

CLIENT ALERT

This Month in International Trade — October 2016

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In this issue:

- **Top Trade Developments**
 - Export Control News
 - Electronic CJ Process Starts November 21
 - New “Guidelines for Agreements” Effective November 15
 - BIS Update 2016 Conference
 - OFAC Clarifies Iran Guidance, but Policy Remains Unchanged
 - European Commission Urges Member States to Reinforce Trade Remedies
 - Significant Changes to Cuba Regulations Creating More Business Opportunities for U.S. Companies
 - U.S. Terminates Sanctions Against Burma
 - FinCEN Proposes Rule to Require Banks Lacking a Federal Functional Regulator to Establish AML Programs
 - Implementation of FinCEN Rule Imposing Special Measures on FBME Bank Again Delayed
 - BEA Changes Certain Private Fund Reporting Requirements & Revises the BE-13 Survey of New Foreign Direct Investment
- **Agency Enforcement Actions**
 - Directorate of Defense Trade Controls (DDTC)
 - Securities and Exchange Commission (SEC) and the Department of Justice (DOJ)
- **Other Agency Actions**
 - Bureau of Industry and Security (BIS) and DDTC
- **Crowell & Moring Welcomes**
- **Crowell & Moring Speaks**

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](#).

TOP TRADE DEVELOPMENTS

Export Control News

- **Electronic CJ Process Starts November 21**

The Directorate of Defense Trade Controls (DDTC) published an Industry Notice on October 21 stating that effective Wednesday, November 16th at 5 pm EST, the Department of State will no longer use the Electronic Form Submission (EFS) application to accept Commodity Jurisdiction (DS-4076) applications.

Beginning Monday, November 21st at 8 am EST, users will submit Commodity Jurisdiction (CJ) applications via the Defense Export Control and Compliance (DECCS) CJ application.

DDTC held a webinar on October 14, 2016, which provided a brief overview of the status of its IT Modernization effort and a demonstration of the new CJ (DS-4076) interface. For more information, please see the links below.

[Click here to read](#) | [Recorded webinar](#) | [Presentation slides](#)

- **New “Guidelines for Agreements” Effective November 15**

Revision 4.4b of DDTC’s “Guidelines for Preparing Agreements” will become effective November 15, 2016.

DDTC has posted the updated document, which may be [found here](#). There is a Summary of Changes included which describes the revisions.

- **Bureau of Industry and Security (BIS) Update 2016**

BIS held its Update 2016 Conference on Export Controls and Policy October 31 – November 2, 2016 in Washington, DC. All of the conference presentations may be [found here](#).

For more information, contact: Chris Monahan, Jana del-Cerro

OFAC Clarifies Iran Guidance, but Policy Remains Unchanged

On October 7, 2016, the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC) updated the [Frequently Asked Questions \(FAQs\) Relating to the Lifting of Certain U.S. Sanctions under the Joint Comprehensive Plan of Action \(JCPOA\)](#).

Although these updates did not involve any change to current law or regulation, they did provide clarification regarding OFAC's interpretations of its existing requirements. Specifically, OFAC updated three existing questions and added three more, the main aspects of which are summarized below:

- **Use of U.S. Dollars by non-U.S. Financial Institutions**

OFAC updated FAQ C.7 to affirmatively state (previously it only implied) that foreign financial institutions, including foreign incorporated subsidiaries of U.S. financial institutions, can process transactions denominated in U.S. dollars and maintain U.S. dollar-denominated accounts involving Iran, persons ordinarily resident in Iran, or the Iranian government, provided that there are no U.S. persons or financial institutions involved in the transaction. In other words, OFAC would not prohibit a non-U.S. financial institution to conduct U.S. dollar transactions involving Iran if those transactions were cleared locally outside the United States. If the transaction involved or required the involvement of a U.S. correspondent, then it would be prohibited unless authorized by a specific or general license.

- **Transactions with Entities Minority Owned by SDNs**

In FAQ M.10, OFAC clarified that it does not consider it sanctionable (pursuant to the remaining secondary sanctions) for a non-U.S. person to engage in a transaction with an entity that is “minority owned, or that is controlled in whole or in part, by an Iranian or Iran-related person on the SDN List;” if the entity was 50 percent or more owned by an SDN, it would be considered blocked by operation of law pursuant to OFAC's 50 percent rule. When transacting with minority-owned and/or controlled entities, OFAC recommends that the non-U.S. person exercise caution to ensure the non-U.S. person is not transacting with the persons on the SDN list directly or indirectly.

- **Due Diligence Obligations for Non-U.S. Persons**

OFAC published two new FAQs related to its expectations of the due diligence obligations for non-U.S. persons and non-U.S. financial institutions doing business with Iran. First, in FAQ M-11, OFAC clarified that it does not view it as “necessarily sufficient” for non-U.S. persons conducting business in Iran to only screen names against the SDN List. In addition to screening, OFAC recommends non-U.S. persons consult with their local regulators to comply with due diligence expectations under local law. In particular, OFAC recommends that the non-U.S. person undertake diligence that conforms to its internal risk assessment and compliance policies which should be based on the best practices within its industry and jurisdiction.

In FAQ M.12, OFAC clarified that it did not expect non-U.S. financial institutions to “repeat the due diligence its customers have performed on an Iranian customer” unless it has reason to believe that the due diligence is insufficient. The appropriate level of due diligence should be tailored to the institution's role in a transaction and should also take into account the expectations of local regulators in their local domestic jurisdictions.

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

European Commission Urges Member States to Reinforce Trade Remedies

On October 18, 2016, [the European Commission released](#) a communication entitled “Towards a robust trade policy for the EU in the interest of jobs and growth” in which it urges the Member States to support its efforts to update and strengthen the EU trade remedy rules to maintain fair trade conditions and safeguard jobs within its territory. The communication builds upon the proposal the Commission tabled in 2013 on the modernization of the EU trade remedy rules and its ongoing efforts to address unfairly traded imports from countries characterized by market distortions and pervasive state influence on the economy.

The Commission notes that despite applying the existing trade remedy rules to their full extent, its efforts have proven insufficient to counter overcapacities in a variety of industrial sectors causing imports to be dumped in the EU market. The communication highlights two elements of the EU trade remedy methodology requiring particular attention – the application of the lesser duty rule and the grant of market economy status. The first limits the level of duties that can be imposed, while the second could result in the imposition of lower duties on unfairly traded imports from China.

Under the lesser duty rule, the EU imposes antidumping duties at the lower of two levels between that of the dumping margin and that which removes injury. As a result, antidumping duties imposed by the EU and U.S. on comparable products can vary significantly, with the U.S. affording its producers greater protection from unfairly traded imports and causing dumped products to be diverted to the EU market. The Commission is bound to apply the lesser duty rule systematically, but has now suggested adapting it in cases involving exporting countries in which there are massive overcapacities or distortions in the prices of raw materials, including energy.

The Commission also would not grant market economy status to countries in which markets are distorted by pervasive state influence on the economy. Instead, it proposes a new methodology whereby costs and prices would be disregarded in calculating dumping when distortions are found, to be replaced by other available benchmarks, including costs and prices in other economies. In support of EU industries seeking action against unfairly traded imports, the Commission would prepare reports on countries or sectors marked by distortions. In addition, subsidies identified in the course of the ensuing proceedings could be investigated and taken into consideration in the level of duties finally imposed.

As a result of the limitations under current EU trade remedy rules, the Commission states that no trade bloc exercises a similar level of self-restraint as the EU in the imposition of duties on unfairly traded imports. In presenting the communication, Commission President Jean-Claude Juncker thus said: “Trade is essential for our economic growth and jobs creation, but we should not be naïve. Our current rules are proving insufficient to combat the harm from unfair foreign competition.” Although the Member States in the Council thus far have failed to agree on the Commission’s proposal, further developments are expected before the end of the year.

For more information, contact: Dan Cannistra, Charles De Jager

Significant Changes to Cuba Regulations Creating More Business Opportunities for U.S. Companies

On October 14, 2016, the Office of Foreign Assets Control (OFAC) and the Commerce Department’s Bureau of Industry and Security (BIS) announced changes to the [Cuban Assets Control Regulations \(CACR\)](#) and the [Export Administration Regulations](#)

([EAR](#)) respectively, to further relax U.S. sanctions targeting Cuba. The new amendments were published in the Federal Register on Monday, October 17, 2016.

With the new amendments, OFAC intends to “create more economic opportunities for Cubans and Americans” further implementing the new U.S. policy towards Cuba that President Obama originally announced on [December 17, 2014](#). These amendments are supplementing those published on [January 16, 2015](#), [September 21, 2015](#), [January 27, 2016](#), and in [March 2016](#).

The specific changes made by OFAC and BIS expand the following opportunities for persons subject to U.S. jurisdiction:

- **Opportunities for Trade and Commerce**

Exports and Re-exports to Cuba. OFAC has expanded its existing export authorization to remove a pre-existing gap in its regulations. Specifically, OFAC has now removed the reference to “100% U.S. –origin items” from its export or re-export authorization. The net effect of this change is to authorize the importation into the United States of non-U.S. origin product for re-export of that product to Cuba. Because of statutory restrictions in the 1992 Cuban Democracy Act, OFAC continues to prohibit persons subject to U.S. jurisdiction to export most products from third countries to Cuba directly.

Consumer goods for personal use. BIS expanded its License Exception Support for the Cuban People (SCP) to authorize the export of all consumer goods for personal use when sold directly to an individual for use by the individual or his/her family. The items must be EAR99 or controlled on the Commerce Control List (CCL) only for anti-terrorism purposes. This updated License Exception facilitates direct sales to the Cuban people, including through online retailers.

Import of items previously exported or re-exported to Cuba. The import into the U.S. or into a third country of items previously exported or re-exported to Cuba is now authorized. U.S. persons can also be involved in the repair and service of such goods regardless of their involvement in the export or re-export. However, the exportation or re-exportation of the repaired goods back to Cuba may need a specific license.

Vessel transactions. Foreign vessels can now call on U.S. ports within 180 days of calling on a Cuban port provided that the foreign vessel had carried items from a third country to Cuba that –if subject to the EAR– would be designated as EAR99 or controlled on the CCL only for antiterrorism reasons.

Contingent contracts. Persons subject to U.S. jurisdiction may enter into contingent contracts for transactions prohibited by the CACR, provided that the performance of such contracts is made contingent to an OFAC authorization and/or the authorization of any other Agency. Prior to this, only executory contracts were authorized. This new language authorizes the execution of pro forma invoices, bids, or proposals in response to public tenders or binding memorandum of understanding.

Transit of Cargo. BIS now authorizes air cargo transiting Cuba via aircraft on temporary sojourn, under its License Exception for Aircraft Vessels and Spacecraft (AVS).

Prohibited Officials of the Cuban government. The definition of Cuban officials and prohibited members of the

Communist party has been narrowed to cover members of the Council of Ministers and members of the Cuban Communist Party.

Donations. BIS has modified its License Exception for Gift Parcels and Humanitarian Donations (GFT) to authorize individuals who wish to send gift parcels to Cuba and certain donated items through a forwarding service acting on behalf of the donor, to an eligible recipient. BIS continues to maintain conditions regarding the types of items that qualify as gifts, eligible recipients, frequency of donations, and value of donations.

- **Supporting People to People Contact and Facilitating Authorized Travel**

Imports from Cuba. OFAC has removed several of the previous restrictions on imports of Cuban-origin product. Previously, travelers were only authorized to import a total of \$400 (of which \$100 could be tobacco or rum products) in Cuban-origin goods when traveling directly from Cuba. Now, authorized travelers may import into the United States the normal limits on duty and tax exemptions, including alcohol and tobacco products, provided that the merchandise is imported for personal use. Non-U.S. nationals traveling to the U.S. and persons subject to U.S. jurisdiction may also import Cuban-origin alcohol and tobacco into the U.S. as accompanied baggage from third countries, provided that it is for personal use.

Remittances. Remittances to third-country nationals for travel to, from, and within Cuba are authorized, provided that such travel would be authorized for a U.S. person.

Record keeping. OFAC is intending to eliminate the burden on record keeping requirements for providers of travel and carrier services to Cuba by allowing them to request either a copy of the travelers' specific license or the specific license number.

Professional meetings in Cuba. The General License authorizing travel to Cuba for purposes of attending or organizing professional meetings has been expanded by eliminating the condition that the conference does not promote tourism in Cuba. Travel to Cuba for tourism purposes is still prohibited.

Civil Aviation Safety. A new general license authorizes the provision of services to Cuba and Cuban nationals for the safe operation of commercial aircraft.

- **Opportunities for Scientific Collaboration and Access to Medical Innovations**

Joint Research. OFAC issued a new authorization allowing persons subject to U.S. jurisdiction to engage in commercial and non-commercial joint medical research projects with Cuban nationals. OFAC may issue specific licenses for importation of Cuban-origin commodities for bona fide research projects.

Marketing sales or distribution in the United States of FDA-approved Cuban origin pharmaceuticals. Transactions to market, sell, or distribute FDA-approved Cuban origin pharmaceutical products are now authorized. OFAC is also authorizing the opening, use and maintenance, and closing of accounts for authorized health-related purposes in Cuba.

- **Opportunities for Grants and Strengthening Cuba's Infrastructure**

Grants, scholarships and awards. OFAC specifically authorizes the provision of grants, scholarships and awards related to scientific research and religious activities. Previously, such contributions were only authorized for educational activities and humanitarian projects.

Cuban infrastructure. OFAC has also authorized the provision of services related to developing, repairing, maintaining and enhancing Cuban infrastructure that directly benefit the Cuban people. This includes services related to: (i) systems and assets used to provide the Cuban people with goods and services by public transportation; (ii) water management; (iii) waste management; (iv) non-nuclear electricity; (v) hospitals; (vi) public housing; (vii) schools; and (viii) environmental projects.

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

U.S. Terminates Sanctions Against Burma

On Friday, October 7, 2016, President Obama signed an Executive Order (EO) for the “Termination of Emergency with Respect to the Actions and Policies of the Government of Burma.” This EO is the promised follow-up to the President’s announcement last month that the U.S. would end its sanctions on Burma. This major policy shift also included a Presidential Proclamation on September 14, 2016, which restored preferential treatment for Burma as a beneficiary developing country under the Generalized System of Preferences (GSP) program. See Crowell & Moring’s previous alert for more information.

The EO was issued as a result of Burma’s recent advances in promoting democracy, releasing political prisoners and an overall increase in fundamental freedoms since the Burmese November 2015 elections. The EO effectively (i) terminates the national emergency declared in E.O. 13047; (ii) revokes Executive Orders 13047, 13310, 13448, 13464, 13619 and 13651; and (iii) waives financial and blocking sanctions in the Tom Lantos Block Burmese Jade Act of 2008 (JADE Act).

For more information on this development, please see Crowell’s Client Alert.

For more information, contact: Carlton Greene, Cari Stinebower, Alex Schaefer, Dj Wolff, Mariana Pendas

FinCEN Proposes Rule to Require Banks Lacking a Federal Functional Regulator to Establish AML Programs

On August 25, the Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN) published a Notice of Proposed Rulemaking that would require banks that lack a federal functional regulator to establish and implement anti-money laundering (AML) programs and extend customer identification program (CIP) requirements to certain financial institutions not already subject to these obligations under the Bank Secrecy Act (BSA).

For more information on this proposed rule, please see [Crowell's Client Alert](#).

For more information, contact: Carlton Greene, Cari Stinebower, Danielle Giffuni

Implementation of FinCEN Rule Imposing Special Measures on FBME Bank Again Delayed

On September 20, 2016, the U.S. District Court for the District of Columbia [again delayed](#) implementation of a rule by the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) branding FBME Bank Ltd. as a "primary money laundering concern" and effectively severing the foreign bank from the U.S. financial system. The rule, which would prohibit U.S. financial institutions from maintaining correspondent bank accounts on FBME's behalf, imposes the harshest measure available under Section 311 of the USA PATRIOT Act of 2001, one characterized by the court as "a potentially existential threat to any international bank."

For more information on this issue, please see [Crowell's Client Alert](#).

For more information, contact: Carlton Greene, Kelly Currie, J.J. Saulino

BEA Changes Certain Private Fund Reporting Requirements & Revises the BE-13 Survey of New Foreign Direct Investment

On October 20, 2016, the Department of Commerce's Bureau of Economic Analysis (BEA) published a [final rule](#) amending the foreign direct investment reporting requirements for certain U.S. private funds (those displaying characteristics of "portfolio investment" rather than "direct investment") and announcing revision of the BE-13 Survey of New Foreign Direct Investment to combine Forms BE-13A and BE-13C, and to clarify certain Survey instructions, effective November 21, 2016.

For more information on this new rule, please see [Crowell's Client Alert](#).

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

AGENCY ENFORCEMENT ACTIONS

Directorate of Defense Trade Controls (DDTC)

On October 5, the [Directorate of Defense Trade Controls \(DDTC\)](#) published its recently concluded consent agreement with Marc Turi and Turi Defense Group, Inc. The company was assessed a \$200,000 civil penalty in connection with the unauthorized conduct of brokering activities and the unauthorized proposal for sale or transfer of defense articles to a prohibited country, Libya.

Securities and Exchange Commission (SEC) and the Department of Justice (DOJ)

- One October 24, [the SEC announced](#) a global settlement along with the U.S. Department of Justice (DOJ) and Brazilian authorities that requires aircraft manufacturer Embraer S.A. to pay more than \$205 million to resolve alleged violations of the Foreign Corrupt Practices Act (FCPA). The SEC’s complaint alleges that Embraer made more than \$83 million in profits as a result of bribe payments from its U.S.-based subsidiary through third-party agents to foreign government officials in the Dominican Republic, Saudi Arabia, and Mozambique. Embraer allegedly created false books and records to conceal the illicit payments, and also engaged in an alleged accounting scheme in India.
 - Under the settlement, Embraer [must pay a \\$107 million penalty to the Justice Department as part of a deferred prosecution agreement](#), and more than \$98 million in disgorgement and interest to the SEC. Embraer may receive up to a \$20 million credit depending on the amount of disgorgement it will pay to Brazilian authorities in a parallel civil proceeding in Brazil. Embraer must retain an independent corporate monitor for at least three years.

For more information, contact: Edward Goetz

OTHER AGENCY ACTIONS

Bureau of Industry and Security (BIS) and DDTC

- On October 12, as part of Export Control Reform (ECR), BIS and DDTC published in the Federal Register final rules revising the [Export Administration Regulations \(EAR\)](#) and the [International Traffic in Arms Regulations \(ITAR\)](#) for U.S. Munitions List (USML) Category XII (Fire Control, Laser, Imaging, and Guidance Equipment).

For more information, contact: Edward Goetz

CROWELL & MORING WELCOMES

Robert LaFrankie is a senior counsel in Crowell & Moring’s International Trade Group and a resident in the firm’s Washington, D.C. office. Bob regularly advises manufacturers, exporters, and importers in all aspects of international trade and customs proceedings before various government agencies, courts, and international tribunals. He focuses on trade-related litigation and counseling, including trade remedy proceedings and U.S. Customs compliance and enforcement issues.

[Click here](#) to read Robert's full bio.

CROWELL & MORING SPEAKS

Paul Davies and Ben Caryl spoke on the “Markets in Transition” panel at the [68th Annual Virginia Conference on World Trade](#) in Norfolk, Virginia in October. Paul presented on Brexit and Ben presented on Cuba.

Ben Caryl will speak on the “Increasing Global Sales and Expanding the Value Chain” panel at the Virginia Manufacturers Association’s (VMA) Annual Industry Forum in Williamsburg, Virginia in November. Ben will be presenting on Federal International Trade Legal and Policy Developments.

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

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