



International Trade Compliance & Risk Mitigation

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ITLS-Mobile (9 MAY 2014)

Agenda

- **International Business Considerations**
- **International Trade Regulatory Framework**
- **Key Compliance Concepts**
- **Export Controls**
 - **Defense Trade Controls/ITAR**
 - **Dual-Use Controls/EAR**
 - **Export Control Reform**
- **Economic Sanctions Programs**
- **Anti-Boycott Regulations**
- **Customs/Import Controls**
- **Anti-Corruption Compliance**
- **How Companies Get into Trouble**
- **International Trade Red Flags**
- **International Trade Enforcement Factors**
- **Voluntary Disclosures**

International Business Considerations

- Legal Counsel (don't wait until you have a problem)
 - U.S. Counsel
 - “Local Counsel” (in the foreign jurisdiction)
- Due Diligence (know who you are dealing with (and check))
- Protect your Intellectual Property (before you go overseas)
- Develop a Comprehensive Compliance Framework
 - Prospective Compliance (some things cannot be done after the fact)
 - Third-Party Representatives = Enforcement Lighting Rods

International Business Considerations

- Address Key Issues BEFORE finalizing agreement, for example:
 - Foreign Contract Laws (what commits you to a contract?)
 - Foreign Employment Laws (what makes you an employer?)
 - Foreign Sales Laws (are there “local content” requirements?)
 - Formation/Qualification for foreign operations (require local ownership?)
 - Choice of Entity (what is the best for the situation/objective?)
 - Currency Considerations (do you need to mitigate fluctuation risk?)
 - Profits (are there restrictions on what you can do with them?)
 - Taxes (consult with an international accountant)
 - Dispute Resolution (international arbitration?)

International Trade Regulatory Framework

- **Export Controls**
 - Defense: (State/DDTC/ITAR)
 - Commercial/Dual-Use: (Commerce/BIS/EAR)
- **Economic Sanctions Programs**
 - Trade Embargoes and/or Asset Freezes (Treasury/OFAC/FACR)
- **Anti-Boycott Restrictions** (Commerce/OAC and Treasury/IRS)
- **Customs/Import Controls** (Homeland Security/CBP)
- **Global Anti-Corruption Laws**
 - US Foreign Corrupt Practices Act (Justice and SEC)
 - Multilateral: UK Bribery Act (+)
- **Anti-Money Laundering Requirements**
- **Foreign Direct Investment Considerations** (CFIUS/Exon-Florio)

Key Compliance Concepts

- International Trade Compliance should be conducted comprehensively across the full spectrum of trade-relevant areas
- International Trade Compliance is a continuing requirement
- Compliance Mindset –
 - Diligence to Prevent Violations
 - Preparation to Defend Actions
- International Trade Compliance = Business Decision
 - Balance Business Operations and Compliance Risk

Export Controls – Defense Trade (ITAR)

- The U.S. Department of State regulates “defense” exports through the Directorate of Defense Trade Controls (“DDTC”)
- Applicable regulations are the International Traffic in Arms Regulations (“ITAR”), which implement the Arms Export Control Act (“AECA”)

The ITAR regulates:

- Exports of Defense Articles (including Technical Data and Software)
- Exports of Defense Services (includes providing Technical Data)
- Re-Exports/Re-Transfers
- [Deemed Exports]
- Brokering Activities

Export Controls – Defense Trade (ITAR)

- ITAR Registration requirements apply to manufacturers *and* exporters *and* brokers
- ITAR controls all items on the U.S. Munitions List (“USML”)
- Policy on Determining Defense Article – not dependent upon “use”
 - “Old” policy focused on (a) specific reason for design, development, configuration, modification, etc., and (b) predominance of civil applications
 - “New” policy guided by a “positive” list of controlled defense articles
 - Focus is now on “Specially Designed” analysis (if applicable)

Export Controls – Defense Trade (ITAR)

- Export Jurisdiction/Classification Analysis
 - Check USML Category – does it list your defense article/defense service?
 - Note definitions used in USML Category
 - “Specially Designed” Analysis (if applicable) – are you caught/released?
 - Migration of item from ITAR/USML to EAR/CCL?
 - Series 600 ECCN?
 - Other ECCN or EAR-99?

- Commodity Jurisdiction (“CJ”) Submission
 - Binding on the U.S. Government
 - ITAR-only (for now)

Export Controls – Defense Trade (ITAR)

- ITAR Licensing Requirement
- ITAR Licenses
 - DSP-5 (Permanent Export)
 - DSP-73 (Temporary Export)
 - DSP-61 (Temporary Import)
 - DSP-85 (Classified Situations)
 - DSP-83 (Non-Transfer/Use Certificate)

Export Controls – Defense Trade (ITAR)

■ ITAR Agreements

- Technical Assistance Agreement (“TAA”)
- Manufacturing License Agreement (“MLA”)
- Warehousing Distribution Agreement (“WDA”)

■ ITAR Exemptions

- Regulatory approvals to export items/technology without a license
- Requires increased due diligence and analysis to ensure eligibility for use
 - “It Depends!”
 - Limited Availability – Avoid Assumptions
 - ITAR 126.1 Prohibitions

Export Controls – Defense Trade (ITAR)

- ITAR Exemption Examples (non-exclusive listing):
 - U.S. Government Exemptions (ITAR 126.4)
 - General Exemptions (ITAR 123.16)
 - Temporary Imports (ITAR 123.4)
 - FMS Exemption (ITAR 126.6(c))
 - Allies Maintenance Exemption (ITAR 124.2(c))
 - Technical Data Exemptions (ITAR 125.4)
 - Canada/Australia/UK Exemptions (ITAR 126.5/126.16/126.17)
 - Plant Visits (ITAR 125.5)

Export Controls – Defense Trade (ITAR)

- ITAR Significant Military Equipment (“SME”) = (*)
- ITAR “see-through” Rule
- ITAR ≠ NISPOM

Export Controls – ITAR – Penalties

- Civil – Maximum of \$500,000 per violation
- Criminal – Fines up to \$1,000,000 per violation and/or imprisonment up to 20 years per violation
- Administrative –
 - Debarment from Government Contracts for Defense Articles or Defense Services
 - Denial of Export Privileges
 - Seizure/Forfeiture of Items

Export Controls – Dual-Use (EAR)

- The U.S. Department of Commerce regulates “dual-use” exports through the Bureau of Industry and Security (“BIS”)
- Applicable regulations are the Export Administration Regulations (“EAR”), which implement the Export Administration Act (“EAA”)

The EAR regulates the export of:

- Commodities
- Technology
- Software
- Re-Exports/Re-Transfers
- “Deemed Exports”

Export Controls – Dual-Use (EAR)

- EAR controls all items on the Commerce Control List (“CCL”)
- Export Control Classification Number (“ECCN”) (e.g., 1C202)
 - Reasons for Control (e.g., Nat’l Security, Crime Control, Anti-Terrorism)
 - Potential License Exceptions (e.g., LVS, ENC, STA)
 - Other Information Pertinent to Licensing Requirements
- “EAR-99” and “Subject to the EAR”
- CCATS Submission for Item and/or System
 - Non-Binding on the U.S. Government
 - But, Export Control Reform ...

Export Controls – Dual-Use (EAR)

- EAR Licensing Requirement Process
 - ECCN + Reason(s) for Control + Destination
 - Review Country Chart / Review Available License Exception(s)
- Ten General Prohibitions (EAR Part 736)
 - Info Needed: Classification/Destination/End-User/End-Use/Activity
- Special Prohibitions
 - e.g., China (PRC) Military End-Use (EAR Part 744.21)
 - e.g., Certain Nuclear End-Uses (EAR Part 744.2)

Export Controls – EAR – Penalties

- Civil – Greater of \$250,000 or twice the value of the transaction
- Criminal – Fines up to \$1,000,000 per violation and/or imprisonment up to 20 years per violation
- Administrative –
 - Denial of Export Privileges
 - Seizure/Forfeiture of Items
 - Suspension of the right to Contract with the U.S. Government

Export Controls Sanity Check

For Every Export:

- What are you exporting?
 - Product Jurisdiction
 - Product Classification
- Where are you exporting?
 - Destination Analysis/Screening
 - License Requirements/Exemptions/Exceptions
- Who will receive the export?
 - Destination/List-based Screening
- What will the export be used for?
 - General Prohibitions
 - Special Prohibitions/Requirements/Restrictions

Export Control Reform

Probable Results:

- No Single Control List / No Single Regulator
- Reduction of ITAR “Catch-all” Controls / Positive List
- Increased Markets for formerly ITAR-controlled Items
- Increased Complexity of Compliance during Implementation
- Increased Enforcement Cooperation among Regulators

Export Control Reform

- Migration of Items from ITAR/USML to EAR/CCL
 - “Series 600 ECCN” (e.g., 9A610, 1A613, etc.)

- Staged Implementation of USML to CCL Migration –
 - **16 APR 2013**: Final Rule regarding (1) USML Categories VIII (Aircraft), XIX (Gas Turbine Engines), XVII (Classified Articles and Technical Data), and XXI (Miscellaneous); (2) New Definition of “Specially Designed” and (3) Transition Rules [**Went into effect 15 OCT 2013**]

 - **8 JUL 2013**: Final Rule regarding USML Categories VI (Vessels of War and Special Naval Equipment), VII (Tanks and Military Vehicles), XIII (Auxiliary Military Equipment), and XX (Submersibles) [**Went into effect 6 JAN 2014**]

Export Control Reform

- Staged Implementation of USML to CCL Migration – (continued)
 - **2 JAN 2014**: Final Rule regarding USML Categories IV (Launch Vehicles/Missiles), V (Explosives/Propellants), IX (Military Training Equipment), X (Personal Protective Equipment), and XVI (Nuclear Weapons/Design/Testing Equipment) [**Goes into effect 1 JUL 2014**]
 - **????**: USML Category XI (Military Electronics)
 - [Second Proposed Rule (25 JUL 2013)]
 - **????**: USML Category XII (Fire Control/Sensors/Night Vision)
 - [No Proposed Rule]
 - **????**: USML Category XV (Spacecraft/Satellites)
 - [Proposed Rule (24 MAY 2013)]

Export Control Reform

- New Definition of ITAR “Specially Designed”
 - Changes the “Jurisdiction/Classification” Analysis
- New Definition of ITAR “Defense Services”
 - Proposed Rules (APR 2011 and MAY 2013)
- New ITAR Brokering Rules
 - ITAR Part 129 (25 OCT 2013)
- New “Military End Use” Rules in the EAR

Export Control Reform

- Expanded Availability (and Enforcement) of EAR License Exception Strategic Trade Authorization (“STA”)
 - Focused on Trade with Allied Nations
- Increased Likelihood of Having to Deal with Both ITAR and EAR
 - USML Category “___ (x)”

Economic Sanctions Programs

- The U.S. Department of the Treasury regulates U.S. unilateral economic sanctions programs through the Office of Foreign Assets Control (“OFAC”)
 - Trade Embargoes (*e.g.*, Cuba, Iran, Sudan)
 - Asset Freezes
- Varied Statutory and Regulatory Basis
 - International Emergency Economic Powers Act (“IEEPA”)
 - Trading with the Enemy Act (“TWEA”)
 - United Nations Participation Act (“UNPA”)
 - Foreign Assets Control Regulations (“FACR”) (31 C.F.R. Part 500 +)
- Targets activities that threaten the national security, foreign policy, and economic stability of the United States

Economic Sanctions Programs

- U.S. Economic Sanctions Programs are increasingly “targeted” towards disfavored groups or activities, such as:
 - Narco-Trafficking
 - Terrorism
 - Nuclear Proliferation
 - Diamond Trading (*e.g.*, Sierra Leone)
 - Democratic Process Disruption (*e.g.*, Balkans, Lebanon, DRC, etc.)
- Iran
- Russia (“Ukraine-related”)
- Substantial Extra-Territorial Jurisdiction asserted by the U.S.
- Multilateral Economic Sanctions Programs
 - United Nations
 - European Union

Economic Sanctions Programs

■ Country-based Sanctions:

- Balkans-related
- Belarus
- Ivory Coast
- Cuba
- DRC-related
- Iran
- Iraq-related
- Lebanon-related
- Former Liberian Regime of Charles Taylor
- Libya
- Myanmar (Burma)
- North Korea
- Somalia
- Sudan
- South Sudan-related
- Syria
- Ukraine-related
- Yemen-related
- Zimbabwe

■ List-based Sanctions:

- Counter-Narcotics Trafficking
- Counter-Terrorism
- Magnitsky Act Sanctions
- Non-Proliferation
- Rough Diamond Trading
- Transnational Criminal Organizations

Economic Sanctions Programs

- U.S. Persons are prohibited from facilitating transactions that are otherwise unlawful under the FACR/Sanctions Programs
- Know Your Customer!
 - List-based screening results
 - Destination-based screening results
 - Activity-based screening results
 - Red Flags
 - Common Sense
- Specially Designated Nationals (“SDN”) List
- Attempts to circumvent U.S. Economic Sanctions Programs are prohibited and aggressively enforced
- Penalties vary depending on the particular Program, but are consistently Draconian

Economic Sanctions – FACR – Penalties

- Civil Penalties determined by the underlying statute for the Sanctions Program
 - \$250,000 per violation, or twice the value of the transaction (International Emergency Economic Powers Act)
 - \$65,000 per violation (Trading with the Enemy Act)
 - \$1,075,000 per violation (Foreign Narcotics Kingpin Designation Act)
- Criminal Prosecutions conducted by the U.S. Department of Justice

Anti-Boycott Regulations

- U.S. Anti-Boycott Regulations are administered by the Commerce Department's Office of Anti-Boycott Compliance ("OAC") and the Treasury Department's Internal Revenue Service ("IRS")

- Statutory Authority:
 - 1977 Amendments to the Export Administration Act

 - Ribicoff Amendment to the Tax Reform Act of 1976

- Anti-Boycott Laws/Regulations prohibit U.S. persons from participating in unsanctioned foreign boycotts
 - Arab League's Boycott of Israel

Anti-Boycott Regulations

- U.S. Anti-Boycott Regulations penalize conduct that includes:
 - Agreeing to refuse or refusing to do business with a boycotted country or blacklisted company
 - Agreeing to discriminate or discriminating against other persons based on race, religion, sex, national origin, or nationality
 - Agreeing to furnish or furnishing information about business relationships with boycotted countries or blacklisted companies
 - Agreeing to furnish or furnishing information about the race, religion, sex, or national origin of another person

Anti-Boycott Regulations

- Recipient of improper boycott request shall report receipt of the request to the Commerce Department/OAC and shall not participate in the improper conduct requested
- If a U.S. Person conducts business in a “boycotting country” it must file an International Boycott Report with the IRS – even if no “request” is received
 - Department of the Treasury “boycotting country” designations (FEB 2014):
 - Iraq, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, UAE, and Yemen

Anti-Boycott Regulations

Examples of Boycott-related language/requests:

- Importer's Purchase Order (Bahrain)
 - “Goods of Israeli origin not acceptable.”

- Inquiry in a Questionnaire (Iraq)
 - “Do you participate or ever participated or owned shares in an Israeli firm or business?”

- Letter of Credit (Kuwait)
 - “We hereby certify that the beneficiaries, manufacturers, exporters and transferees of this credit are neither blacklisted nor have any connection with Israel, and that the terms and conditions of this credit in no way contravenes the law pertaining to the boycott of Israel and the decisions issued by the Israel Boycott Office.”

- Freight Forwarding Documents (Saudi Arabia)
 - “Certificate from insurance company stating that they are not blacklisted.”

Anti-Boycott Regulations – Penalties

- Criminal (EAR)
 - Greater of \$50,000 fine or five times the value of the exports involved, and imprisonment up to five years
 - If Executive Orders pursuant to IEEPA are in effect, fine of up to \$50,000 and imprisonment up to ten years.

- Administrative (EAR and IRS)
 - Denial of export privileges
 - Fines of up to \$11,000 per violation
 - Loss of Foreign Tax Credits (IRS)

Customs/Import Controls

- U.S. Customs and Border Protection (“CBP”) is the agency within the Department of Homeland Security responsible for border security and facilitating the arrival of foreign goods and visitors to the U.S.

- Key Customs/Import Considerations:
 - Classification
 - Valuation
 - Country of Origin/Marking

Customs/Import Controls

■ Classification

- Imported goods must be designated with the proper tariff classification under the Harmonized Tariff Schedule (“HTS”)
- The HTS Code controls the rate of duty assessed for a particular imported good
- **Example:** HTS Ch. 85 = Electrical Machinery and Equipment;
 - HTS 8541.40.20.00 = LEDs

■ Valuation

- In most cases, the duty charged on an imported good is based on a percentage of its value
- The preferred valuation method is “Transaction Value” –
 - Price actually paid or payable for the goods, plus certain expenses and commissions (if not already included in the price)

Customs/Import Controls

■ Country of Origin/Marking

- In most cases, imported goods must be accurately marked with their country of origin
 - Importers are also required to declare the country of origin upon entry of the goods to the U.S.
 - Country of Origin generally is determined by “the country of manufacture, production, or growth ...”
 - If an imported good is comprised of materials from more than one country, country of origin is last country where article underwent “substantial transformation”
- A good Customs Broker can help navigate many of these issues, but they are not the importer of record, and do not have ultimate responsibility to CBP

Customs/Import Controls

■ Customs Seizures/Forfeitures

- In order to facilitate legitimate trade, Customs is empowered to seize and forfeit goods arriving at a U.S. port of entry for importation into the U.S.
- Customs *will* seize goods that have been involved in illegal activity (e.g., stolen merchandise, smuggled contraband)
- Customs *may* seize goods under other conditions, such as:
 - Goods without the proper import licenses or permits
 - Goods violating U.S. trademark, copyright, or trade name laws
- CBP conducted 23,000 seizures of goods in FY 2012
 - totaling approximately \$1.2 billion
- Upon receipt of Seizure Notice from CBP, many importers will elect to pursue administrative relief by filing a petition for return of the seized goods with CBP

Customs/Import Controls

■ Buy American Act (“BAA”)

- The BAA is protectionist legislation passed during the Great Depression that generally requires federal agencies to favor American products over foreign products
- A federal agency may not procure any end product that is not a “domestic end product”
 - Product must be manufactured in the United States
 - Cost of the manufactured product’s domestic components must exceed 50 percent of the cost of all components
- Exceptions:
 - Public Interest
 - Unreasonable Cost
 - Non-Availability

Customs/Import Controls

■ Trade Agreements Act (“TAA”)

- Gives the President authority to waive the BAA for designated products from certain designated countries (over 100), including:
 - World Trade Organization (WTO) Government Procurement Agreement (GPA) countries
 - Free Trade Agreement (FTA) countries
 - Least developed countries and Caribbean basin countries.
- Designated Country end products receive equal consideration with domestic offers in U.S. Government Contracts as long as the value of the acquisition of which they are a part meets the threshold set by the USTR
- The country of origin under the TAA is determined by applying the “substantial transformation” test
 - Different test is used under the BAA

Customs/Import Controls – CBP – Penalties

- Civil Penalties – 19 USC §§ 1581 - 1631
 - Depending on the level of culpability (fraud, gross negligence, negligence, etc.), maximum civil penalty = domestic value of the merchandise in the entry(ies)

- Criminal Penalties – 18 USC §§ 541-555
 - § 541- Entry of Goods Falsely Classified
 - § 542 - Entry of Goods by Means of False Statements
 - Maximum criminal penalty for customs violations = two years imprisonment and/or a fine for each violation (importation *or attempted* importation)

- Other agencies (*e.g.*, FDA) may also impose penalties for violations of their regulations in connection with the entry(ies)

Anti-Corruption Compliance

- U.S. Foreign Corrupt Practices Act of 1977, as amended (“FCPA”)
 - Anti-Bribery Provisions
 - Recordkeeping Provisions
- The FCPA makes it unlawful for certain classes of persons and entities to **corruptly** give, promise, offer, or authorize (or knowingly allow a third-party to give, promise, offer, or authorize) **a thing of value** to a foreign (non-U.S.) government official for the purpose of influencing the official’s actions, securing an improper advantage, obtaining/retaining business, or directing business to any person.

Anti-Corruption Compliance

- U.S. Department of Justice (“DOJ”) is the chief enforcement agency for violations of the anti-bribery provisions (civil or criminal)
- U.S. Securities and Exchange Commission (“SEC”) enforces the recordkeeping provisions
 - But lines between DOJ and SEC enforcement are becoming blurred
 - Formal guidance is limited - (Prosecutor Roulette)
 - No implementing regulations
 - Most cases settle
 - DOJ Opinion Procedure is rarely helpful

Anti-Corruption Compliance

- Who is covered by the FCPA?
 - U.S. citizens, nationals, residents, and companies, wherever located
 - Applies to U.S. subsidiaries of non-U.S. parent corporations
 - Non-U.S. citizens or companies who
 - Registered securities on a U.S. stock exchange
 - Act as an agent or intermediary of another party governed by the FCPA
 - For example, a controlled non-U.S. subsidiary of a U.S. company
 - Cause something to be done in the U.S. in furtherance of a FCPA violation
 - For example, sending an e-mail or wiring money

Anti-Corruption Compliance

- What does it mean to give a “thing of value” under the FCPA?
 - Interpreted broadly by DOJ
 - Anything that the foreign government official subjectively considers to be a “thing of value” – no objective standard
 - No *de minimis* standard regarding value
 - Tangible, high-dollar items, but also services, charitable donations, promises of future employment, payment of medical expenses
 - **Travel and entertainment expenditures, such as airline tickets, hotels, golf outings invite scrutiny under the FCPA if given to foreign government officials**

Anti-Corruption Compliance

- Who qualifies as a “foreign government official” under the FCPA?
 - Any person employed by, or acting in an official capacity on behalf of:
 - a foreign (non-U.S.) government
 - any department, agency, or instrumentality of a foreign government
 - a public international organization
 - Foreign political parties, foreign political party officials, and candidates for foreign office
 - Can be at any level – includes clerks, guards, and administrative personnel

Anti-Corruption Compliance

- Who qualifies as a “foreign government official” under the FCPA?
 - A business can be an “instrumentality” of a foreign government if:
 - it is generally understood to be performing a public function or providing public services
 - a foreign government controls a majority of the company’s stock
 - a foreign government appoints the key officers and directors
 - a foreign government contributes significant financial support to the organization by giving it subsidies, special tax treatment, or loans
 - Be particularly careful in China and in the Middle East

Anti-Corruption Compliance

- What is the level of intent necessary to violate the FCPA?
 - A gift, promise, offer, or authorization must be made “corruptly”
 - the giver must intend the payment to induce the recipient to misuse his/her position, wrongfully direct business, etc.
 - the giver does not have to know that the payment violates the FCPA or any other law
 - an entity does not have to have corrupt intent itself – corrupt intent can be imputed if intermediaries are used in an attempt to circumvent the FCPA’s intent element
 - knows or is substantially certain that a payment to an intermediary will go to a foreign official for an unlawful purpose
 - willful blindness by ignoring anticorruption “Red Flags”

Anti-Corruption Compliance

- Are there Exceptions or Defenses under the FCPA?
 - One Exception: Facilitation Payments
 - to expedite or secure the performance of routine, non-discretionary governmental actions
 - to obtain a permit or license – but not for the award of a contract
 - to process government papers – but not for relief from paying taxes
 - to provide police protection – but not to the exclusion of competitors
 - facilitation payments are NOT permitted under the UK Bribery Act or under most anti-corruption regimes in the Middle East.

Anti-Corruption Compliance

- Are there Exceptions or Defenses under the FCPA?
 - Two Defenses:
 - payment authorized by written law at the time it was made
 - rarely helpful – few countries authorize payments to government officials, even if customary
 - must still be void of “corrupt intent” by the payer
 - *bona fide* business expenditure
 - travel and lodging expenses directly related to
 - » the promotion, demonstration, or explanation of the payer's products and services
 - » the performance of a contract with a foreign government or agency

Anti-Corruption Compliance

- What are the “Red Flags” that trigger concern under the FCPA?
 - **Who are you dealing with?**
 - Are the individuals or companies involved connected to a government official or a company owned or controlled by a government?
 - Does the transaction involve non-employee local representatives?
 - Is there a party involved who will not or cannot disclose its representation of a company?
 - Is there a party involved who habitually provides lavish gifts or entertainment?
 - Is there a joint venture partner or representative who was recommended by an official of the potential governmental customer?
 - Is a party offering preferential access to government officials or information important to your business?
 - Are all parties performing readily quantifiable or definable services?

Anti-Corruption Compliance

- What are the “Red Flags” that trigger concern under the FCPA?
 - **Where are you operating?**
 - Are you operating in a country with a high risk of corruption or bribery, whether based on your experience or third party rankings, such as Transparency International’s Corruption Perception Index?
 - Does the local custom involved tolerate (or even expect) facilitation payments?
 - Are you operating in a country with a government managed economy or significant government interest in private business, such as China?
 - Are you operating in a country where there is a powerful, ruling monarchy with family placed throughout the business community?
 - Do business relationships depend largely, or exclusively, on personal relationships and connections?

Anti-Corruption Compliance

- What are the “Red Flags” that trigger concern under the FCPA?
 - **What kind of payments and documentation are involved?**
 - Is there a preference for cash or avoidance of detailed accounting?
 - Are there requests for commissions which are in excess of 5% of sales or economic activity or are otherwise unusually high for the market at issue?
 - Are there requests for payments to third parties not involved in the transaction, including charities?
 - Are there requests for payments to an unrelated country which is a tax haven or for payments to an offshore account?
 - Have there been requests for, or production of, inaccurate documents including over invoicing, under invoicing, or inaccurate descriptions?
 - Have there been requests for extra funding or higher discounts to “overcome obstacles,” to “get business done,” or to cover “unanticipated extra expenses?”

Anti-Corruption Compliance

- What steps should be take to ensure compliance with the FCPA?
 - FCPA Risk Assessment to determine compliance scope and features
 - Written Compliance Policy
 - Designated Compliance Officer
 - Training
 - Reporting Mechanism
 - Auditing Mechanism
 - Due Diligence regarding Third Parties

Anti-Corruption – FCPA – Penalties

■ **Criminal Violations (FCPA/Anti-Bribery Provisions):**

- Fine up to \$2,000,000 (business entities)
- Fine up to \$100,000 and a prison term up to 5 years (officers, directors, employees, agents)
- Courts may impose higher fines, including up to twice the gross gain of the bribe
- Debarment from participating in U.S. Government contracting, loss of export privileges.

■ **Civil Violations (FCPA/Anti-Bribery Provisions):**

- Fines up to \$10,000 per violation against a business, officer, director, employee, or agent
- Debarment from participating in U.S. Government contracting, loss of export privileges

How Companies Get Into Trouble

- Failure to conduct comprehensive analysis of international trade compliance issues
 - “It Depends” (so look it up)
 - Product Jurisdiction Determination / Classification Analysis
 - Economic Sanctions Programs + Anti-Corruption Laws
- Failure to update transaction compliance information
 - Know Your Customer (continually) – Do Not “Self-Blind”
 - OFAC Never Sleeps

How Companies Get Into Trouble

- Failure to coordinate internal procedures
 - e.g., Sales must be in sync with Shipping
- Failure to demonstrate compliance “best practices”
 - e.g., Diversion Controls, End-Use(r) Certifications
- Failure to mitigate risk
 - Create Mitigating Evidence (e.g., lack of corrupt intent in FCPA context)
 - Proactive Internal Response Mechanism

How Companies Get Into Trouble

- Failure to control intermediaries
 - Inform / Educate / Monitor
- Use of logic and assumptions in interpreting regulations
 - “ ... not being used for a military end-use.”
 - “ ... this is for (“in the best interest of”) the U.S. Government.”
 - “... I’ve worked with the ITAR for “___” years”

International Trade Red Flags

- Know your products and how they are controlled
- Know your customer
 - Subsidiaries, parent companies
 - Shareholders, owners, officers
- Look for **RED FLAGS**
 - Hits via List-Based and Destination-Based Screening
 - Lack of information about the customer
 - Lack of information about the end-use or ultimate end-user
 - Willingness to pay cash for expensive items
 - Customer is not familiar with product's performance or characteristics
 - Abnormal shipping routes
 - Customer has little or no business background
- Do Not Ignore Red Flags – Address Them!

International Trade Enforcement Factors

- **General factors for consideration by Regulators in assessing penalties:**
 - Export Destination Involved
 - Degree of Willfulness
 - Number of Violations
 - Potential for Criminal Charges
- **Mitigating factors:**
 - Voluntary Self-Disclosure (EAR)/Voluntary Disclosure (ITAR)
 - Adequate and Effective Int'l Trade/Anti-Corruption Compliance Program
 - Cooperation with Investigators
 - No Previous Record of Violations
- **Aggravating factors:**
 - Deliberate Effort to Conceal Violations
 - Disregard for Export Compliance Responsibilities (Willful Blindness)
 - Sensitivity of Item/Article
 - History of Violations
 - High Quantity/Value of Exports

Voluntary Disclosures

Voluntarily disclosing a suspected or known violation of international trade laws/regulations is a business decision (unless the disclosure is mandatory or directed)

Voluntary Disclosures

“Every exporter makes mistakes. ...

A company that is not disclosing violations is either covering them up or is too stupid to know it has violations.”

- Former Director of DDTTC/Compliance

Key Compliance Concepts

- Int'l Trade Compliance should be conducted comprehensively across the full spectrum of trade-relevant areas
- Int'l Trade Compliance is a continuing requirement
- Compliance Mindset –
 - Diligence to Prevent Violations
 - Preparation to Defend Actions
- Int'l Trade Compliance = Business Decision
 - Balance Business Operations and Compliance Risk
- You Don't Have to Like It – You Just Have to Do It



International Trade Compliance & Risk Mitigation

Alan F. Enslin

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