FOLEY HOAG LLP

Cross-Border Compliance UPDATE

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Trade and Compliance Alerts from June and July 2020

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Foley Hoag LLP has formed a firm-wide, multi-disciplinary task force dedicated to client matters related to the novel coronavirus (COVID-19). In the rapidly changing global health environment, Foley Hoag will provide clients with the resources required to develop and implement legal and operational policies and procedures, as well as business strategies during the outbreak and beyond. For more information, see our Task Force statement here.

With an overwhelming majority of US companies feeling supply chain disruptions as a result of COVID-19, companies are facing shortages, longer lead time, and uncertainty around revenue targets. With a long history of working with clients from a broad range of industries, our Trade Sanctions & Export Controls team is equipped to guide and counsel clients as issues undoubtedly arise in the coming days, weeks and potentially months.

Hong Kong Updates and Alerts

New Restrictions on Exports to Hong Kong – License Exceptions for Hong Kong Suspended

On June 29, 2020, the State Department announced that the U.S. will end the export of U.S.-origin defense equipment to Hong Kong and will impose the same restrictions on U.S. defense and dual-use technologies exported to Hong Kong as it does for China. On July 31, the Bureau of Industry and Security (BIS) published a Final Rule implementing changes (announced on June 30) to the Export Administration Regulations (EAR) which suspend the availability of all license exceptions for exports or re-exports to Hong Kong, or transfers within Hong Kong, that provide different treatment for exports to Hong Kong as compared to China. Exporters should ensure that their internal processes are updated to avoid seeking to use such license exceptions when shipping to Hong Kong.

This change comes in response to the new Hong Kong national security law, which grants the Chinese government enforcement control over political offenses and vastly reduces Hong Kong's autonomy. In a press statement, Secretary of State Michael Pompeo said that after the passage of the new law, the United States "can no longer distinguish between the export of controlled items to Hong Kong or to mainland China."

Hong Kong Autonomy Act and New Executive Order

On July 14, 2020, President Trump signed the Hong Kong Autonomy Act (HKAA) into law. The HKAA enables sanctions on foreign persons who materially contribute to the Chinese government undermining the autonomy of Hong Kong, as well as foreign financial institutions which engage in "significant" transactions with such persons. As with the end of defense exports to Hong Kong, the HKAA was passed in response to the new Hong Kong national security law and growing U.S. concerns regarding the erosion of Hong Kong's autonomy.

Pursuant to the HKAA, President Trump released on the same date Executive Order (EO) 13936 which determines that Hong Kong is no longer sufficiently autonomous from China to justify differential treatment under U.S. law, and requires agencies to implement policies within 15 days to eliminate different and preferential treatment for Hong Kong, including in the areas of export control and immigration.

EO 13936 also includes blocking provisions that would create a new set of sanctions applicable to any person determined by the Secretary of State to be involved in actions or policies in Hong Kong including censorship; coercion or detention of individuals under the new Hong Kong national security law; acts that undermine democratic processes or institutions; acts that threaten the peace, security, stability, or autonomy of Hong Kong; and extrajudicial rendition, arbitrary detention, or torture. In addition, any leader or official of any entity, including any government entity, determined to have engaged in any of those acts is also subject to the EO's restrictions. At the time of publication of this Update, no persons have yet be sanctioned pursuant to EO 13936.

Exporter Alert: Military End-Use and End-User Expansion on China, Russia, and Venezuela Exports Creates Enhanced Diligence Burden and Restrictions

On June 26, 2020, BIS released new FAQs on the expansion of export, reexport, and transfer controls on certain items for "military end use" or to "military end users" in China, Russia, and Venezuela. The new export controls are set forth in 85 Fed. Reg. 23459 (April 28, 2020) and went into effect on June 29, 2020. This change expanded the definition of "military end use" and added "military end users" to controls that previously only applied to "military end *use*." The FAQs clarify that military end users includes foreign national governmental organizations, as well as state-owned enterprises (SOEs) or other specific entities that develop, produce, maintain, or use military items, meaning that covered exports will require a license even when the item to be exported is known to be destined for a dual-use purpose or item. For more information on this Rule, see our April Update.

Trump Administration Issues New EO to Authorize Sanctions on Persons Affiliated with the International Criminal Court (ICC)

On June 11, 2020, President Trump released Executive Order 13928, "Blocking Property of Certain Persons Associated With the International Criminal Court." EO 13928 would impose sanctions on any person determined by the Secretary of State to have directly engaged in any effort by the ICC to investigate, arrest, detain, or prosecute any U.S. personnel or personnel of a country that is an ally of the U.S., or any person who has materially assisted or provided supportto such persons. At the time of publication of this Update, no designations have been made pursuant EO 13928.

Huawei Updates

New Rule Allows "Standards Development" Disclosures to Huawei

On June 15, 2020, the Department of Commerce announced a new rule intended to promote U.S. industry engagement in standards-development activities related to 5G, autonomous vehicles, artificial intelligence, and other innovative technologies. This rule specifically addresses the addition of Chinese telecommunications company Huawei Technologies Company (Huawei) to the Bureau of Industry and Security (BIS) entity list. Under the new rule, technology that previously would not have required a license to be disclosed to Huawei can be disclosed for the purpose of standards development without need for an export license. For more information, see the press release.

Huawei included in Defense Department list of Chinese Military Companies Operating in United States

On June 24, 2020, the Defense Department made public a list of 20 Chinese companies operatin directly or indirectly in the United States, which had been determed to be "Communist Chinese military companies." The list, which includes conglomerates such as Huawei, the Aviation Industry Corporation of China (AVIC) and Hikvision, was prepared as required under Section 1237 of the National Defense Authorization Act for Fiscal Year 1999, and was updated and released at the request of Senator Tom Cotton (R-AR).

U.K. Prohibits Huawei equipment in 5G Networks

In a reversal from a its prior position, on July 14, 2020, the United Kingdom announced that it will prohibit Huawei equipment in all future 5G networks, and by 2027 will remove all Huawei equipment from existing 5G networks. As described in the State Department press release, the UK joins the Czech Republic, Denmark, Estonia, Latvia, Poland, Romania, and Sweden in banning Huawei from future 5G networks.

Huawei Restrictions for Government Contractors to go into Effect August 13, 2020

On July 14, 2020, the Department of Defense published an interim rule to amend the Federal Acquisition Regulation (FAR) to implement Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA). Section 889(a)(1)(B), which goes into effect on August 13, 2020, prohibits executive agencies from entering into, extending or renewing, a contract with an entity that uses covered telecommunications equipment or services. Covered telecommunications services include Huawei and its subsidiaries. The interim rule implements 889(a)(1)(B) and requires the submission of a representation regarding whether, after reasonable investigation, covered telecommunications equipment or services are used by the contractor.

New Visa Restrictions Include Huawei Employees

On July 15, 2020, the State Department imposed visa restrictions pursuant to Section 212(a)(3)(C) of the Immigration and Nationality Act, which prohibits the entry of foreign persons into the U.S. if the Secretary of State has reason to believe that entry "would have potentially serious adverse foreign policy consequences for the United States." The new visa restrictions apply to certain employees of Chinese technology companies that "provide material support to regimes engaging in human rights abuses globally," including Huawei employees deemed to provide material support to the Chinese government. The State Department press release states that "[t]elecommunications companies around the world should consider themselves on notice: If they are doing business with Huawei, they are doing business with human rights abusers."

Updated CAATSA Public Guidance

On July 15, 2020, the State Department updated the public guidance for Section 232 of the Countering America's Adversaries Through Sanctions Act (CAATSA). Section 232 of CAATSA enables the imposition of sanctions on persons making certain investments or engaging in certain activities related to energy export pipelines that (1) originate in the Russian Federation, and (2) transport hydrocarbons across an international land or maritime border for delivery to another country. The updated guidance clarifies that CAATSA Section 232 covers investments related to the Nord Stream 2 pipeline and the second line of the TurkStream pipeline, which are both currently under construction. The State Department has found that Russia is using these pipelines to create national and regional dependencies on Russian energy supplies, and leverages these dependencies to expand its political, economic, and military influence.

According to the updated guidance, the focus of Section 232 for imposing sanctions is on persons who, on or after August 2, 2017, (1) made an investment that meets the fair market value thresholds in Section 232(a) and directly and significantly enhances the ability of the Russian Federation to construct energy export pipelines, or (2) sells, leases, or provides to the Russian Federation goods or services that meet the fair market value thresholds in Section 232(a) and that directly and significantly facilitate the expansion, construction, or modernization of energy export pipelines by the Russian Federation. This now includes, but is not limited to, persons facilitating the construction or deployment of the Nord Stream 2 pipeline and the second line of the TurkStream, such as financing partners, pipe-laying vessel operators, and related engineering service providers.

For purposes of implementing Section 232 of CAATSA, the State Department will interpret the term "investment" broadly as a transaction that constitutes a commitment or contribution of funds or other assets or a loan or other extension of credit to an enterprise.

New Additions to the Export Administration Regulations

On June 17, 2020, the Bureau of Industry and Security (BIS) amended the Export Administration Regulations (EAR) to expand upon certain Export Control Classification Numbers (ECCNs) on the Commerce Control List (CCL). This amendment was made pursuant to changes agreed upon by countries participating in the February 2020 Australia Group (AG) Intersessional Implementation Meeting. Under the new rule:

- ECCN 1C350 (Chemical Weapons Precursors) is amended by adding twenty-four precursor chemicals, as well as mixtures in which at least one of these chemicals constitutes 30 percent or more of the weight of the mixture, to ECCN 1C350.d.
- ECCN 1C351 (Human and Animal Pathogen and Toxins) is amended to add Middle East respiratory syndrome-related coronavirus (MERS-related coronavirus).
- ECCN 2B352 (Equipment Capable of Use in Handling Biological Materials) is amended by adding a *Technical Note* to indicate that cultivation chamber holding devices controlled in 2B352.b.2.b include single-use cultivation chambers with rigid walls.

For more information and for the specific precursor chemicals added to the ECCNs, see the Federal Register notice.

Syria Sanctions: Additional Regulations; Caesar Act Sanctions Imposed

On June 5, 2020, the Office of Foreign Assets Control (OFAC) added regulations to implement Executive Order 13894 of October 14, 2019 ("Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Syria"). The new Syria-related Sanctions Regulations (31 CFR part 569) covers subjects including banking, blocking of assets, penalties, and reporting and recordkeeping requirements. OFAC intends to supplement these regulations with a more comprehensive set of regulations, which may include additional interpretive and definitional guidance, general licenses, and statements of licensing policy.

On June 17, 2020, OFAC and the State Department sanctioned 39 individuals and entities for supporting Syrian President Bashar al-Assad, and on July 29, designed 14 additional individuals and entities, including the First Division of the Syrian Arab Army. These designations mark the first implementation of sanctions pursuant to the Caesar Syria Civilian Protection Act of 2019 (the Caesar Act). The Ceasar Act, which is named in honor of the photographer who documented human rights abuses committed by Bashar al-Assad, authorizes economic sanctions against individuals and entities engaging in business with the Assad regime. More information is available here.

Iran Sanctions Updates: Impacts on Shippers and Metal Industry

On June 5, 2020, OFAC release a new Iran-related FAQ. The FAQ addresses the question, "will OFAC target Iranian manufacturers of medicines, medical devices, or products used for sanitation or hygiene or as personal protective equipment for use in Iran pursuant to Executive Order (E.O.) 13902 for continuing to manufacture these items?" While the answer is "no," note that humanitarian exemptions do not apply to transactions involving persons on OFAC's Specially Designated Nationals and Blocked Persons (SDN) List that have been designated in connection with Iran's support for international terrorism or proliferation of weapons of mass destruction or in connection with activity that is subject to other sanctions not specific to Iran. Sanctions against Islamic Republic of Iran Shipping Lines (IRISL) and its Shanghai-based subsidiary, E-Sail Shipping Company Ltd (E-Sail) went into effect on June 8, 2020, pursuant to Executive Order 13382, which targets proliferators of weapons of mass destruction. Exporters had been able to engage in transactions with the sanctioned entities for the past six months after they were first designated "to allow exporters of humanitarian goods to Iran sufficient time to find alternate shipping methods."

On June 25, 2020, the U.S. designated nine entities connected with Iran's metal industry pursuant to Executive Order 13871 and the Iran Freedom and Counter-Proliferation Act. Designated entities include Tara Steel Trading GMBH, Metil Steel, Pacific Steel FZE, Better Future General Trading Co. LLC, Tuka Metal Trading DMCC, South Aluminum Company, Sirjan Jahan Steel Company, and Iran Central Iron Ore Company. Global Industrial and Engineering Supply Ltd. was also designated for transferring 300 metric tons of graphite to the Islamic Republic of Iran Shipping Lines (IRISL), an Iranian entity on the SDN List (as discussed above). The State Department described these actions as part of its "maximum pressure campaign" against Iran.

Venezuela Sanctions Update

On June 18, 2020, the U.S. State Department announced a wave of new sanctions against participants in a network of companies that transported oil as part of an "oil for food" sanctions evasion scheme. The participants used Mexico-based front companies to divert funds that were intended for humanitarian aid. The money was then used to purchase oil rather than to deliver food to the Venezuelan people. OFAC also released an infographic showing the relationship between the Venezuelan state-owned oil company PDVSA, the individuals operating in the Venezuelan oil sector from inside Venezuela, and the individuals operating in Mexico involved in the scheme, as well as the entities designated for being owned or controlled by the designated individuals.

Nicaragua Sanctions Regulations Amendments, Designations

On July 17, 2020, OFAC amended the Nicaragua Sanctions Regulations to incorporate the Nicaragua Human Rights and Anticorruption Act of 2018 (NHRAA) into the Regulations. Because the NHRAA has been in effect since December 2018, the July 17 changes do not substantively alter current sanctions but rather update the Regulations to include existing law and general licenses.

Also on July 17, OFAC continued to exert pressure on the Nicaraguan regime by designating two individuals tied to

Nicaraguan President Daniel Ortega, and two companies linked to them, as SDNs. Juan Carlos Ortega Murillo, son of President Ortega, was designated for misappropriating public funds and expropriating private assets for personal gain or political purposes, engaging in corruption related to government contracts, or bribery. Jose Jorge Mojica Mejia, who, according to OFAC, has acted as a personal representative of the Ortegas, was designated for having created shell companies to launder money, and concealed their ownership and illicit profits. In addition, OFAC designated Difuso Comunicaciones S.A. and Mundo Digital S.A. Difuso Comunicaciones S.A.

Sanctions on Nigerian Cyber Actors

On June 16, 2020, OFAC sanctioned six Nigerian nationals, pursuant to Executive Order 13694 for manipulating U.S. individuals through an online scheme to gain access to sensitive personal and financial information. Over $6 million was stolen in the scheme from victims across the U.S. For more information, see the State Department press release.

Chinese Media Entities Designated as "Foreign Missions"

On June 22, 2020, the U.S. State Department designated the U.S. operations of China Central Television, China News Service, the People's Daily, and the Global Times as "foreign missions" under the Foreign Missions Act. These entities are deemed foreign missions as they are "substantially owned or effectively controlled" by a foreign government (here, China). In order to operate in the U.S., entities designated as foreign missions must adhere to certain administrative requirements that also apply to foreign embassies and consulates. This action was in response to China earlier revoking the press credentials of American journalists.

BIS Seeks Comments on Export Controls Impacting Surveillance and Human Rights

On July 17, 2020, the Bureau of Industry and Security (BIS) requested public comments on the list of crime control (CC) and surveillance items on the Commerce Control List (CCL) that are controlled due to their potential for human rights violations. Comments will be accepted until September 15, 2020. BIS is especially focused on facial recognition software and other biometric systems for surveillance, non-lethal visual disruption lasers ("dazzlers"), and long-range acoustic devices and their components, software, and technologies. Commenters are encouraged to address (1) information that may distinguish purely or predominantly consumer or commercial applications from applications purely or predominantly for use by law enforcement or security services and/or used in mass surveillance, censorship, privacy violations or otherwise useful in committing human rights abuses; (2) the impact of adding to, modifying, or removing items from the CCL on U.S. support of human rights throughout the world; and (3) the impact that changes of controls would have upon the competitiveness of U.S. business and industry.

Xinjiang Uyghur Autonomous Region (XUAR) Updates

Chinese Entities Added to the BIS Entity List for Human Rights Abuses

On July 22, 2020, the Bureau of Industry and Security (BIS) amended the Export Administration Regulations (EAR) by adding eleven Chinese entities to the Entity List. The eleven entities were added based on § 744.11 of the EAR, which imposes license requirements on entities acting contrary to the national security or foreign policy interests of the United States. All eleven entities have been implicated in human rights violations and abuses related to the repression, mass arbitrary detention, forced labor and high-technology surveillance of Uyghurs and other minority groups in the Xinjiang Uyghur Autonomous Region (XUAR). Note that due to the COVID-19 pandemic, BIS has adopted a policy of case-by-case review for items subject to the EAR that are necessary to detect, identify and treat infectious disease.

Advisory Issued for Business Risks Related to XUAR Human Rights Violations

On July 1, 2020, the U.S. Departments of State, Commerce, Homeland Security, and Treasury issued an advisory on the risks for businesses with potential exposure in their supply chain to entities engaged in human rights abuses in the XUAR. The advisory urges businesses to be "aware of the reputational, economic, and legal risks of involvement with entities that engage in human rights abuses, including but not limited to forced labor in the manufacture of goods intended for domestic and international distribution." Areas of heightened risk include the provision of goods or services with a nexus to surveillance technology in Xinjiang and forced labor and prison labor in Xinjiang. The advisory includes due diligence guidelines, a list of industries in which labor abuses may be taking place, an overview of the cotton supply chain, a list of U.S. authorities for enforcement actions, and resources for industry.

Magnitsky Act Designations for Human Rights Abuses Against Ethnic Minorities in the XUAR

On July 9, 2020, OFAC sanctioned one Chinese government entity and four government officials in connection with human rights abuses against ethnic minorities in the XUAR. These designations include Chen Quanguo, the Communist Party Secretary of XUAR; Zhu Hailun, a former Deputy Party Secretary of the XUAR; the Xinjiang Public Security Bureau (XPSB); the current Director and Communist Party Secretary of the XPSB, Wang Mingshan, and the former Party Secretary of the XPSB, Huo Liujun. The human rights violations committed by the sanctioned individuals and entities include mass arbitrary detention and severe physical abuse of Uyghurs and other ethnic minorities in the region. The sanctions were issued pursuant to Executive Order 13818, "Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption," which implements the Global Magnitsky Human Rights Accountability Act. For more information, see the press release here.

Additions to the Cuba Restricted List

On June 3, 2020, the U.S. State Department added seven new subentities to the Cuba Restricted List. The subentities include Cuban military-owned tourism industry operations (such as scuba diving centers and marine parks) and a military-owned financial institution (FINCIMEX). In its press release, the State Department noted that these "subentities disproportionately benefit the Castro dictatorship, … which uses the profits from these businesses to oppress the Cuban people and to fund its interference in Venezuela."

Reminder to Submit Blocked Property Reports

On July 1, 2020, OFAC issued a reminder that 2020 Annual Reports for property blocked pursuant to OFAC regulations are due by September 30, 2020. The report must cover all blocked property held as of June 30th. Note that property that was unblocked by an OFAC general or specific license or was previously blocked pursuant to a sanctions program that was terminated on or before June 30, 2020, is not considered blocked property.

CFIUS Online Case Management System Now in Effect

A new online CFIUS Case Management System (CMS) went into effect on June 1, 2020. The CMS is required to file any draft or formal written notice or submit any declaration pursuant to 31 CFR parts 800 or 802. Information on the CMS, including FAQs and a new user manual, are available here.

DOJ and SEC Release Second Edition of FCPA Resource Guide

On July 3, 2020, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) released the Second Edition of their Resource Guide to the U.S. Foreign Corrupt Practices Act (the "Resource Guide"). As we have previously reported on here, the original Resource Guide was released in November 2012. The second edition consists of a compilation of information and analysis regarding the Foreign Corrupt Practices Act (FCPA), including the statutory requirements of the FCPA, and uses hypotheticals, examples of enforcement actions and case law summaries to give updated insight into the DOJ's and SEC's FCPA enforcement policies and practices. Additional details regarding the second edition of the Resource Guide can be found here.

For more information about cross-border compliance, visit the Foley Hoag Trade Sanctions & Export Controls Practice Group.

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