FOLEY HOAG LLP

Cross-Border Compliance UPDATE

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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. For the latest updates, see our most recent COVID-19 Supply Chain and Trade Update.

Telecommunications Updates:

"Team Telecom" Formalized by Executive Order

On April 4, 2020, President Trump released an "Executive Order on Establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector." The Committee will have a formal role in assisting the Federal Communications Commission (FCC) in its review of national security and law enforcement concerns that may be raised by foreign participation in the U.S. telecommunications services sector. Previously, the Committee existed as an ad hoc working group of federal agencies known as 'Team Telecom." The new Committee has two main functions:

1. Review FCC applications and licenses for risks to national security; and
2. Respond to any risks presented by applications or licenses by making recommendations to the FCC regarding such licenses or applications, which can include recommending the modification or dismissal of the license or application.

The Committee is composed of the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, any other executive department or agency heads as the President deems appropriate. The Department of Justice (DOJ) provides funding and administrative support for the Committee. While these agencies also participated in Team Telecom, the new Committee formally designates their role in investigations. For more information, see the EO here.

DOJ Asks FCC to Revoke China Telecom Authorization

On April 9, 2020, the DOJ, along with the (formerly) Team Telecom federal agencies, asked the FCC to revoke China Telecom (Americas) Corporation's authorization to provide international telecommunications services to and from the U.S. after a review process. China Telecom (Americas) Corporation is the U.S. subsidiary of China Telecom, a telecommunications company owned by the People's Republic of

China (PRC). In their recommendation, The DOJ "identified substantial and unacceptable national security and law enforcement risks associated with China Telecom Americas' operations, which render the FCC authorizations inconsistent with the public interest." Specific issues included:

1. Concerns that China Telecom Americas is vulnerable to exploitation or control by the PRC government;
2. Inaccurate statements by China Telecom Americas to the U.S. government regarding the storage of its U.S. records and its cybersecurity practices; and
3. The potential for PRC state-actors to engage in malicious cyber activity, such as economic espionage and disruption and misrouting of U.S. communications, through China Telecom Americas activities in the U.S.

OFAC Civil Monetary Penalties Adjusted for Inflation

On April 9, 2020, the Department of the Treasury's Office of Foreign Assets Control (OFAC) issued a final rule to adjust certain civil monetary penalties for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the FCPIA Act). The FCPIA Act requires that federal agencies that have the authority to issue civil monetary penalties periodically adjust their penalties to account for inflation.

OFAC has the authority to issue civil monetary penalties under five statutes:

1. Trading With the Enemy Act (TWEA)
2. International Emergency Economic Powers Act (IEEPA)
3. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)
4. Foreign Narcotics Kingpin Designation Act (FNKDA)
5. Clean Diamond Trade Act (CDTA)

The adjusted civil monetary penalty maximum amounts under each statute are:

Statute	Previous Amount	Adjusted Amount
TWEA	89,170	90,743
IEEPA	302,584	307,922
AEDPA	79,874	81,283
FNKDA	1,503,470	1,529,991
CDTA	13,669	13,910

For more information, see the Federal Register publication.

State Department Sanctions Russian Imperial Movement

On April 6, 2020, the Department of State sanctioned the Russian Imperial Movement (RIM) as a Specially Designated Global Terrorist (SDGT), along with three RIM leaders. This is a historic and unprecedented designation, as stated by Nathan Sales, Coordinator for Counterterrorism: "[t]his is the first time the United States has ever designated white supremacist terrorists, illustrating how seriously this administration takes the threat." The Department of State describes RIM as a terrorist group that provides paramilitary-style training to neo-Nazis and white supremacists, and actively recruits Europeans and Americans. RIM members have committed multiple terrorist attacks in Sweden in 2016 after receiving training in St. Petersburg. For more information, see the Press Release here.

North Korea Sanctions and Cybersecurity Updates

OFAC Amends North Korea Sanctions Regulations

On April 10, 2020, OFAC amended the North Korea Sanctions Regulations (the "Regulations," found at 31 CFR Part 510), pursuant to the North Korea Sanctions and Policy Enhancement Act of 2016 (NKSPEA), as amended by the Countering America's Adversaries Through Sanctions Act (CAATSA). This amendment incorporates several provisions from the NKSPEA into the Regulations in order to ensure consistency between the Regulations, NKSPEA, and CAATSA.

The amendment includes adding blocking and correspondent account sanctions provisions into the Regulations, which prohibit or impose strict conditions on the maintenance of a correspondent account or a payable-through account in the U.S. with any North Korean financial institution and add a new prohibition on such accounts applicable for persons that are owned or controlled by a U.S. financial institution and established or maintained outside the United States. In addition, OFAC also amended the definition of luxury goods to exclude items approved for import, export, or reexport to or into North Korea by the United Nations Security Council. The final rule is available here.

Federal Agencies Issue Advisory on the Cyber Threat Posed by North Korea

On April 15, 2020, the Departments of State, the Treasury, and Homeland Security, and the Federal Bureau of Investigation issued an advisory on the cyber threat posed by North Korea (DPRK) and provided recommendations on

how to mitigate this threat. The intention of the advisory is to provide a comprehensive resource on the North Korean cyber threat for the international community, network defenders, and the public. The advisory:

1. Describes specific threats posed by North Korea, including cyber-enabled money laundering, extortion campaigns, and "cryptojacking" of digital currency computing resources.
2. Lists known cyber operations attributed to North Korea by the U.S. government;
3. Provides measures to counter the cyber threat and best practices;
4. Describes the consequences of engaging in prohibited or sanctioned conduct; and
5. Collects resources and public information for use in countering cyber threats.

OFAC Issues Venezuelan-Related General License 8F, Replacing General License 8E

On April 21, 2020, the Office of Foreign Assets Control (OFAC) issued General License 8F "Authorizing Transactions Involving Petróleos de Venezuela, S.A. (PdVSA) Necessary for the Limited Maintenance of Essential Operations in Venezuela or the Wind Down of Operations in Venezuela for Certain Entities." General License 8F signals the end of the temporary authorization by the U.S. government for certain companies to do business with PdVSA.

The new General License replaces and supersedes the previous General License 8E dating from January 17, 2020, and extends until December 1, 2020. This license now only allows covered companies to engage in limited "winding down" business activities. Previously, Chevron Corporation, Halliburton, Schlumberger Limited, Baker Hughes (a GE Company), and Weatherford International (Public Limited Company) and their subsidiaries were allowed under General License 8E to continue certain regular business activities with PdVSA.

PdVSa was added to the Special Designated National List (SDN List) on January 28, 2019, with the intention to stop the Maduro regime from profiting from Venezuelan oil revenue. After this designation, OFAC introduced multiple general licenses which allowed specific U.S. entities to engage in business transitions related to PdVSA, commonly known as "Chevron Licenses." As indicated by General License 8F, the U.S. government remains focused on increasing sanctions on Venezuela through its "maximum pressure" policy, and oil and gas companies which previously were able continue operations in Venezuela will likely no longer be able to do so while President Maduro remains in power.

SEC Charges Former Executive of Financial Services Company with FCPA Violations

On April 13, 2020, the Securities and Exchange Commission (SEC) charged Asante Berko, a former executive of a U.K. subsidiary of Goldman Sachs, with violating the Foreign Corrupt Practices Act (FCPA) by bribing Ghanaian officials to help a client win a government contract to build and operate an electrical power plant in the Republic of Ghana. The SEC did not charge Goldman itself, stating in its press release that "[t]he firm's compliance personnel took appropriate steps to prevent the firm from participating in the transaction."

The SEC's complaint alleges that Berko arranged for a Turkish energy company that was a Goldman Sachs client to funnel at least $2.5 million to a Ghana-based intermediary to pay illicit bribes to Ghanaian government officials in order to gain their approval for the electrical power plant project. According to the complaint, Berko helped the intermediary pay more than $200,000 in bribes to various other government officials, and Berko personally paid more than $60,000 to Ghanaian government officials. In this process, Berko "took deliberate measures to prevent his employer from detecting his bribery scheme," which included for example, using his private email instead of his work email to communicate with the intermediary and the Turkish energy company about the bribery scheme, and intentionally failing to correct a critical document used by Goldman to evaluate the power plant project. The document falsely stated that the energy company had not compensated an intermediary or any persons with a close relationship to government official in connection with the power plant transaction.

Despite Berko's attempts to hide the bribery scheme from Goldman, Goldman designated the project as "significant and complex" and as requiring additional due diligence before the project could receive final approval. As part of the enhanced due diligence, Goldman's compliance personnel conducted a review of Berko's work emails, which led them to uncover the involvement of the intermediary. Even though Berko attempted to downplay the role of the intermediary in response to questioning by Goldman's compliance personnel, Goldman escalated the issue to its legal team for further investigation. Berko then allegedly assisted the energy company in drafting false and misleading responses

to questions posed by Goldman regarding the intermediary. Goldman nonetheless continued to press the energy company about the intermediary's services and payments. When the energy company ultimately refused to answer additional questions concerning the intermediary, Goldman's compliance personnel terminated Goldman's involvement in the power plant project.

The *Berko* case (and in particular the SEC's decision not to charge Goldman in connection with the bribery scheme) highlights the importance for companies of having risk-based compliance controls in place that require heightened due diligence for transactions that carry a high risk of corruption or bribery. More importantly, where such due diligence raises any red flags – such as the discovery of the intermediary in *Berko* – companies need to take immediate steps to investigate such red flags.

For more information, see the Press Release and the SEC complaint.

USTR Announces USMCA Entry into Force on July 1, 2020; New Executive Order Establishes USMCA Interagency Labor Committee

On April 24, 2020, U.S. Trade Representative Robert Lighthizer notified Congress that Canada and Mexico have taken measures necessary to comply with their commitments under the United States–Mexico–Canada Agreement (USMCA) and that the Agreement will enter into force on July 1, 2020. Following the notification, the U.S. completed its domestic procedures to implement the agreement. While the COVID-19 pandemic has slowed down many areas of international trade, Ambassador Lighthizer noted that the pandemic has made the implementation of USMCA more crucial than ever so that the U.S. can "strive to increase manufacturing capacity and investment in North America." For more information, see the Press Release. The text of the USMCA is available here.

As part of the USMCA entry into force, on April 28, 2020, President Trump released the "Executive Order (EO) on the Establishment of the Interagency Labor Committee for Monitoring and Enforcement Under Section 711 of the USMCA Implementation Act." The purpose of the new Committee is to coordinate the efforts of the United States to monitor the implementation and maintenance of the labor obligations of Canada and Mexico, to monitor Mexico's labor reform, and to recommend enforcement actions in case of noncompliance. The EO is available here.

New BIS Rule Tightens Exports to China, Venezuela, and Russia; License Exception for Civil End-Users Removed from EAR

On April 28, 2020, the Bureau of Industry of Security (BIS) amended the Export Administration Regulations (EAR) to restrict exports, reexports, and transfers in-country of items intended for military end use or military end users in China, Russia, or Venezuela. A key change is that licensing requirements for China now apply to ''military end-users" and "military end-use," rather than only "military end-use.'' It also expands the definition of military end use and broadens the list of items covered under this definition.

The amendment also provides policy reasons related to restricting the export of certain items to China, Russia, or Venezuela. This includes whether the export is "contrary to the national security or foreign policy interests of the United States, including the foreign policy interest of promoting the observance of human rights throughout the world." In addition, the amendment adds Electronic Export Information filing requirements in the Automated Export System for exports to China, Russia, and Venezuela.

On the same day, BIS also removed License Exception Civil End-Users (CIV) (15 CFR §740.5) from the EAR This license exception previously allowed for the export, reexport, and transfer in-country of certain items controlled for national security reasons to most civil end-users located in Country Group D:1, which includes Russia and China. Now, exporters will need to apply for and receive an export license in order to send covered items to Country Group D:1 civil end-users. The final rule goes into effect on June 29, 2020. In the final rule, BIS explained that this change is due to the increasing integration between civil and defense technology development, which "can present an economic challenge to nations that export high-tech products, including the United States, as individual country goals could also directly support military modernization goals contrary to U.S. national security or foreign policy interests."

Updates on CBP Forced Labor Enforcement

Withhold Release Order (WRO) on Tuna Revoked

On April 1, 2020, Customs and Border Protection (CBP) revoked a Withold Release Order (WRO) which covered tuna harvested from the Tunago No.61 fishing vessel. After the revocation of the WRO, these products will now be admissible at all U.S. ports of entry. Brenda Smith, CBP Executive Assistant Commissioner for the Office of Trade,

announced that the decision was based on information obtained by CBP that tuna from the vessel was no longer produced under forced labor conditions. CBP issues WROs to block the import of goods into the U.S. when information available "reasonably" indicates that the goods may be made with forced labor. More information on WROs is available here.

CBP Releases Forced Labor Process Presentation

On April 27, 2020 CBP released a presentation from December 12, 2019, which provides an overview of the regulations and enforcement mechanisms prohibiting the import of goods made with forced labor into the U.S., and also explains the process by which CBP issues a WRO. The presentation provides information related to CBP's internal investigation of forced labor allegations and describes four phases of the investigation process: 1) case initiation; 2) research and validity check; 3) case escalation; and 4) WRO/Finding and enforcement. The presentation also includes information on Countering America's Adversaries Through Sanctions Act (CAATSA) and its evidentiary standards. Although CAATSA applies only to goods produced by North Korean nationals, many other countries have been identified by the State Department in using North Korean labor, and are listed in the presentation.

OFAC Issues Finding of Violation to American Express

On April 30, 2020, the Office of Foreign Assets Control (OFAC) issued a Finding of Violation to American Express Travel Related Services Company ("Amex") for conducting transactions in violation of the Weapons of Mass Destruction Proliferators Sanctions Regulations with German businessman Gerhard Wisser, a Specially Designated National (SDN). OFAC found that Amex issued a prepaid card to Wisser and processed 41 of his transactions totaling $35,246.82. In 2009, Wisser was added to the SDN List for his involvement with Pakistani scientist Abdul Qadeer Khan's nuclear proliferation smuggling network. Amex remediated and disclosed the violations to OFAC, and there is no monetary penalty associated with a Finding of Violation.

OFAC determined that Amex's violations were the result of human error and defects in their screening system, which resulted in their system "timing out" during a standard compliance check and inaccurately placing Wisser on an "Accept List." This error was then not caught in a manual review by an Amex compliance analyst who approved the Accept List placement. This is an important reminder that as all compliance systems are susceptible to human (and computer) error, it is crucial to have multiple review mechanisms to quickly catch these mistakes.

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

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