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GOVERNMENT SHUTDOWN UPDATE – SANCTIONS, EXPORT CONTROLS AND OTHER INTERNATIONAL TRADE OPERATIONS

To Our Clients and Friends:

The U.S. Government is now approaching the second week of a partial shutdown that has affected nine departments, several agencies, and approximately 800,000 federal workers. The U.S. Government agencies responsible for administering U.S. sanctions, export controls, and other trade-related functions are among those affected by the lapse in federal appropriations. As a result, these agencies have substantially reduced their operations. While some of these agencies' core functions will continue to operate, the shutdown will certainly increase wait times for licenses, advisory opinions, or other responses and will generally hamper communication with the agencies, even on time-sensitive requests. A brief overview of the current operating status of these international trade-related agencies follows below.

OFAC

The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC"), which administers U.S. sanctions programs, remains functional but in limited capacity.^[1] OFAC continues to administer the Specially Designated Nationals and Blocked Persons ("SDN") List and to enforce U.S. sanctions and will administer newly authorized sanctions should the need arise. OFAC is situated in the U.S. Treasury Department's Office of Terrorism and Financial Intelligence, which will continue to perform certain limited national security-related functions.

Guidance from the Department indicates that OFAC will also have limited capacity to communicate with financial institutions and other affected industries during the shutdown. As a result of these restrictions, the public can expect increased wait times for responses to license applications, voluntary disclosures, advisory opinions, and other communications. In our experience, most efforts to contact OFAC policy personnel have gone unanswered and messages to compliance officers have been met with out-of-office replies citing the shutdown.

BIS and DDTC

Although the U.S. Department of Commerce is closed, its Bureau of Industry and Security ("BIS"), which is responsible for administering U.S. export controls applicable to dual use items, remains relatively well-staffed. According to the Department's shutdown guidance, almost 70 percent of the Bureau's 358 employees are excepted from the shutdown either because they are considered essential or because funding for their positions comes from alternative sources.^[2] The Department's shutdown guidance also notes that ongoing export enforcement will continue during the lapse in

appropriations.[3] However, as with the other agencies described here, even a slight reduction in personnel may make it more difficult to receive responses from BIS.

The U.S. Department of State's Directorate of Defense Trade Controls ("DDTC") administers restrictions on the export of defense articles, defense services, and related technical data. While the State Department has provided relatively little information regarding its shutdown operations, DDTC has helpfully set forth certain specifics regarding its "significantly curtailed" operations.[4] During the shutdown DDTC will have limited ability to process license requests, advisory opinions, and retransfers. DTrade, the portal for requesting and receiving license requests, automatically rejects new submissions, and the Directorate's daily pick-up and drop-off service is cancelled. Requests in-process at the time of the shutdown will remain in-process but further action will not occur until funding is restored. DDTC may, however, respond to certain emergency requests.

Other Trade-Related Functions

Other offices and agencies responsible for performing trade-related functions are differently impacted by the ongoing shutdown. For example, The Committee on Foreign Investment in the United States ("CFIUS"), the interagency committee tasked with reviewing foreign investment in the United States, is also operating at reduced capacity. According to guidance published by the Department of the Treasury, CFIUS will be able to perform "caretaker functions" related to existing reviews or investigations of inbound investment initiated before the recently enacted Foreign Investment Risk Review Modernization Act ("FIRRMA"), but ongoing cases will be tolled.[5] Although the Committee will continue to perform certain national security functions, other CFIUS activities are suspended.

Although BIS is experiencing only limited personnel reductions, the Department of Commerce's International Trade Administration and the Bureau of Economic Analysis are operating with a fraction of their normal operating personnel. The U.S. International Trade Commission is closed, which could delay the release of the Commission's report on the economic impact of the new U.S.-Mexico-Canada Agreement.[6] The Office of the U.S. Trade Representative, which administers the new tariffs on Chinese imports, remains operational.[7]

[1] U.S. Dep't of the Treasury, Lapse of Appropriations Plan 7 (Dec. 2018), *available at* <https://home.treasury.gov/system/files/266/DO-Lapse-Contingency-Plan-2018-12-18.pdf>.

[2] U.S. Dep't of Commerce, Plan for Orderly Shutdown Due to Lapse of Congressional Appropriations 6 (Dec. 17, 2018), *available at* <https://www.commerce.gov/sites/default/files/2018-12/DOC%20Lapse%20Plan%20-%20OMB%20Approved%20-%20Dec%2017%2C%202018.pdf>.

[3] U.S. Dep't of Commerce, *Shutdown Due to Lapse of Congressional Appropriations*, Blog (Dec. 22, 2018), <https://www.commerce.gov/news/blog/2018/12/shutdown-due-lapse-congressional-appropriations>.

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- [4] DDTC, U.S. Dep't of State, *Industry Notice: Lapse in Funding*, News & Events (Dec. 22, 2018), https://www.pmdtdc.state.gov/?id=ddtc_public_portal_news_and_events.
- [5] U.S. Dep't of the Treasury, *Lapse of Appropriations Plan 7* (Dec. 2018), *available at* <https://home.treasury.gov/system/files/266/DO-Lapse-Contingency-Plan-2018-12-18.pdf>.
- [6] Jennifer Scholtes, Caitlin Emma, and Katy O'Donnell, *How the Shutdown Is Reaching a Breaking Point*, Politico (Jan. 3, 2018), <https://www.politico.com/story/2019/01/01/how-the-shutdown-is-reaching-a-breaking-point-1053885>.
- [7] Press Release, Office of the U.S. Trade Representative, *USTR Operating Status* (Dec. 28, 2018), *available at* <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/december/ustr-operating-status>.



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