

Global Import and Export Controls

Christopher Goddard, Associate General
Counsel Washington University in St. Louis

Daniel Schwarzenbach, ACC of Louisiana
President

Overview of Export Administration Regulations (EAR)

- Code of Federal Regulations
 - 15 CFR 730 – 774
- Available on line:
 - www.bis.doc.gov
 - <http://www.access.gpo.gov/bis/ear/eardata.html>
- Order from Government Printing Office
 - 866-512-1800
 - <http://www.access.gpo.gov/bis/earorder.html>

Bureau of Industry and Security (BIS)

- Part of the U.S. Department of Commerce
- Mission Statement
 - “Advance U.S. national security, foreign policy, and economic objectives by ensuring an effective export control and treaty compliance system and promoting continued U.S. strategic technology leadership.”
- BIS is responsible for implementing and enforcing the laws which regulate the export and reexport of most commercial items.

Why Are Exports Controlled?

- National Security
- Foreign Policy
 - Anti Terrorism
 - Crime Control
 - Regional Stability
- Non Proliferation
 - Nuclear weapons
 - Chemical/Biological Weapons
 - Missiles

Definitions - Part 772

- Item – “commodities, software and technology . . .”
- Export – an actual shipment or transmission of items out of the United States.
- Reexport – an actual shipment or transmission of items subject to EAR from one foreign country to another foreign country

Definitions Continued

- Subject to the EAR – A term used to describe those items and activities over which the BIS exercises regulatory jurisdiction.
- Commerce Control List – A list of items under the export control jurisdiction of BIS
- Export Control Classification Number (ECCN) – The numbers used in the EAR to classify items for the determination of licensing requirements.

Definitions Continued

- Release of Technology – can occur through:
 - Visual Inspection
 - Oral Exchange
 - Application of Knowledge
- Deemed Export – a release of technology or source code to a *foreign national* in the United States.
 - Considered an export to the home country of the foreign national;
 - Does not apply to permanent resident aliens and protected individuals

Questions to Ask Before Shipment

- Must know for every export transaction:
 - What is my item?
 - Where is it going?
 - Who will receive it?
 - What will be the end use?

General Prohibitions 1 – 3

List Based, Part 736

- You may not without an Export License or License exception:
 - Export or reexport controlled items to listed countries.
 - Reexport foreign made items incorporating more than de minimis amount of controlled U.S. content (U.S. software, technology).
 - Reexport foreign produced direct product of U.S. technology and software (D:1 Countries in part 740 Supplement 1, including Cuba)
- NB – Each of the License Exceptions contained in Part 740 supersedes these prohibitions if all terms and conditions are met.

General Prohibitions 4-10

Part 736.2(b)

4. Denial Orders (available on website)
 5. Knowledge of end use and end user controls
 6. Embargoed Countries
 7. U.S. person support of proliferation
 8. Transit through certain countries
 9. Terms or conditions of licenses
 10. Knowledge of a violation
- NB. Generally, License Exceptions in Part 740 not available.

License Exceptions

- An authorization that allows for export or reexport of items requiring a license under certain stated conditions.
 - Cannot be used:
 - When authorization has been suspended or revoked;
 - Crime control items to most destinations
 - Most Missile Technology control items
 - Embargoed destinations, in most instances

License Exceptions

- Country Group B
- Civil End Users (non-military)
- Limited Value Shipments (no splitting orders)
- Technology and Software Related (written assurance from consignee required)
- Temporary Imports, Exports and Reexports
- Service & Replacement of Parts and Equipment
- Technology & Software Unrestricted

Embargoed and Sanctioned Countries

- Iran
- Cuba
- Syria
- North Korea
- Sudan

Office of Foreign Assets Control (OFAC)

- U.S. Department of Treasury
- OFAC Administers and enforces economic and trade sanctions against targeted:
 - Foreign Governments (Iran, Sudan Cuba)
 - Individuals (terrorists, narcotics traffickers)
 - Entities (front companies, charities linked to terrorist organizations)
 - Practices (diamond trade, proliferation activities)

Prohibited Activity

- Exports
- Imports
- Trade brokering, financing or facilitation
- Any attempt to evade or avoid sanctions
- Applies to most goods, technology and services.

Foreign Corrupt Practices Act (FCPA)

- FCPA Anti-bribery provisions prohibit:
 - U.S. company, individual, or foreign subsidiary;
 - Offering or authorizing payment of \$ or anything of value;
 - Stock;
 - Entertainment;
 - Gifts;
 - Discounts of products or services not readily available to the public;

FCPA Overview

- Offering or authorizing payment of \$ or anything of value:
 - Charitable donations;
 - Offer of employment;
 - Assumption or forgiveness of debt;
 - Payment of travel expenses; and
 - Personal favors.

FCPA Overview

- Knowing that some or all of the payment will go to the foreign official;
 - Actual knowledge
 - No due diligence
- For the purpose of influencing any official act or decision;
- To obtain or retain business.
 - Includes payments to a foreign official to lower corporate taxes and custom duties to gain unfair competitive advantages

FCPA Overview

- Directly or indirectly;
 - 80% of FCPA related bribes are done through intermediaries
- With a corrupt intent;
 - Improper motive or purpose
- To a foreign official, political party or candidate;

FCPA Overview

- FCPA Requires Issuers (Public Companies) to have:
 - Proper accounting principles;
 - Proper record entries; and
 - Proper accounting controls.

Facilitation Payments

- Exception for routine government action (“grease payments”):
 - Obtaining permits;
 - Processing visas and work permits;
 - Scheduling inspections; and
 - Providing utility services

Facilitation Payments

- However grease payments may violate the accounting provisions of the FCPA if not accurately reported;
- Anti-corruption laws in many countries (e.g., the U.K., Germany, and Italy) do not have exemption for grease payments;

Affirmative Defenses

AFFIRMATIVE DEFENSES

- A payment is lawful under the WRITTEN foreign law; and
- Reasonable and bona fide travel and entertainment expenditures for promotion/ demonstration or contract performance.

International Vendor Vetting

- Make sure you Check Parties for:
- Denied Persons
- Entity List
- Unverified List
- OFAC Lists
- Debarred Lists
- Available at www.bis.doc.gov

Red Flags

- Possible indicators of unlawful activity – must be resolved, require follow up
- Abnormal or suspicious circumstances
 - Excessive Invoices for Services
 - “Consulting Services” with little or no detail
 - Routine on site services is declined
 - Hesitancy to disclose ownership information
 - Resistance to answering questions
 - Countries with Corruptions Perception Index Score of less than 7 (www.transparency.org)

Vetting Continued

- Full Names, place of birth, date of birth, nationality, full address, passport number of owners and officers
- Full Names of commercial entities, location, business registration
- International Company Profile – US Dept. of Commerce (www.export.gov)
- Third Party Vendors – TRACE, International

Anti Boycott Laws

- The antiboycott laws were adopted to encourage, and in specified cases, require U.S. firms to refuse to participate in foreign boycotts that the United States does not sanction. They have the effect of preventing U.S. firms from being used to implement foreign policies of other nations which run counter to U.S. policy.
- The Arab League boycott of Israel is the principal foreign economic boycott that U.S. companies must be concerned with today. The antiboycott laws, however, apply to all boycotts imposed by foreign countries that are unsanctioned by the United States.
- The EAR requires U.S. persons to report quarterly requests they have received to take certain actions to comply with, further, or support an unsanctioned foreign boycott