in Persons Report. The amendment's sponsor, Bob Menendez (D-NJ), announced on May 19 that he had reached a compromise with Senators Hatch and Wyden to weaken the language in the amendment, which is expected to be achieved later in the legislative process.

The House Republican leadership has indicated that the House will begin consideration of TPA the week of June 8. At this point, it remains unclear whether the legislation will pass the House, given opposition by a majority of House Democrats and a conservative wing of House Republicans. Both TPA supporters, including industry groups and the White House, and TPA opponents, including labor unions and environmental groups, are ramping up efforts in the lead up to the House vote to shore up support for their respective sides.

For *more information, contact: Dj Wolff, Evan Yu*

Exports to Russia: BIS Issues Additional Due Diligence Guidance

On May 20, the Bureau of Industry and Security (BIS) posted additional guidance to U.S. exporters to prevent unauthorized re-exports to Russia. BIS is concerned with efforts by front companies and other intermediaries, who are not the final end-user, to transship or re-export U.S.-origin items to the Russian Federation in violation of the restrictions implemented last August to target Russia's energy and defense sectors.

BIS is particularly concerned with transactions involving National Security (NS)-controlled items, or items listed in Supplement No. 2 to Part 744 of the Export Administration Regulations (EAR), which lists items that are subject to the military end use license requirement.

As described in Supplement No. 3 to Part 732 of the EAR, whenever a person who is clearly not going to be using the item for its intended end use (*e.g.*, a freight forwarder) is listed as an export item;s final destination, the exporter has an affirmative duty to inquire about the end use, end user, and ultimate destination of the item to ensure the transaction complies with the EAR.

In the new guidance, BIS states that in addition to screening all parties to a proposed transaction, exporters should pay attention to any information that may indicate an unlawful diversion is planned. For example, companies should be alert to any discrepancies between destination country on the one hand, and the country from which an order is placed or payment is made, on the other.

BIS asks exporters investigating the ultimate destination of an item to consider e-mail addresses and telephone number country codes, as well as the languages used in communications from customers or on a customer;s website, and to conduct research on intermediate and ultimate consignees and the purchaser using business registers, company profiles, websites, and other resources. Additionally, BIS directs exporters to pay attention to the countries a freight forwarder serves, and the sectors a distributor or other non-end user customer supplies.

Based on the results of this extensive due diligence, exporters should consider whether a license is required to the likely country of ultimate destination and end use and end user. If any doubts or concerns remain, BIS recommends suspending the transaction and applying for a license and including any relevant information, or to refrain from the transaction altogether.

For more information, contact: Jana del-Cerro, Edward Goetz

EU and Mexico to Upgrade Free Trade Agreement

On May 11, in the course of a meeting taking place in Brussels, European Trade Commissioner Cecilia Malmström and Mexican Secretary of Economy Ildefonso Guajardo Villarreal announced their intention to upgrade the existing EU-Mexico Free Trade Agreement (FTA). EU and Mexico had previously concluded an agreement for trade in goods in 2000, which was followed in 2001 by an agreement for trade in services.

According to Commissioner Malmström, the upgrade is necessary in view of the strong ties between the EU and Mexico and to make the past agreements more suitable to the new global economic scenario. In particular, the new agreement should aim at a

level of integration similar to those achieved by the EU-Canada trade agreement (CETA) and by other 'deep' trade agreements recently entered into by the EU. To this end, it is necessary for the future deal to include not only trade in goods and services, but also detailed provisions in other areas such as the protection of intellectual property rights and investments.

Commissioner Malmström indicated her commitment to request a mandate from the Council of the European Union to start negotiations this year.

Crowell will be carefully monitoring the agreement as it takes shape and encourages EU companies to reach out to one of us with any questions on how to ensure the negotiating mandate reflects your specific priorities.

For more information, contact: Salomé Cisnal De Ugarte, Grégoire Ryelandt, Lorenzo Di Masi

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BIS Seeks Comments on Proposed Export Controls for Intrusion Software and Network Surveillance Equipment

While Congress debates the extent of U.S. government surveillance over U.S. communications, the Bureau of Industry and Security (BIS) has proposed a rule to control certain surveillance technology, such as intrusion software and network surveillance equipment that could be used by authoritarian regimes to track and target dissenting citizens. This proposal, published for comment on May 20, implements certain agreements reached at the 2013 plenary Wassenaar session.

The proposed rule:

- Revises the eligibility of certain software controlled under ECCN 5D002 for License Exception ENC and adds a new requirement for license applications to export such items.
- Adds a new Category 4 entry, ECCN 4A005 concerning delivery systems for "intrusion software" as well as related software and technology.
- Adds a new Category 5 Part 1 entry, ECCN 5A001.j, designed to cover a narrow category of systems that are capable of analyzing large amounts of data and enable tracking of users on an individual level.
- Adopts the Wassenaar Arrangement definition of "intrusion software," covering software that is "specially designed or modified to avoid detection by 'monitoring tools,' or to defeat 'protective countermeasures,' of a computer or network capable device," *and* is capable of performing either information or data extraction or modification, or the modification of standard program or process execution paths to allow the execution of externally provided instructions.

Although BIS has publicly expressed its intent that the changes are to apply narrowly to target surveillance and network exploitation tools used offensively for surveillance purposes rather than for internal, defensive network security purposes, many in industry have expressed concern that the BIS proposal has failed to define these tools with sufficient precision. The challenge in reaching the appropriate balance is underscored by the very fact that it has taken BIS a full year to propose a rule.

Comments are due by July 20, 2015 and may be made by:

- Submission to the Federal rulemaking portal (*www.regulations.gov*). The regulations.gov ID for this rule is: BIS-2015-0011; or

- Submission via email to *publiccomments@bis.doc.gov* or on paper to Regulatory Policy Division, Bureau of Industry and Security, Room 2099B, U.S. Department of Commerce, 14th St. and Pennsylvania Ave. NW., Washington, D.C. 20230. BIS asks commenters refer to RIN 0694-AG49 in all comments and in the subject line of email comments.

Please feel free to contact Crowell with any questions you might have on this proposed rule.

For more information, contact: Alan Gourley, Lindsay Denault

DOJ Expectations from Companies Cooperating with Criminal Investigations

In early May, Assistant Attorney General Leslie R. Caldwell, speaking at the New York City Bar's fourth annual White Collar Crime Institute in Manhattan, candidly expressed what the government is looking for from companies wanting credit for cooperating in criminal investigations.

She noted, "While every internal investigation will be unique, and depend on the scope of misconduct and the size and nature of the corporation, there are a few aspects that are universal:

- We expect you to learn the relevant facts, assuming they are learnable.
- If you choose to cooperate with us, we expect that you will provide us with those facts, be they good or bad.
- Importantly, that includes facts about individuals responsible for the misconduct, no matter how high their rank may be.
- We expect timely provision of evidence. What does that mean? That doesn't mean you need to call us on day one. In most cases it is in everyone's interest for there to be an orderly internal investigation. Exact timing varies with the facts, but once companies know the facts, we do not expect them to delay providing them to us."

Ms. Caldwell also said, "A company's cooperation can be particularly helpful where the criminal conduct continued over an extended period of time, and the culpable or knowledgeable personnel and/or the relevant documents may be dispersed or located abroad. The difficulty of investigating under these circumstances makes your cooperation especially useful to us. Cooperation in these cases means helping to remove and overcome the barriers to identifying and producing the relevant information that we need to conduct a meaningful investigation. A company can do this by:

- Making relevant documents available where the department would otherwise have difficulty in obtaining them, either through protracted litigation or other compulsory process.
- This is especially true for evidence that is located abroad. While we recognize there may be some real legal hurdles to the provision of some types of data and information, subject to foreign law, your first instinct when providing cooperation should be, "how can I get this information to the government?" It should not be a knee-jerk invocation of foreign data privacy laws designed to shield critical information from our investigation.
- We have taken recent steps to increase our knowledge of foreign data privacy laws, and we will question what we think are overbroad assertions about those laws."

In addition to illustrating her points on what cooperation is with recent cases, she also emphasized what cooperation is not. Caldwell explained, "Compliance with our subpoenas is not cooperation. Public relations talking points are not cooperation. A whitewash about the facts of any individual's involvement is not cooperation. We do not want you to decide to withhold information about what seems on its face to be wrongdoing just because you or your clients are able to imagine a hypothetical scenario in which there could be an innocent explanation for the conduct."

Caldwell's comments reflect the regulatory expectations across multiple agencies relating to sanctions, export controls, anti-corruption and anti-money laundering. Internal reviews must be well organized, thorough, prompt and often must take into account cross-border issues arising from potentially conflicting legal obligations. We at Crowell & Moring help clients navigate this web of legal obligations in order to address the corporate culture of compliance and would be happy to provide additional details relating to developing effective policies and procedures as they relate to compliance and internal reviews.

For more information, contact: Cari Stinebower, Edward Goetz

Canada and Mexico Prepare to Initiate Retaliatory Tariffs over Meat Labeling Requirements

The U.S. Department of Agriculture's country of origin labeling (COOL) regulations, in effect since 2009, require that the labels of various meats (such as beef, lamb, pork, chicken, and goat) identify the country where the animal was born, raised, and slaughtered.

Alleging the regulations discriminatory, Canada filed a complaint against the U.S. regarding this regulation at the World Trade Organization (WTO), which Mexico later joined. In 2011, a WTO dispute resolution panel ruled against the U.S.; on appeal the following year, the result was upheld.

The U.S. proposed an amendment to the regulations in May of 2013 to comply with the WTO decision. Canada and Mexico challenged the new rule at the WTO, and again the panel ruled against the U.S. in July of last year. Just last month, the WTO upheld that ruling on appeal.

Canada has threatened to assess retaliatory tariffs on various food products (such as beef, pork, corn, apples, chocolate, and pasta), and is considering to initiate the retaliatory tariff process at the WTO. Mexico is expected to follow suit.

In response, House Agriculture Chairman K. Michael Conaway (R-Texas), introduced House Resolution (H.R.) 293, which would amend the Agricultural Marketing Act of 1946 by repealing the country of origin labeling requirements with respect to beef, pork, and chicken, and for other purposes. The bill reported out of the House Agriculture Committee on May 18 with a 38 – 6 vote.

It is unknown when the bill will be taken up by the full House, or how it will be handled in the Senate. Recent comments on the subject by Senator Chuck Grassley (R-Iowa), a proponent of COOL, suggest the Senate will not be in a rush to repeal the rule. In a May 19 conference call with agriculture media, Grassley said Congress should take its time and consider alternatives.
Please contact one of us with any questions on this issue.

For more information, contact: Jini Koh, Aaron Marx

Court Changes Government's Flight Plan – Limits Warrantless Laptop Seizures at Border

On May 8, 2015, U.S. District Judge Amy Berman Jackson granted a motion to suppressthe use of potentially incriminating emails recovered from a laptop computer seized at Los Angeles International Airport in 2012 from a South Korean businessman, Mr. Jae Shik Kim. By granting this motion, the court prevented the U.S. Department of Homeland Security (DHS) from using the email as evidence in a case in which the government alleged that Mr. Kim conspired to send aircraft parts from the U.S. to China, and from there to Iran.

DHS had received information that indicated that Mr. Kim was involved in a previous shipment of controlled articles that were ultimately forwarded to Iran. Based on this, the DHS agents elected to seize and search Mr. Kim's laptop on his next visit to the U.S. As it happens, the laptop was seized as Mr. Kim boarded his return flight to South Korea and not returned to him prior to departure. Instead, the laptop was taken for examination at a location 150 miles from the airport. Further, the government had unlimited time to conduct a search of the laptop (*i.e.*, the situation was not a normal border search). The computer's hard drive was copied and searched using specialized software and a list of keywords. Moreover, a warrant was only obtained *after* incriminating emails were found on the machine. No further searches were then undertaken. Nonetheless, the emails discovered before the warrant was issued formed the basis of the government's criminal cases against Mr. Kim. Mr. Kim argued that his rights under the Fourth Amendment of the U.S. Constitution had been violated.

The government maintained that the imaging and search of Mr. Kim's laptop (aided by specialized forensic software) for the purpose of gathering evidence in a pre-existing investigation was similar to the inspection of a piece of luggage: therefore, it was not subject to a limitation under the border search doctrine.

Judge Jackson disagreed. The court determined that the government had little cause to suspect criminal activity at the time of seizure. Accordingly, the judge rejected the government's argument because it would mean that the border search doctrine has no borders. In reaching this result, the judge reasoned that the amount of private information carried by international travelers was historically circumscribed by the size of the traveler's luggage or automobile, but that this was no longer the case. The court reasoned that technology has advanced to the point where electronic devices now store warehouses worth of information. Further, laptop computers, iPads and the like are simultaneously offices and personal diaries because they contain the most intimate details of our lives such as medical records, private emails, confidential business records and financial documents.

Also, the fact that Mr. Kim's name had been provided in connection with an alleged prior export violation did not persuade the court that there was sufficient evidence "that a crime was 'afoot.'" Accordingly, the Court found that under the totality of the unique circumstances—the imaging and search of the laptop, aided by software, for a period of unlimited duration and an examination of unlimited scope, for the purpose of gathering evidence in a pre-existing investigation, was: (1) supported by little suspicion of ongoing or imminent criminal activity; (2) was invasive of Kim's privacy; and (3) was so disconnected from the government's authority to search at the border—that it was unreasonable. Therefore, the Judge granted motion to suppress the evidence seized as a result of that search.

For more information, contact: Frances Hadfield, Edward Goetz

ITC Issues Ten Year Exclusion Order Against Chinese Company for Misappropriation of US Company's Trade Secrets and Patent Infringement

The International Trade Commission (ITC) issued a Limited Exclusion Order (LEO) excluding imported crawler cranes from Chinese manufacturer Sany Heavy Industry Co that were designed and manufactured using the misappropriated trade secrets and patented inventions of Manitowoc Cranes. The Commission's final determination in the *In Re Certain Crawler Cranes and Components Thereof* investigation (Inv. No. 337-TA-887) confirms that the ITC is a favorable forum in the fight against foreign intellectual property theft, especially in cases where jurisdiction may be difficult to establish in U.S. Courts.

The ITC issued its Final Determination affirming, in part, Administrative Law Judge Shaw's Final Initial Determination that Chinese heavy machinery manufacturing company Sany Heavy Industry Co. had misappropriated Manitowoc Cranes trade secrets in developing its products, infringed on two of Maitowoc's patents, and harmed the U.S. domestic crawler crane industry. The ITC determined that at least one product infringed certain claims of one of Manitowoc's patents and that six trade secrets of Manitowac's were protectable as trade secrets and misappropriated.

The investigation began in July 2013 after Manitowoc filed a complaint alleging Sany America imported crawler cranes which used Maitowoc trade secrets and infringed two of its patents. The alleged trade secrets included Manitowoc's specific marketing and business plan for certain crawler cranes, detailed cost and pricing information, manufacturing process and procedures, and engineering design standards and plans. Maitowoc claimed that the trade secrets were passed to Sany by a former Manitowoc employee.

Although the ALJ only recommended an exclusion order of 5-10 years, the ITC apparently believed the evidence supported the longer period of exclusion, and issued an exclusion order enjoining Sany America, Inc. from importing cranes that infringe the patent or use any of Manitowoc's trade secrets for 10 years. The Commission further issued a cease-and-desist order for a period of 10 years to prohibit the sale of cranes already imported into the United States. Although Sany America had only imported one crane into the United States, the ITC found that this was a commercially significant inventory in the light of the small market for that specific type of crane.

The Commission set a bond at 100 percent of the entered value, allowing accused products to enter the United States during the 60-day Presidential Review Period. While the President through his U.S. Trade Representative has the ability to disapprove the remedy for policy reasons, that authority has only been used once in the past 28 years and is extremely unlikely in this case.

Investigations alleging theft of trade secrets had not been a significant part of the ITC's docket until the Federal Circuit issued its landmark decision in the *Tian Rui* case, confirming that the ITC has jurisdiction over misappropriation of trade secrets even when the predicate acts occurred entirely outside of the United States. Since *Tian Rui*, the ITC has played an important role in addressing the alarming rise in international trade secret theft and is a particularly attractive forum against foreign defendants with no American presence because of its *in rem* jurisdiction over the goods imported into the U.S.

For more information, contact: Kathryn Clune, Mark Klapow, Frances Hadfield, Ru Xiao-Graham

FinCEN Levies 1st Civil Enforcement Action on Virtual Currency Exchangers

On May 5, Treasury's Financial Crimes Enforcement Network (FinCEN) levied its first fine against a virtual currency exchanger, Ripple Labs Inc. and its wholly-owned subsidiary, XRP II, LLC (formerly known as XRP Fund II, LLC). After BitCoin, Ripple is the second-largest cyber currency by market capitalization as of 2015.

The $700,000 civil money penalty was assessed because Ripple Labs willfully violated several requirements of the Bank Secrecy Act (BSA) by acting as a money services business (MSB) and selling its virtual currency, known as XRP, without registering with FinCEN, and by failing to implement and maintain an adequate anti-money laundering (AML) program designed to protect its products from use by money launderers or terrorist financiers.

FinCEN had previously issued guidance that it considered virtual currency providers to be subject to the same U.S. AML rules as MSBs. This action represents FinCEN's first enforcement measure demonstrating that it is holding virtual currency money exchangers to the same standards as conventional ones.

For more information, contact: Cari Stinebower, Dj Wolff, Nicholas DeLong

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Venezuela to Ease Currency Exchange by Authorizing Car Sales in U.S. Dollars

According to local press, the Venezuelan Government and *Ford Motors de Venezuela* have reached an agreement allowing the automaker to sell cars in U.S. dollars, instead of in local currency (*bolívares*). This measure, which may be implemented as early as July, constitutes an attempt by the Government of Venezuela to alleviate currency control problems and to allow Ford to recover revenue. Without a solution to the currency control problem, manufacturers such as Ford have been forced to drastically cut production in the country.

The disarray of Venezuela's exchange system has caused a significant impact on foreign investors. Billions of U.S. dollars have been stranded in *bolívares* awaiting repatriation. As an attempt to reduce the gap between the official and parallel exchange rates, the Government introduced in February a new foreign exchange platform called "Marginal Currencies System" (*Sistema Marginal de Divisas* or SIMADI). However, as expected, the creation of SIMADI has produced a substantial devaluation of the *bolívar* and thus negatively impacted sales and profits. Since 2011, the parallel market rate has risen from 10 to over 400 *bolívares* per U.S. dollar. (Please see Crowell's previous Client Alert for further explanation regarding the creation of SIMADI and Venezuela's exchange structure.)

In March, representatives of *Ford Motors de Venezuela* met with government officials to announce the signing of a "strategic alliance" to guarantee automotive production in the country. No further details were provided as to the nature and content of this alliance. Two months later, however, the leader of *Ford de Venezuela* labor union informed that the company will start selling certain car models in U.S. dollars, as part of a deal with the Government to resume production. The agreement provides that invoices of the Ford units will be issued in U.S. dollars and payments will be made through wire transfers to a foreign bank account.

Ford's alleged agreement triggered speculation as to whether the Government would dollarize Venezuela's economy, even though Venezuelan authorities have publicly denied the intention to do so. Given the deep economic recession that the country is facing, a move to a dual-currency system may be developing in Venezuela.

Problems with Venezuela's exchange control system have not only affected Ford. Other companies in a variety of industries, including the automotive sector, have disclosed substantial exposure to Venezuela's currency exchange restrictions. Worse still, many of these companies have reduced or even suspended operations as a result of the shortage of hard currency. Yet, there have been no other indications that any other company will be allowed to shift sales to U.S. dollars.

The Government's actions in refusing to permit monetary transfers out of the country could well violate Venezuela's international obligations, in particular the "free transfer" obligations found under bilateral investment treaties (BITs). Moreover, the Government's treatment of *Ford Motors de Venezuela* raises the question of whether such similar treatment will be offered to other companies and of whether this may also violate Venezuela's "national treatment" obligations under BITs. Even if the Government manages to liberalize capital movements in all sectors, Venezuela may well still be required to compensate companies for any losses incurred as a result of the delays, in addition to the base amount of all pending transfers.

For more information, please contact: Ian Laird, Cari Stinebower, and Eduardo Mathison.

AGENCY ENFORCEMENT ACTIONS

Securities and Exchange Commission (SEC)

- The SEC charged global resources company BHP Billiton with violating the Foreign Corrupt Practices Act (FCPA) when it sponsored the attendance of foreign government officials at the Summer Olympics in 2008. BHP Billiton, which neither admitted nor denied the SEC's findings, agreed to pay a **$25 million penalty** to settle the SEC's charges. The company also must report to the SEC on the operation of its FCPA and anti-corruption compliance program for a one-year period.The settlement reflected the company's remedial efforts and cooperation with the SEC's investigation.

For more information, contact: Cari Stinebower, Dj Wolff

OTHER AGENCY ACTIONS

Office of Foreign Assets Control (OFAC)

- On May 22, OFAC, in coordination with BIS, published Ukraine-related General License No. 9 , "Exportation of Certain Services and Software Incident to Internet-Based Communications Authorized."
- On May 5, OFAC issued Guidance Related to Travel Between the United States and Cuba pertaining to the Cuban Assets Control Regulations (CACR).

U.S. Customs & Border Protection (CBP)

- On May 29, CBP published a notice of intent to **distribute assessed antidumping or countervailing duties** (known as the continued dumping and subsidy offset) for **Fiscal Year 2015** in connection with countervailing duty orders, antidumping duty orders, or findings under the *Antidumping Act of 1921.* This **document** provides the **instructions** for affected domestic producers, or anyone alleging eligibility to receive a distribution, to file certifications to claim a distribution in relation to the listed orders or findings.

Department of State

- On May 26, DDTC proposed a new rule which provides more explicit guidance on the registration and licensing requirements applicable to U.S. citizens who furnish defense services as employees of foreign companies. For more information, please see our recent Client Alert.

Bureau of Industry and Security (BIS)

- On May 22, BIS issued a final rule amending the Export Administration Regulations (EAR) to **facilitate Internet-based communications with persons in the Crimea region of Ukraine.**
- On May 21, BIS issued a Final Rule implementing changes to the Export Administration Regulations (EAR) from the December 2014 Wassenaar Arrangement (WA) Plenary Meeting. Among other things, this rule amends the Commerce Control List (CCL) by implementing changes to 42 Export Control Classification Numbers (ECCNs), adding one ECCN and removing one ECCN, as well as amending the General Technology Note, WA reporting requirements, adding seven (7) definitions and revising six (6) definitions in the EAR.

For more information, contact: Edward Goetz

CROWELL & MORING SPEAKS

Frances Hadfield spoke at Fashion Group International of Toronto's "Export Success to the USA" event on May 26 at Shopify, 98 Spadina Ave, 4th Floor in Toronto (@FrancesHadfield).

Crowell invites you to an in-house discussion on "Cuba: An Update on the Liberalization of Trade Relations" at its New York office on June 18 from 9 – 10:30 am.

- Daniel Cannistra, Mike Gill, and Cari Stinebower will provide an update on Cuba trade policy, the prospective for further liberalization, and a discussion of the commercial considerations as U.S. businesses develop their strategy for reengaging with Cuba.

Please register at the link above or contact Stephen Kimmerling (skimmerling@crowell.com).

Chris Monahan will be a panelist on July 30 at ACI's Economic Sanctions West Coast Forum in San Diego. His panel's topic is "Working with OFAC to Obtain Necessary Licenses or Advisory Opinions in a Timely Manner."

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

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