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CFIUS – How Would Your Export Compliance Program Hold Up?

Does your company have controlled and or emerging technologies and foreign investors? If so, you need to know if your export compliance program would hold up to a Committee on Foreign Investment in the U.S. (CFIUS) investigation.

CFIUS is a committee made up of sixteen inter-government agencies authorized to review certain transactions involving foreign investment in the U.S. transactions, in order to determine the effect of such transactions on the national security of the United States. The sixteen agencies include the International Trade Administration (ITA) and the Bureau of Industry and Security (BIS).



The ITA Serves as Commerce's CFIUS Coordinator and provides analysis of economic vulnerabilities, market trends, and business rationale. The BIS provides analysis of dual-use export control implications and defense industrial base issues. Either way, CFIUS is sensitive to national security implications of foreign investment in US companies. In addition to national security concerns, the committee is also concerned if the foreign investor is controlled by a foreign government, if the transaction could affect homeland security or if it would result in control of any critical infrastructure (e.g. ownership of real estate next to a U.S. military base) that could impair the national security.

A CFIUS review is intended to identify foreign threats, and if the U.S. target entity presents a vulnerability. Parties to transactions where there is a CFIUS-related risk associated with the U.S. target (commonly referred to as a "vulnerability") or the foreign investor (commonly referred to as a "threat") are expected to file voluntarily. The Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA") expanded CFIUS's jurisdiction and activity and it's important to be aware of U.S. Treasury's proposed regulations in September to implement FIRRMA's expanded jurisdiction over non-controlling investments in Technology, Infrastructure and Data "TID" U.S. businesses.

A CFIUS investigation will include a full review of all your company's controlled technology to determine if there is a national security risk. Unfortunately, this investigation can also poke holes in your export compliance program. To prepare for an impending CFIUS investigation, consider the following:

Commodity Jurisdiction:

Commodity Jurisdiction has to do with whether your items, software and technology fall under the State Department's International Traffic in Arms Regulations (ITAR) or the Commerce Department's Export Administration Regulations (EAR). It only takes one U.S. Munitions List (USML) controlled item to make your company an ITAR shop. You might not manufacture USML items but if you purchase third party items that are for guidance/navigation such as Global Navigation Satellite System (GNSS) receiving equipment, certain gyroscopes or infrared sensors, etc. make sure you know if they are listed on the USML. If your company was provided any technical data for these items such as CAD files or other design work and it's highly export controlled, it's a game changer in terms of the scrutiny of a CFIUS investigation. The expectations will be that you have a robust export compliance program in place to control access to this type of technology.

Classification:

Even if you don't have any items on the USML, you could have technologies that are still very highly controlled by the Commerce Control List (CCL). The Commerce Department has yet to make any determinations [on certain emerging technologies](#) such as artificial intelligence, certain robotics and advanced surveillance technologies. The CFIUS committee will expect you have classified your products, software and / or technology including any third-party products or components. Many companies that are still building prototypes don't realize that when they export a sample or components for assembly overseas, they are still subject to all export regulations even though they are not shipping a finished product.

Deemed Exports:



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All technologies for the production development or use of an item has be classified to determine if you have a deemed export. If you are not familiar with deemed exports, the U.S. government considers the 'transfer' of technology to a foreign national while they are here in the U.S. as an export since this person will eventually return to their home country with new knowledge. You can see how the CFIUS committee would be concerned with foreign investors wanting access to designs, specifications, manufacturing processes, etc. Any employee, visitor, investor, etc. might require an export license to have access to this type of technical data and if the technology is heavily regulated, it could cause more concern for the CFIUS committee.

Technology Exports:

Another concern for CFIUS regarding national security is exporting the very same technology to the foreign investor. Exports could occur via download, email, conference call or other electronic means. Even though sending specifications or technical drawings through email, discussing them in a meeting, or storing them on a shared server doesn't seem like an export, it is—and may require an export license.

Technology Control Plans:

Because of all the concerns around access to controlled technology, the CFIUS committee will expect your company to have technology control plans (TCP) in place. A TCP describes how controlled items, software and technology will be secured. It includes plans for storing / housing the items and procedures for guarding against unauthorized access to the restricted items or information.

Having a comprehensive export program in place also includes restricted party screening, license determination, sanctions & embargoes, AES Electronic Export Information (EEI) declarations, government reporting, recordkeeping, etc. A CFIUS investigation can paralyze your company with requests for information which is not only limited to your export compliance. So, having a robust export compliance program in place now puts you ahead of the game.

Hopefully we've shed some light on this hot topic. Let BPE Global know if we can help you with any of your trade compliance needs. BPE Global is a global trade consulting and training firm. Julie Gibbs is a Director of BPE Global. You can reach Julie by email at julie@bpeglobal.com or by phone at 1-415-595-8543.