



Export Compliance Manager

WE WANT YOU!

Why trade compliance skills are in demand

Risk assessments: managing the changing regulatory landscape

“Selling the sizzle” – A case study in marketing trade compliance

How can non-US technology companies best manage OFAC risk?

A week in the life of IBM’s Export Regulation Office

A new journal for a new decade

Export Compliance Manager will focus on the everyday questions and challenges faced by professionals working in the field of trade compliance. We hope it will become required reading for your organisation.

Welcome to the inaugural issue of *Export Compliance Manager* (or ECM as we're already calling it in the office). Fans of the *Export Compliance Manager's Handbook* (worldcr.com/books) will find familiar ground with this new journal. For those not familiar, ECM aims to be the must-read journal for export compliance practitioners. That means providing topical articles that reflect your day-to-day challenges in getting the job done.

If you think of an x-axis and y-axis, articles in the x-axis will address topics related to internal compliance programs at one end and those related to external issues like third parties, screening providers and industry associations at the other. On the y-axis, we plan to cover issues that apply to both large, mature export compliance teams and those smaller, one or two persons (possibly wearing more than one hat). How will we do that? By focusing on smart practices, trends, professional development, and bringing expert advice on how to add value to the business.

With these goals in mind, we kick off with an investigation into the growing demand for trade compliance professionals and the impact of that demand on hiring and wages. Despite, and in some cases because of, current interest in export controls and sanctions – think huge corporate penalties – the prospects for trade compliance professionals are looking rosy. In the article, recruiters share what their clients are looking for when they hire, and in-house team leaders give us an insight into the soft skills they seek.

Many of those skills will be on display among the team at IBM's Export Regulation Office. In this issue, we get a view of the varied and exciting workings of the team. Thanks to the team for letting us in!

A few thank-yous

I'll take this opportunity to thank all of our contributors this first issue.

John Pisa-Relli has offered a superb sales manifesto for trade compliance professionals eager to impress other divisions of their organisation on the importance of compliance.

We have an excellent introduction to restricted party list screening and some really smart questions to ask when selecting your screening solution – thank-you to the experts at Deloitte and to Valérie Josien for sharing their insights.

The management of risk – which, at the end of the day, informs most compliance efforts – is an important theme this issue. Many thanks for the insights from our Editorial Advisory Board members, Steptoe and KPMG for their fine advisories. Don't risk not reading the first of their regular columns. And if you are re-exporting items with controlled content, don't risk missing the timely *de minimis* reminder courtesy of Page Fura.

We're thrilled to have contributions from the State Department's Bureau of International Security and Nonproliferation (we encourage all readers to engage with ISN where they are able: the support they offer business and also non-US governmental authorities through their outreach efforts is superb), and from the Swedish Export

Despite, and in some cases because of, current interest in export controls and sanctions, the prospects for trade compliance professionals are looking rosy.

Control Society, which has done so much to encourage the development of the profession, through training, information sharing and lobbying in its 25 years – we hope to be a platform for enhancing the development of trade compliance associations, and I will be very pleased to hear from you about your efforts here.

It's a wide and varied collection of contributions but with the common theme of covering issues arising in the day-to-day job of the Export Compliance Manager. I hope you'll find a few nuggets here which you can use in your job and which you will want to share with your colleagues.



Get in touch

I'm keen to hear from you, to receive feedback on this first issue; to read your news and success stories; to understand how you approach the challenges that every trade compliance professional can face, no matter the industry they're working in, no matter the country they're located. Email me at the address below.

Finally: difficult times

Of course, we cannot ignore the fact that we launch in the midst of a health emergency on the cusp of achieving pandemic status – a threat to lives, livelihoods, and social and civil order. From a trade security and compliance perspective, Covid-19 represents a massive interruption to supply chains. Trade compliance professionals are no strangers to such disruptions, and may well be called upon to assist their companies in weathering what promises to be a prolonged storm. We will endeavor to share information that we consider useful for purposes of business continuity and trade facilitation – and help you keep a cool head in fevered times.

I hope you enjoy this first issue.

Katherine Peavy, Editor

katherine@exportcompliancemanager.com

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NEWS ROUND-UP

Sanctions relief for virus aid

The United States will allow aid organisations working in North Korea to sidestep sanctions in order to fight the Covid-19 coronavirus, a State Department spokesperson has said.

In a tweeted statement, spokesperson Morgan Ortagus said the US “stands ready and is prepared to expeditiously facilitate the approval of assistance from US and international aid organisations to counter and contain the spread of #coronavirus in response to concerns about the vulnerability of the people of North Korea.” (13 February)



Wassenaar addresses cyber arms

The member states of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, a group of 42 countries, have agreed to include military-grade cyber software and manufacturing technology of weapon-capable semiconductor parts for export control in an effort to counter cyberattacks and other international threats.

The move is apparently aimed at curbing the proliferation of military technology by countries such as China, North Korea and Iran. (24 February)

GL for Iran humanitarian aid

The Department of the Treasury's Office of Foreign Assets Control (“OFAC”) is issuing General License 8 “Authorizing Certain Humanitarian Trade Transactions Involving the Central Bank of Iran” and related FAQs. The move comes following the formalization of the Swiss Humanitarian Trade Arrangement. (27 February)

New reporting requirement FAQs

OFAC issued two new FAQs on the Reporting Procedures and Penalties Regulations (RPPR), 31 CFR part 501. In June 2019, OFAC amended the RPPR, significantly expanding the requirements for

US persons (and in some circumstances non-US persons) to report blocked property, unblocked property, or rejected transactions to OFAC.

FAQ 819 emphasizes that “OFAC expects all U.S. persons and persons otherwise subject to U.S. jurisdiction, including parties that are not U.S. financial institutions, to comply fully with all requirements of this rule.”

FAQ 820 clarifies that OFAC expects reports of rejected transaction reports to provide all the information about the counterparty in their possession, but does not expect files to request additional information from the counterparty. (20 February)

Rosneft sanctions

OFAC has designated Switzerland-based oil broker Rosneft Trading SA, a subsidiary of Rosneft Oil Company, as a Specially Designated National (“SDN”) for “operating in the oil sector of the Venezuelan economy,” under Executive Order 13850.

OFAC also sanctioned Didier Casimiro, Rosneft Trading's Chairman and President, who, a State Department press release notes, “also serves as Rosneft's Vice President for Refining, Petrochemical, Commerce and

Logistics.” It is noteworthy that the US government intentionally targeted an officer and director of the Rosneft parent entity. (18 February)



EU adds to Syria sanctions

Eight businessmen and two entities have been added to the EU's Syria sanctions list, the European Council has announced. The additions bring the total list to 277 individuals and 71 entities whose actions, the Council says, have directly benefited the Assad regime, including through projects located on lands expropriated from people displaced by war. (17 February)

Airbus pays the penalty

Airbus Group SE (‘Airbus’) – the second-largest aerospace provider in the world – agreed to pay nearly \$4 billion to resolve foreign bribery and other charges by authorities in the US, the UK and France arising out of the

company's scheme to use third-party business partners to bribe government officials and airline executives in violation of the Foreign Corrupt Practices Act

(‘FCPA’), the Arms Export Control Act and its implementing regulations, the International Traffic in Arms Regulations (ITAR), writes law firm BakerHostetler.

The terms of the deferred prosecution agreement (‘DPA’) with the authorities underscore the value of a comprehensive compliance programme by highlighting the inherent deficiencies in Airbus' anticorruption controls. Airbus will pay fines and costs amounting to \$582.4 million to the US Department of Justice, \$1.09 billion to the UK's Serious Fraud Office, and \$2.3 billion to France's Parquet National Financier. The DPA was approved in all three countries on 31 January 2020 and will be in force until 31 January 2023. (WorldECR, issue 87)

UK records inspections

UK exporters of controlled goods have been advised that the Export Control Joint Unit (‘ECJU’) has amended its records inspection process. Businesses will now be informed of the exact date an inspection of their records will take place. ECJU says it will “try to give between four and six weeks' notice of the inspection date”.

Chinese delistings

OFAC lifted sanctions on China-based COSCO Shipping Tanker (Dalian) Co., Ltd. (COSCO Dalian), five affiliates, and one individual who were named as Specially Designated Nationals (“SDNs”) in September 2019 for knowingly engaging in a significant transaction for the transport of oil from Iran. COSCO Shipping Tanker (Dalian) Seaman and Ship Management Co., Ltd., as well as several affiliates and their executives, remain on the SDN List. (31 January)

Trading places

Valentin Povarchuk, former trade compliance counsel at ‘Science applied to Life’ company (roughly translated means active in worker safety, health care, and consumer goods, among other things) 3M, has made the move from industry to private legal practice, opening for business at Midwest Trade Law (midwesttradelaw.com). Based in St Paul, Minnesota, Povarchuk advises on export controls, sanctions, embargoes and other elements of trade law and regulation.

Meanwhile, moving in the other direction in the Netherlands, **Yuri Florentinus** has joined Cargill as Regional Trade Compliance Manager. Florentinus, who focuses on EMEA trade compliance, was previously at trade consulting company, Pincvision.

In the US, **Mike Forster** has joined Teijin Holdings USA Inc. as Director, Global Trade Compliance. The company is active in the manufacture of aramid and carbon fiber products.

In France, **Nicolas Pianelli** has taken the role of Export Control Manager at aviation industry supply company, Daher.

In Ireland, former Global Trade Director at Aptiv, **Ciarán McConigley** has joined Across Borders Consulting as a Director, a new boutique consultancy business in the area of customs and international trade.

Kristina Beifus has been promoted to Senior Manager, Global Compliance & Sustainability at American Greetings.

After more than 22 years at the US Department of Commerce, where he served mainly as Senior Special Agent and Liaison Officer, DC-based, **Donald Pearce** has become a consultant at Sentinel Ilc.

Trading places? Let us know. email
info@exportcompliancemanager.com with news of your move

Covid-19 – the risk for trade compliance

With the Covid-19 coronavirus having brought the US stock market to a crashing halt on 9 March, it's increasingly clear that the epidemic is no flash in the pan, and that its economic impact will be far-reaching.

Timeline

On 23 January, two days before the Lunar New Year holiday was scheduled to start, China's central government quarantined the city of Wuhan, a key manufacturing and transport hub, in Hubei Province due to the number of patients and quick spread of a coronavirus (later named Covid-19). The quarantine was successively implemented in the rest of Hubei Province, as well as less stringently in other cities in China. Initially all passenger rail and air travel from Wuhan was suspended, but as the Lunar New Year holiday soon followed, commercial air and rail travel were suspended as well.

Once the World Health Organization declared the virus a global emergency on 30 January, China's authorities extended the Lunar New Year holiday through 10 February to try to arrest the spread of the virus. For export and logistics teams, this meant that the typical delays due to the Lunar New Year period were extended by a week.

On 5 February, all US airlines cancelled flights to and from China into March and April causing significant delays to air freight. As of publication, offices, factories and ports in China, while technically allowed to operate normally, may be short-staffed or working remotely, causing further delays of shipments by sea. One export compliance manager called the situation "a commercial disaster".

Outside of China, South Korea, Italy and Iran are reported to have suffered the highest levels of infection, with the European country's government imposing a 'lock-down' on the entire country.

Supply chain concerns

Björn Wahlström, managing director at Current Consulting Group, a firm that specializes in supply chain risk and audits told *Export Compliance Manager*, "Aside from the bottleneck in



The World Health Organization has declared the virus a global emergency.

transportation and logistics, the main issue now across industries is getting access to factory and port areas without facing quarantine either on arrival, or when returning to a larger city. For compliance teams this means potentially trying to assess compliance issues remotely, while working out a safe access plan for auditors."

For trade compliance managers, any crisis affecting the supply chain creates high-risk alerts for issues other than commercial and labor challenges. Tony Lugg, Chairman of Transported Asset Protection Association ("TAPA") APAC, says: "During any ongoing crisis, occasions may occur where criminal gangs, unscrupulous organizations or other embargoed countries would try to exploit the ongoing crisis and import, export and provide the movement of goods and technology and/or services that are prohibited."

DDTC encryption update

New guidance from the US Directorate of Defense Trade Controls ("DDTC") on encryption is that after 25 March, "If you properly secure your unclassified technical data using the minimum encryption standards provided, you can take or send that data out of the U.S. or between other countries, and the action may not require a license. There are only a few things to remember:

1. Meet or exceed the standard
2. Watch out for 126.1 countries

https://www.pmddtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=dd2ecd1adbcb8105564ff1e0f9619f2

Some typical examples of where export controls could be breached, says Lugg, are when shipments are described as humanitarian aid and sent as expedited.

Amanda deBusk, partner at the DC office of law firm Dechert, told ECM, "Other supply chain threats include the fact that the massive reduction of outbound freight from China means a dearth of empty shipping containers – with sea-bound freight between non-Chinese ports affected."

deBusk said that trade lawyers are fielding myriad questions about Covid-19. Key amongst industry concerns are the impact of the virus on the shipping industry, which is largely staffed by crew from China and other Asian nations.

According to Lugg, "Critical infrastructure and utilities companies are asking themselves questions such as: 'At what point would we close a key facility –

such as an oil refinery? At a rate of 1% of employees infected? Or 5%?' [They are] trying to put in place continuity plans in the event of further infection."

Crisis management

Even in times of crisis, trade compliance managers are responsible for implementing a trade compliance program that identifies risks, and prevents and mitigates damages related to the customs laws of countries where the company operates and the loss of key personnel in the business, such as trade compliance could result in severe fines or other punishments.

As a result of these risks, Lugg suggests that "Trade compliance managers should be regarded as key or critical personnel and should be segregated away from the mass workforce to prevent cross-infection of key people. It appears that key personnel sometimes only extends to the senior management team."

Further reading

Sheppard Mullin: The Impact of Coronavirus on Supply Chain:
<https://www.globaltradelawblog.com/>

Akin Gump: FAQs for Employers about Novel Coronavirus (COVID-19):
<https://www.akingump.com/en/experience/industries/national-security/covid-19-resource-center/index.html>

Norton Rose Fulbright: Personal data protection in the time of coronavirus (Covid-19):
<https://www.nortonrosefulbright.com/en/knowledge/publications/d61ee6b6/personal-data-protection-in-the-time-of-coronavirus-covid-19>

and the Russian Federation
3. Keep it end-to-end encrypted."

In December, DDTC published an ITAR interim final rule (84 FR 70887) "creating a new definition of activities that are not exports, reexports, retransfers, or temporary imports" and which "consolidates in one location several previously existing but disassociated activities that are not considered exports and adds a new entry for properly secured unclassified technical data in an encrypted state."

Dates for the diary

This year's BIS Update conference will run between 29 June and 1 July. It takes place at the Marriott Marquis Hotel in Washington, DC. bis.doc.gov/index.php/compliance-a-training

Export Compliance Training Institute will be running their two-day seminar on US export controls for non-US companies in Singapore in April and in London in May. learnexportcompliance.com

The WorldECR Export Controls and Sanctions Forum 2020 will take place in London on 8-9 October and in DC on 21-22 October. worldecr.com

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**Don't miss issue 2
(April 2020)
when ECM looks at**

**BUDGET – DO YOU
HAVE ENOUGH?**

There may be no such thing as an 'average company', but you still need to be able to calculate the right spend on staff, trade automation, screening and other solutions, and external legal advice...

Are you getting what you need? And if not, how do you make the case for MORE?

People get ready

As the United Kingdom begins its talks with the European Union on a post-Brexit trade agreement, ECM asked experts for tips to include on an exporters' Brexit checklist.

Know your licensing obligations

Traders should confirm that their goods are properly classified for export control reasons (Export Control Classification Control Number) as dual-use controlled goods (Annex 1 goods) will need export license authority when being exported to any EU Member State from 1 January 2021. UK exporters of dual-use goods (including software and technology) should register with SPIRE (UK government portal) in order to use the UK's new Open Export Licence (export of dual-use items to EU Member States).

Additionally, exporters should ensure that they have proper processes and procedures in place in order to fully comply with the conditions of this new license. Similarly, exporters in EU Member States should ensure that they are registered with the relevant EU authority for use of the UGEA 001 if they wish to export Annex 1 controlled goods to the UK.¹

Update your IT systems

From 1 January 2021, IT systems should be programmed so as to prevent all exports of dual-use controlled goods (including software and technology) from the UK and any EU Member State. The relevant export control classification control number ("ECCN") should be held within the system against each applicable item, and any export-controlled order should be held in the system pending release subject to proper export license authorisation.

Exporters of controlled goods should also work closely with their freight-forwarders to ensure

that customs declarations are made in accordance with all applicable regulatory controls, and that they retain all necessary evidence of the export in order to satisfy compliance visits from the Export Compliance Joint Unit ("ECJU").²

Andrew Skinner, AM Skinner Solicitors, amskinnersolicitors.co.uk

Don't rely on trade finance exemption

Companies which have previously relied on the trade finance exemption in the Ukraine-related sanctions under Regulation 833/2014 need to consider whether the exemption is still available once the UK becomes a third country.

Anticipate divergence...

Export compliance managers need to be aware of the fact that EU and UK controls may diverge over time – in particular, the UK might adopt a more or less favorable treatment of certain sanctioned countries, or even introduce its own autonomous sanctions.

...and tariff changes

Importers and exporters will also need to check whether any tariffs will apply on trade between the UK and EU. Businesses currently producing goods of EU origin should consider whether the origin of the goods will change in the event of "no deal". Businesses currently importing or exporting UK-origin goods into a country with which the EU currently has a free-trade agreement, and vice-versa, should check whether these goods will still benefit from any reduced tariff set out in the free trade agreement. If tariffs are increased on goods being imported or exported, businesses should check whether contractual provisions determine who should



pay the increased tariffs and whether these provisions can be renegotiated.

Daniel Martin and Anthony Woolich, HFW, hfw.com

Spread the word

We would estimate that a very high percentage (even up to 90%) of exporters of dual-use goods are unaware that what they export is controlled, because they've been exporting to the EU without need of a license. If you're an EU company importing controlled goods from the UK (or vice-versa), make sure that your trading partners knows that their goods are controlled and that they'll need a license to export.

End-use considerations

Before the UK's departure from the EU, there was no requirement, where an export

was heading to another EU country, to obtain an end-user undertaking if the exporter was aware that it might ultimately be exported outside of the EU. That now changes: If a UK company is exporting to (say) Germany, and becomes aware that it may be exported beyond the EU, the UK exporter should now look to acquire an end-user undertaking from the ultimate recipient.

Military authorisations

We've become aware that Poland and Italy have now introduced a licensing requirement for military exports to the UK. Italy requires an end-user certificate from the UK Foreign Office before issuing licences. We expect that more will follow.

Sandra Strong, Steve Berry and Gail Leeson, Strong & Herd, strongandherd.co.uk

Links and notes

¹ Information on the UK's new Open Export Licence (export of dual-use items to EU Member States) can be found at: <https://www.gov.uk/government/publications/notice-to-exporters-201903-new-ogel-published-covering-export-of-dual-use-items-to-eu-member-states/notice-to-exporters-201903-new-ogel-published-covering-export-of-dual-use-items-to-eu-member-states>

² Details of ECJU compliance visits can be found at: <https://www.gov.uk/government/publications/compliance-visits-explained/compliance-visits-explained>

CFIUS changes update

The Department of the Treasury has released two final regulations to implement the changes that FIRRMA made to CFIUS's jurisdiction and processes. The regulations, which were released in two parts, became effective on 13 February. The full language of

FIRRMA and related information can be found on the CFIUS Laws and Guidance page at the Treasury website.

New edition of popular book

WorldECR, sister publication to *Export Compliance Manager*, has announced that it will be bringing

out a second edition of its popular *Export Compliance Manager's Handbook*.

The new edition updates and expands the original (first published in 2017) with new and additional content and interviews with senior export compliance professionals who share their

experiences of the role, the challenges they may face and the solutions that they arrived at.

The new edition will be available in April. Keep an eye out at www.worldecr.com/books or feel free to email info@worldecr.com for further updates.

Five mandatory topics to flag for 2020

Courtesy of Julie Gibbs and Gabrielle Griffith, BPE Global, bpeglobal.com

1. Export license renewal

If you utilize export licenses, you'll want to create a schedule for renewal. This is especially important for licenses from OFAC that are not driven by quantity or dollar amount. You'll want to start working at least 60 days in advance of the expiration. Hopefully you have a pulse on your company's business and development strategies and are aware of upcoming licensing needs.

2. Auditing schedule

Your compliance audit schedule should be established now so that you can ensure your company's divisions or business units can plan for appropriately and won't be adversely impacted.

Coordinate your internal audits with your corporate auditing team to ensure your audits don't overlap. Also include in your schedule an audit of your service providers such as your

customs brokers and the freight-forwarders who are filing AES declarations on your behalf. A review of their performance and compliance with your standard operating procedures should be conducted annually.

3. Training schedule

In the same vein, you should be scheduling your trade compliance training sessions for the company. The entire company should be trained annually on general trade compliance with an emphasis on high-risk areas for your company. Certain departments will require more in-depth training, such as shipping and order management. Whether these are in-person or online trainings, the earlier you plan and coordinate with other company initiatives, the more successful you will be.

4. Recordkeeping

The next item on the checklist has to do with recordkeeping. Are there records that can move to your archives? Are there records

that exceed all company recordkeeping guidelines that can be destroyed? Remember that some records need to be kept more than five years. Records such as supporting documentation for certain drawback claims might need to be retained past the five years, even up to 11 years.

5. Contract renewals and Incoterms 2020

You'll want to review powers of

attorney and other third-party contracts for renewals. Ensure that if your company is renewing contracts with customers, vendors and suppliers that they are including the appropriate level of trade compliance verbiage and that incoterms are aligned and current. Manufacturer contracts should also have specific language regarding deemed exports and controlled technology transfers.



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Strategic trade controls and sanctions are critical tools in the international efforts to prevent the proliferation of sensitive technologies and their use in the development of weapons of mass destruction ('WMD') programs and military capabilities by state and non-state actors. While the primary responsibility for the establishment and administration of strategic trade controls lies with national authorities, the sheer speed and volume of global trade require a multilayered system, in which industry plays a significant role in ensuring that these technologies are not diverted to illicit use.

The international supply chain includes manufacturers, exporters, brokers, freight-forwarders, maritime insurance companies, flag registry managers, shipping industry associations, commodity brokers, ship owners, classification societies, financial institutions, as well as academic and research institutions and other industry stakeholders in critical technology sectors. Many of these entities operate in a transnational environment – they have foreign subsidiaries, rely on diversified supply chains, and employ foreign nationals. They transfer software and technology around the globe daily and share information across borders with the click of a button. They store software and technical data in a cloud. As a result, they have a commercial interest protecting their intellectual property, reputation, and shareholder value from exploitation by proliferation networks.

Correspondingly, industry bears corporate responsibility for upholding international nonproliferation norms and for adherence to export controls and sanctions laws that apply in all jurisdictions in which they are operating. Ensuring compliance with international export controls and sanctions necessitates a comprehensive understanding of emerging procurement trends and of potentially complex issues, such as the

regulation of international brokering and financing, intangible technology transfer controls, and catch-all controls. At the same time, rapid technological advances frequently outpace multilateral regulatory efforts, lending unwanted advantage to nefarious actors seeking to exploit gaps in the international

It is hard to overstate the critical role of export control and sanctions compliance professionals in protecting international security and safeguarding legitimate international trade.

nonproliferation framework. The private sector is often referred to as 'the first line of defense' against proliferation, and it is hard to overstate the critical role of export control and sanctions compliance professionals in protecting international security and safeguarding legitimate international trade.

To achieve optimal levels of strategic trade and sanctions compliance without unduly restricting international trade, the government and industry must work in tandem in a spirit of genuine partnership and information sharing, addressing the latest technological developments, supply chain issues, and international security concerns. For this reason, industry outreach is a significant component of the State Department's Bureau of International Security and Nonproliferation's ('ISN') efforts to prevent proliferator states, such as the DPRK and Iran, from acquiring proliferation sensitive material and generating the revenue that funds the development of WMD and destabilizing military capabilities. Our objective is to sensitize industry to the evolving ways proliferators use to subvert export controls and circumvent sanctions and to

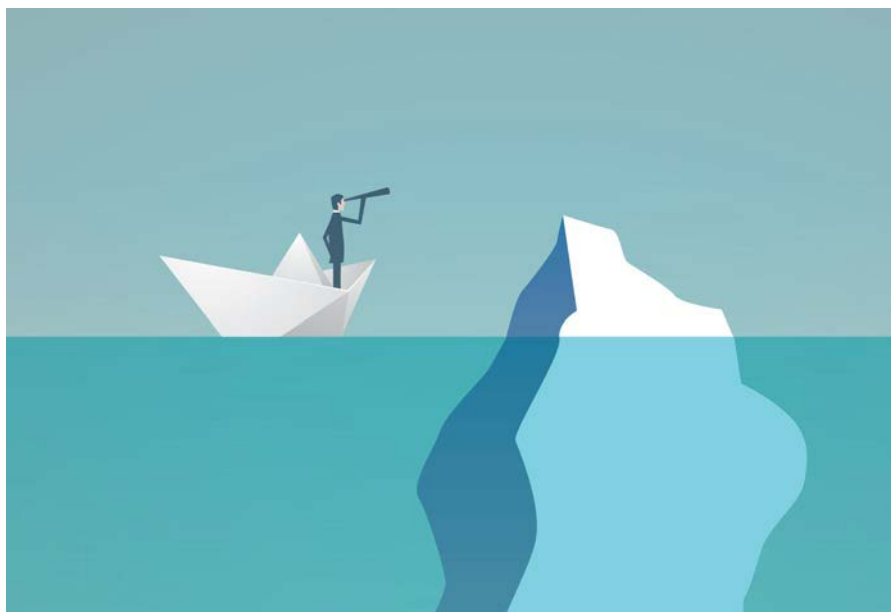
strengthen industry's ability to protect sensitive technologies with national security implications from acquisition, diversion, and exploitation by proliferant states and non-state actors.

ISN's approach involves the development of public advisories and direct outreach to the manufacturing, shipping, and maritime industry. To encourage responsible behavior, ISN also promulgates resources that facilitate industry compliance, such as red flag indicators of vessels engaged in sanctions evasion activities, transactions screening software, internal compliance tools, and electronic licensing systems, and provides training to ensure that those involved in international trade remain informed of the compliance requirements and maintain a systematic approach to risk management. These resources ensure that industry understands that the threat stretches across the entire supply-chain. We work with industry to develop strategies to raise the baseline for compliance across their industry.

Effective implementation of strategic trade controls and sanctions measures requires joint effort of government and industry compliance practitioners to prevent proliferation of WMD and to facilitate legitimate international trade and economic development. We look forward to working with you in securing responsible trade in sensitive technologies. ■

About the authors:

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KPMG SMART PRACTICE

Risk assessments: managing the changing regulatory landscape

The genesis of today's export controls is rooted in the Cold War when allied countries wanted to limit the export of certain "dual-use" items. However, the demise of the Cold War introduced a new, and long, period where industry argued for de-control with the notion that export controls were too restrictive. Governments began lifting regulations and easing export-control requirements. Both industry and government became accustomed to a permissive, export-forward environment.

That period is coming to an end. China's investment in technology has prompted the US government to tighten export-control restrictions. Simultaneously, the furious pace of innovation is pushing governments to determine if and how emerging technology will be controlled without undermining industry.

As the trade wars play out, we can anticipate more individuals and companies to be placed on restricted party lists and, similarly, more export controls. The best way to mitigate these risks is through a risk assessment. The goal is to benchmark the risk drivers that may lead to a violation, identify

their root causes and propose mitigation solutions. The structure of a risk assessment is unique to the company undergoing it, although typically there are common elements. At the outset, the company must determine if it will conduct a sanctions risk assessment, export controls or both.

A sanctions risk assessment focuses on the touchpoints with the outside world, as described in the US Department of the Treasury, Office of Foreign Assets Control's ("OFAC's") "Framework for OFAC Compliance Commitments." The primary point of interest is on the ways the company interacts with, does business with, or otherwise touches third parties. This typically includes an analysis of:

- Touchpoints with counterparties and third parties;
- Geographies and likelihood of higher sanctions risks;
- OFAC compliance screening gates;
- Restricted party and country screening processes; and
- Risk mitigation strategies

A successful sanctions review provides visibility into the entity's

inherent risk, mitigation controls and aggregate risk. It can then take targeted action to mitigate specific risks.

Export control risk assessments are fundamentally different, and more complex, than sanctions reviews. They involve not only the touchpoints with the outside world, but also those exclusively within the company itself. This requires an assessment of the entire business function within the context of the specific industry risk. In addition to stakeholder discussions, the following key areas will be tested:

- Product life-cycle including the technology roadmap, research and development, product servicing and end-of-life processes
- Customer life-cycle
- Sales and order fulfillment
- Workforce and visitor management (including deemed exports)
- Vendor relationships and management
- Shipping and delivery, as well as returns and repairs
- Use of export licenses, license exceptions/exemptions, or other government authorizations.

At the conclusion of an export control risk assessment, the company has quantified and qualified its level of potential compliance exposure based on its business profile and specific activities. It can then assess how best to promote compliance without impeding business.

The risk assessment provides a roadmap to strong export compliance. Typical follow-on actions include: process enhancements, improvement of systems and data issues and resource allocation assessments. Depending on the results, additional transactional testing may be necessary to clarify an issue. Occasionally, the company may need to take corrective actions.

As we move into an era of fast-paced regulatory and technological change, understanding the best approach to managing risk will be key. Through a risk assessment, the parameters of potential compliance challenges are identified. These are then used to establish a clear roadmap that will assist the enterprise in navigating these complex regulations. ■

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STEPTOE OUTSIDE COUNSEL

How can non-US technology companies best manage OFAC risk?

Sometimes it can be difficult for non-US companies to pinpoint exactly how US sanctions risks can affect their business activities. This is particularly true for companies operating in the technology industry, which can often be subject to OFAC's jurisdiction when dealing with hardware, software, technology and services with some link to the United States. Managing that OFAC risk can be challenging in this fast-moving industry.

For example, Switzerland-based Société Internationale de Télécommunications Aéronautiques ('SITA') became subject to OFAC's jurisdiction, according to its recent settlement with OFAC, because SITA was providing software and services that were either US-origin or depended on US-based servers or facilities.

In general, OFAC's "primary sanctions" regulations apply to activity by "US persons" or activity "in the United States". On its face, that sounds like a reasonably limited jurisdictional authority. But OFAC interprets this authority broadly, and its jurisdictional approach to non-US technology companies is not always intuitive.

Starting with digital services, in the

SITA settlement, OFAC said the airline services provided by SITA "were subject to US jurisdiction because they were provided from, or transited through, the United States." OFAC's enforcement history suggests that the use of US-based servers or other infrastructure or facilities, or involvement of US entities or individuals located in the United States, in performing services involving a sanctioned party or territory can provide OFAC with a sufficient jurisdictional "hook" to pursue an enforcement action.

The issue of software jurisdiction can be equally complicated. Among OFAC's charges against SITA was that it provided US-origin software to sanctioned airlines. OFAC's enforcement notice did not mention any US person involvement in that activity. This could suggest that OFAC views dealings between non-US persons and sanctioned entities involving US-origin software as subject to US sanctions jurisdiction, regardless of US person involvement. This is in addition to US export controls jurisdiction and OFAC jurisdiction in the context of a country-based sanctions regime.

Because of the breadth and lack of clear delineation of the reach of OFAC's jurisdictional authority, and because

OFAC can in some circumstances impose "secondary sanctions" even where it has no "primary sanctions" enforcement jurisdiction, many non-US companies opt to apply OFAC compliance measures either globally or in higher-risk areas of their business.

What can a non-US technology company do to protect itself? At a minimum, for digital services and software providers, this often means name screening controls to try to identify sanctioned parties (including any ultimate or beneficial owners of parties to a transaction) and geographical (e.g., country code top-level domain or IP address) screening to try to identify users located in or otherwise affiliated with sanctioned territories (i.e., Crimea, Cuba, Iran, North Korea, and Syria). One of the clear lessons emerging from OFAC's recent enforcement history is that this name and geographical screening should not be limited to immediate parties, but should often extend to intermediaries and ultimate end-users (e.g., your customer's customer). Companies unsure of whether their activities are subject to OFAC's jurisdiction also should consider whether any of the following are involved in their activities:

- US-incorporated entities or their foreign branch offices, or any entity with a presence in the United States;
- entities owned or controlled by US persons;
- individual US citizens or permanent residents, or individuals located or acting within the United States;
- US dollar-denominated transactions;
- US-origin goods, software or technology;
- non-US products/technologies with US-origin content or that are commingled with or drawn from US-origin technology; and
- servers, infrastructure or other facilities located in the United States.

If any of these factors are present in a transaction or business relationship, OFAC risk could apply, and in order to protect themselves companies should take steps to ensure that their compliance program adequately addresses those risks. ■

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Meredith and Peter counsel clients on achieving their business goals while ensuring compliance with US export controls and economic sanctions laws.

A close-up photograph of a person's hand holding a white rectangular sign. The sign has the words "WE WANT" in black, bold, sans-serif capital letters, and "YOU!" in red, bold, sans-serif capital letters. The person's face is blurred in the background, and their hand is in sharp focus holding the sign.

**WE WANT
YOU!**

Trade compliance: this year's must-buy

Demand for trade compliance professionals has never been higher. Nor have average salaries. *ECM* investigates who is hot and why trade compliance skills are top of the shopping list.

"Companies that had not realized the importance of trade compliance are now finding out how helpful it can be." So says Linda Lexo, Buffalo-based Managing Director at Trade Compliance Recruiting Solutions. Lexo is referring to the challenges business has faced on the trade front in the past year.

According to law firm Gibson Dunn's Year End Sanctions Update, the US Treasury's Office of Foreign Asset Controls ('OFAC') enforced monetary penalties on companies to the tune of \$1.38bn in 2019, announced sanctions actions against 82 companies, and designated 792 individuals as SDNs (Specially Designated Nationals). With OFAC's powers in those areas a favorite foreign policy tool of the current US administration, the financial risks and

sanctions designations are unlikely to abate in 2020. Indeed, global trade regulation is likely to become even more complex with both Russia and China planning their own counter-sanctions. The Chinese authorities have already issued a draft of proposed changes to the country's export controls. And trade compliance teams are sure to be impacted sooner or later by the ever opaque plans of the UK government's Brexit aftermath.

One consequence of the enhanced focus on trade control has been a hike in the number of highly visible enforcement actions and high-value settlements. In the latest of these, Airbus agreed to pay nearly \$4 billion to resolve foreign bribery and other charges, including violation of the ITAR, to authorities in the US, the UK and France. Settlements of

this size put ethics and trade compliance on the front page of newspapers and very much in the minds of the C-suite. The fall-out: trade compliance is currently high on the agenda for international businesses.

Demand is high

Lexo has been watching these developments and their impact on human resources. "It is a true head hunting market for trade compliance professionals," she says. "Candidates are in high demand. Many are getting multiple offers, and those who give notice are receiving counter-offers."

Indeed, demand for trade compliance team members is as effervescent as the US sanctions lists themselves. According to Lexo, high demand and a limited pool of candidates has meant that salaries are

RECRUITMENT

creeping up and, more impactful, candidates are climbing the career ladder at an ever-faster pace.

And it's not just the story in the US. In Europe, trade teams are also being fortified with additional team members and staff with more expertise. Paris, France-based Stephanie Greaves, of recruitment firm Laurence Simons Search, told *ECM* that demand for trade compliance professionals began to swell with the reinstatement of the Iran sanctions after the US pulled out of the JCPOA: "We have noticed an increase in allocating internal staff or recruiting externally to reinforce the export control function," she says, noting that employers are often looking for both solid technical and "soft" skills from new team members.

Back in the US, Texas-based Garrett Stephenson, President of Gateway Recruiting, echoes the bull market sentiment for trade compliance hiring. "There are probably 300 or more openings in trade compliance on LinkedIn right now. There are a lot of openings compared to market size," he says.

Stephenson's research shows that salary levels are feeling the results of this demand. He says the real need at present is for trade compliance managers and analysts: "The mid-level talent pool is really lacking right now."

Stephenson and his team produce an annual salary survey, the latest edition of which has just been published. It shows salary increases at every level of position for trade compliance professionals in the US, with the West Coast and East Coast pretty much neck and neck with remuneration levels across all levels; 10% of his research pool reporting a salary increase of between 21% and 39% over the past three years; and the EU and Asia Pacific giving the US a run for its money as top payer, particularly at senior level.

However, the desire for a combination of technical and soft skills can make salaries difficult to predict. In Europe, says Greaves, salaries reflect the full skillset for candidates that are in high demand. Stephenson notes that those building trade compliance teams are seeking a different level of professional than a few years ago. "Trade teams are looking for candidates who can be involved in strategy and process development, and can look from a global standpoint as well as how the team can contribute to business growth."

Team building

Linda Lexo's colleague and fellow

'Seeking trade compliance professionals with soft skills'

Export Compliance Manager's canvas of Trade Compliance Directors found they share many of the same wishes and concerns in developing their teams. Soft skills are more in demand than technical skills, which directors believe they can train on and, in any case, need to be updated regularly.

"The soft skills I look for? **Capability to change**," says GE's Senior Executive International Trade Compliance Kathleen Palma. "Not everyone can accept feedback and do something constructive with it. Our world is always dynamic. We need professionals who understand that the environment will keep changing and are able to onboard feedback in a productive way to make the team stronger."

One senior trade compliance executive in a logistics-focused company notes that aside from adaptability, she values **communication**: "The ability to explain these often complex trade terms and the changes in the field to both senior executives, junior employees and across regions is critical. Communication is a necessary skill."

Reinforcing the case for **adaptability**, an international trade team leader in the oil and gas sector says that one of his hiring must-haves is "finding people that can hit the ground running." He also looks for staff that can quickly become specialized due to the global trend in emerging export compliance programs, such as with China.

Candidates might read into the needs for high adaptability, great communicator and dynamic change and be intimidated by these high performance requirements. But GE's Palma says, "I also value humility and kindness as soft skills."

When asked about technical skills, Palma says that recently she's interested in more **leadership-focused** than technical skills and values abilities such as being able "to distill complex information into accurate summaries for leadership decision, the ability to push back on a more senior manager if the employee disagrees with a position, but also the ability to accept when the decision is final."

Our oil and gas executives, however, are looking for some specific **information technology-related prowess**. One is focused on the state of technology today versus what the state will be five or ten years down the road. He looks for people not focused on specific technologies, but understanding "how automation is coming in and what the impact will be." In addition, systems knowledge will become integral to the job, "a knowledge of how ERP systems work will be useful," in addition to the flexibility to adapt to new systems.

Finally, our logistics executive encourages team members to develop skills in **project management**. With the dynamic state of the industry, project management has become a necessary functional skill to benefit the department and help organize the dynamic state of change that is a never ending challenge for large and small trade compliance teams.

An oft-repeated phrase in all our discussions with trade compliance teams is "hands-on." It is clear no matter what level of seniority or salary range export compliance teams are hiring for, the continuous changes in multi-jurisdictional trade controls, sanctions, anti-boycott regulations, screening requirements, the tariff wars, and new guidance from all governments coming out every few weeks, that all levels of a trade compliance teams must be hands-on to get the job done.

Managing Director, Rick Miller is a former trade compliance director at Electrolux. He notes that historically there has not been a clear and structured career path for trade compliance professionals, and there are few college courses or certificates in trade or export compliance. With bodies like OFAC and the Directorate of Defense Trade Controls ('DDTC') putting pressure on companies with consent agreements to staff up their trade teams, "Trade compliance is being brought to the front lines," he says.

Those who end up in trade compliance, says Miller, have always come from a variety of backgrounds – customs brokerage companies, supply chain departments, legal, and contract administration. This is true in Europe as well. According to Greaves, "There are a

large variety of trade specialists emanating from different backgrounds. From a traditional legal perspective, those who have studied international law, can gravitate toward this area, often

"The mid-level talent pool is really lacking right now."

playing on an international contracts background, and enjoy bringing their legal expertise to meet the needs of a socio-political landscape."

Customs and the law are not the only breeding grounds for trade compliance

Gateway Recruiting Salary Survey 2020 – Trade Compliance Highlights

Associate

Average salary by region

West Coast (US)	\$82,152.50
Midwest/South (US)	\$62,951
East Coast (US)	\$64,500
Canada	\$68,725.50
European Union	\$74,375.66
APAC	\$70,525.30
Latin America	\$53,867.75

Manager (direct reports)

Average salary by region

West Coast (US)	\$134,046.72
Midwest/South (US)	\$128,750
East Coast (US)	\$128,465.13
Canada	\$135,875
European Union	\$138,450
APAC	\$161,666.67
Latin America	\$82,475

Director

Average salary by region

West Coast (US)	\$184,357.35
Midwest/South (US)	\$164,961.90
East Coast (US)	\$173,128.16
Canada	\$142,725
European Union	\$154,944.17
APAC	\$195,000
Latin America	\$130,000

Source: Gateway Recruiting, <https://www.gatewayrecruiting.com/>

specialists, however. Greaves has seen individuals with a military background getting into trade compliance in the defense sector, along with IT professionals attracted by the opportunity to add value within the context of digitalization and export controls.

With trade compliance teams coming from a variety of backgrounds and many professionals' paths far from linear, all the recruiters we spoke with agreed that experience over education is often a rule of thumb for hiring in a trade compliance team. Miller suggests that one professional designation can be useful for companies – the Licensed Customs Broker. "It is a nice thing for any company to have a Licensed Customs Broker on their staff in the event Customs

comes knocking on your door. Having someone that can help through the audit process is definitely useful." Unfortunately, the pass rate in the US for the Customs Broker license is only between 3% and 20% for first time testers.

Wherever they come from, right now they are not particularly easy to find. "It is a challenge to hire junior team members," says Lexo, "since most candidates are looking for a promotion; most companies cannot attract a lateral hire." Companies are upgrading positions that become vacant and adding junior staff to build their departments.

Seize the day

Import and export compliance tradition-

ally started out as a function in the operations teams – often specifically in logistics and sometimes in supply chain. However, says Lexo, "With the increased knowledge and penalties that have a threat of closing a business, companies have realized over the years that compliance needs to, or should, be a separate entity – preferably reporting to legal or better yet, directly to a CEO or General Counsel."

In some industries, trade compliance teams have become part of the wider compliance and governance framework and within these departments report to a Chief Compliance Officer ('CCO'). Certainly, this is a developing trend with guidance on internal compliance programs from many countries indicating that reporting to a CCO or even to a specific board function as best practice. How a company structures compliance will depend on its own markets, challenges and culture. Garrett Stephenson notes, for example, that California's tech firms have a particular challenge in hiring trade compliance professionals because they are not just shipping products, but keeping up with the new regulations around protected technology and "defining what categories products go into." It's a high-risk responsibility.

All these factors make every hire an individual one. As Rick Miller sums up: "There is no perfect candidate. Trade compliance is so varied, don't expect to find someone with experience in it all. Look for someone who can get things done, fits into your culture and is passionate." And remember, he says, "Most compliance people are passionate about compliance, otherwise they wouldn't be doing it." ■

Outsourcing and technology

Typically, when an industry experiences an uptick in business or has concerns about higher risks, outsourcing tasks to third parties and seeking technology solutions to help the internal team are the quick fixes they go for. In Europe, however, Stephanie Greaves, of Laurence Simons Search, says she has seen more companies increase their compliance headcount in order to reduce reliance on third parties.

Rick Miller and Linda Lexo, of Trade Compliance Recruiting Solutions, tell a similar story for the US, noting there is a great risk to outsourcing compliance. "Companies used to naively depend on customs brokers and freight-forwarders, or even customers and suppliers, to shore up compliance, but usually found out the hard way the only way to do it right is in-house," says Lexo. However, she does note that some companies will outsource specialized services like classification.

The same goes for machine-learning programs that tempt companies with potential time savings. "Technology has certainly enhanced processes such as denied party screening," says Miller. "Many companies offer all sorts of programs for trade compliance needs, but you will still need the teams to analyze, audit and process the findings." Greaves agrees: machines, she says, "cannot substitute understanding how business is conducted on the ground in order to ensure compliance."

One area that has benefited from machine learning, she believes, is training. Machine learning has proven to be useful in reaching as many people as possible and monitoring their learning. Technology has a place for trade compliance teams, but in a wider compliance strategy not as an end-all, be-all solution in itself.

IBM's Export Regulation Office

Ed Bond, Director of IBM's Export Regulation Office, sits in his DC office preparing for the weekly team meeting. He might be anticipating a briefing from one of the team members returning from an overseas compliance review, a process managed by Alexis Wetzler. He could be wondering what Lillian Norwood's team has faced with a briefing the week before from a research team working on a new technology. He is certainly ready to hear about the costs of a new technology solution Kevin Cuddy wants to implement to improve education and training across the company. Whatever the news, as the Export Regulation Office's ('ERO') Director, Bond is sure to hear new information each week.

"Things happen more quickly than on a 12-month basis," says Bond. "The team has to constantly readjust, monitor and support the business on a cyclical basis." To keep those headlights firmly focused on the business, the team tracks three main vectors: regulatory changes, business changes, and compliance structure changes. With these vectors in mind, *Export Compliance Manager* got an

inside pass to a week in the life of IBM's ERO, thanks to Bond and his team.

MONDAY

Every Monday – indeed, every day of the week – a team member monitors the Federal Register. An email goes out to the entire team in DC highlighting any changes in regulations that could affect IBM's business. Team members analyze the change, look at the business areas they themselves support, and engage with the business to determine any potential impact to operations. The ERO staff will also canvas the wider export compliance community of over 100 compliance coordinators in the business units and countries where IBM operates.

Most recently, a team led by Lillian Norwood, Manager, Government & Regulatory Affairs, has been keeping an eye on developing regulation relating to emerging and foundational technologies. Norwood's team supports IBM's research operations and the CIO's office, what she calls "the fun stuff. When any changes come out, in the Federal Register or from the Bureau of Industry and Security ('BIS'), the team has to be locked

in with the organization and see what is coming down the path, seeing what groups might be impacted. Are the impacted groups global or restricted to US players?"

Another part of the ERO's responsibility, led by Alexis Wetzler, supports IBM's services business, which includes consulting, IT outsourcing, and

"The team has to constantly readjust, monitor and support the business on a cyclical basis."

managed applications. A key responsibility for Wetzler is to review the higher-risk engagements, flagged in an IBM internal system requiring all deals and services to go through an export check that includes a tailored export checklist designed by the ERO. The



Meet the team. From left to right: Kevin Cuddy, Francia Torres, Ed Bond, Diane Baker, Ed Gillespie, Lillian Norwood, April Snyder-Bolden, Kimberly Brown and Gus Anifantis and (not pictured) Alexis Wetzler, Bill Oswald, Robin Randall and Steve Zeoli.

A WEEK IN THE LIFE OF...

transactions are approved through a tiered process with low or no risk deals approved by the in-country or business unit compliance coordinators. Wetzler receives the higher-risk customer engagements. After looking at the contract terms, services, and working to resolve any affirmative answers on the questionnaire, she will approve the flagged engagement only if IBM's internal compliance requirements are met. The key, Wetzler says, "is to determine what truly requires closer evaluation as opposed to being worried that every deal presents a red flag." During her time with IBM, she's seen many deals and as patterns start to emerge, "It becomes easier to identify exceptions over time."

TUESDAY

Both Wetzler and Kevin Cuddy, the lead on the ERO's education initiatives, clear the flagged engagements in IBM's system. Cuddy is responsible for transaction reviews in the Middle East and Africa and likes to address any flagged engagements as soon as he arrives in the office. "The challenges in the transaction review process," says Cuddy, "are measuring the potential risks of the transaction and getting the available information about end-users, circumstances of the deal, and other emerging issues in the export control space, such as surveillance issues, dual-use aspects and even human rights considerations." A solid review takes a little time and the team aims to be responsive to the business while protecting the company.

Cuddy then puts on his education hat and spends some time working towards his goal this year for the ERO's education on export compliance regulations. "The goal is to make education a continuous learning process as opposed to a one and

done, in order to raise awareness and become more engaging." To that end, Cuddy focuses time on moving the education to a new, internal training platform where he'll eventually host webinars and live video trainings. That, he says, is a year or more long process.

Team director Bond often gets pulled into one of a number of touchpoints the ERO has with the business. These could be new hire training, attending a meeting about potential new products going to market, a new service being considered by a business unit. Bond, or another member of the team will be in on the conversation with the business. He considers that this inclusion "allows the team to test the operations control points, and also allows the ERO to more quickly adjust to new business proposals."

WEDNESDAY

In order to ensure coverage across the business, any identified requirements for export regulations and initial interpretations of a new rule are brought up in the weekly team meeting, every Wednesday at 10:00am EST. Whenever possible, everyone attends either in person or virtually. Sometimes there will be a special topic for discussion: this could be anything from a regulatory update to a business process update to an update in compliance practices (perhaps driven by one of the first two). If no special topic, then it's straight to updates from each team member. "The trick is keeping the individual updates relevant to the entire team," says Bond.

Of course, the ERO's location in DC means team members can and do engage with BIS or State Department officials and participate in industry associations discussing proposed changes to – and new – regulations. Bond generally spends some time each week on engagement with government entities. ERO members might attend an advisory committee for the Department of Commerce, for example. "We are fortunate enough to be a company of IBM's size and breadth of interactions, which gives us a lot of opportunity to hear things from third parties and participate in advisory committees," he says.

Back with Lillian Norwood, IBM's research and development unit often requests an ERO team member attend a meeting on a new product to weigh in on what can and cannot go ahead. Norwood says that due to her team's perspective, they can look across the business and boil down potential classification issues, flag up any issues on source code and



I take pride in knowing that the work of our team is important to the company, and that compliance is valued in IBM.

Diane Baker

While it can be trying sometimes, the best part of being in export compliance is hands down working in a field that is intrinsically and directly linked with current world politics and foreign affairs, and responsibly balancing those exogenous factors with the mission and values of our company.

Francia Torres

I like the fact that our role touches the entire company globally and provides us a world view of how the company, and the world operates in our industry.

Gus Anifantis

What was once a quiet arcane area in corporate compliance 15 years ago, is now on the cutting edge of trade and national security policy.

Ed Gillespie

Economic sanctions are the perfect mix of foreign policy and national security issues. They are complex and ever-changing...but never boring.

Kimberly Brown



Year founded: 1911
Nickname: Big Blue
DJIA rank: 34th
Revenue (2019): US\$77.14 billion
Net Income (2019): US\$9.4 billion
Number of employees (2018): 350,600
Operating footprint: 177 countries

encryption standards that might cross BIS regulations, or even the move of a business unit from one office to another that could cause personnel issues within export controls.

Next, Kevin Cuddy sends a message via Slack to the entire ERO network, including the strategically placed compliance coordinators. He shares relevant articles, and might also gather any challenges or suggestions the compliance coordinators might have for further education needed in their business unit or geographic location. Last August, Cuddy headed a regional face-to-face meeting of all the compliance coordinators in the Americas, hosting "Think Sessions", per IBM's favorite mantra, to give a chance for compliance coordinators to consider the team's responsibilities and engage with them on how education can support their goals for the businesses they support. He'll send or answer a couple of messages

A WEEK IN THE LIFE OF...

following up on that meeting with different team members.

THURSDAY

Back with Alexis Wetzler: she is working on scheduling the upcoming compliance reviews. With 30-35 reviews across the company each year, and the need to travel to international locations, the planning for each review starts months before the team members are on the ground. Each team member has two or three trips per year for the reviews which are tailored to the specific trade compliance risks of the particular business unit and business location. The ERO team member will carry out the review in person, interacting with the business team members face-to-face for a couple of days, allowing the ERO to get a real understanding of the business and challenges the business might be facing. In addition, it allows the ERO to ensure IBM's compliance program is working as designed and to provide in-person education. The time and resource commitments are large. In addition, a number of factors go into planning the review, including selecting team members who have the right technical and systems knowledge and

relevant service background. Wetzler says the compliance reviews "are a very valuable exercise as we sometimes only learn about changes in the business through the compliance reviews."

Lillian Norwood agrees: "Having a technical map of the company is critical. As is actively knowing the business and their potential next moves. Being embedded in decision-making areas of the company helps us monitor for compliance."

Beyond the office, the team also monitors external export events. Cuddy says he makes sure to attend meetings of industry associations, think tanks or human rights meetings focused on technology in order to keep tabs on what the emerging risks are. He says, "External events can be ancillary to what you do day-to-day, but they have an impact on your understanding of the reputation risks faced by the company."

FRIDAY

Following the discussions, leads and always moving tentacles of export compliance is something Bond does daily through meetings with business units and other support functions. His view is,

"Export compliance is not a single process. It is embedded into a host of other processes." His office has worked extensively with corporate internal audit to ensure that team also reflects export compliance issues in internal audit processes. "It is a mix of daily and long-term planning," he says. "The team is conscious of the need to test interactions, not at single points in time, but over a period of time. You might enter a conversation in February that started in January, but new information has been added either internally or externally that changes the decision-making process."

It's the end of the week and team members are attending meetings on some of the cutting-edge technologies IBM is creating. Norwood says these challenges are what has kept her at IBM, "We haven't remained stagnant and that's why I love it. We get a chance to stay at the front of new discoveries in tech each week." She says the team values those times when a development unit calls one of her team members to participate in a meeting... even if that means attending a meeting on quantum computers or artificial intelligence late Friday afternoon. ■

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“Selling the sizzle” – A case study in marketing trade compliance

Advertising guru Elmer Wheeler is credited with coining in the late 1930s the famous adage, “Don’t sell the steak – sell the sizzle”. This fundamental sales advice means to emphasize the benefits of a product over its features; i.e., what will it do for you rather than how it works or what it is. The “sizzle” is the experience of enjoying the steak. So, it may be useful to describe that the steak comes from the finest cut of beef, that it is cooked to perfection by an expert chef and served by an attentive waiter. But it’s the anticipation of taking a bite into a delicious filet or sirloin, and the experience of actually doing so, that gets the patron to come to the restaurant and return time after time.

What does this have to do with trade compliance? Why, everything, of course.

Trade compliance only matters if it is effective to prevent, detect, and correct violations of law. Extensive commentary abounds on the best practices that make for an effective trade compliance program. These best practices focus on the features of the program; screening, training, monitoring, auditing, policies, procedures, controls, etc.

But a compliance program can only be truly effective if the organization understands why the program matters and is actively engaged to do its part. And understanding and engagement necessarily follow from recognizing the benefits of compliance.

The “Sizzle” of trade compliance

An effective trade compliance program provides the following benefits to an organization:

1. Protecting against violations of law;
2. Reducing non-legal risks;
3. Providing a competitive advantage.

These benefits are intertwined. It should go without saying that the readers of this article represent or support organizations that seek to follow the law. But given the complexity and ambiguity of international trade controls, lapses occur despite best efforts. And consequences of even technical noncompliance can manifest in adverse

impacts to an organization’s reputation and bottom line.

We know all this. We also know that a strong compliance program can encourage the regulators and prosecutors to go easy on enforcement or forgo taking any action whatsoever; the proverbial ounce of prevention. Strong compliance also keeps an organization out of the news for doing things that would draw adverse attention from investors, business partners, and other important constituencies.

The question is: Are we communicating these benefits to our leaders and colleagues? Are we as good as we could be at articulating the value proposition of effective compliance? What’s more, are we able to demonstrate that effective compliance goes beyond just protecting the organization; that it can actually help the organization prosper by providing a competitive advantage?

Selling “the Sizzle” – the Accenture case study

Accenture is one of the world’s largest and leading professional services firms, providing management consulting, digital transformation, outsourcing, and a wide array of other services to most of

Are we as good as we could be at articulating the value proposition of effective compliance?

the Fortune Global 500. We have built our internal trade compliance program around three guiding principles; our “sizzle” is comprised of:

1. Simplicity
2. Clarity
3. Relevance

When I first joined the company seven

SELLING “THE SIZZLE”

years ago, I was challenged by my boss to transform a substantively excellent but over-engineered trade compliance program that an otherwise smart and motivated workforce found challenging to follow.

Case in point: when I joined Accenture, we had two separate policies associated with trade compliance, totaling over 50 printed pages with various country supplements. Laden with legalese, trade jargon, and gobbledygook, these policies were the first dragons to be slain. Over the course of many months of arduous work, we boiled things down to a single three-page policy, that reduced trade compliance from a dizzying maze of laws and regulations down to three simple concepts: WHERE, WHO, and WHAT. In other words, international trade controls were legal requirements that affected WHERE we could do business (and where we could not), WHO we could do business with (and who we could not), and WHAT industries and technologies were at a higher risk of being subject to export controls, such as aerospace and defense and financial services. A training campaign and awareness blitz followed and set the stage for the modern Accenture trade compliance program.

This WHERE/WHO/WHAT campaign was a tremendous success, because in simple and clear terms it provided a framework for turning non-SMEs into effective first-level issue-spotters. Was it a panacea? Of course not. Behind the simple, clear elevator-speech approach is a team of highly capable SMEs, with access to world-class external advisers, to breathe the substantive life into the simple concepts. We deputized contracting lawyers, contract managers, and other power-users into becoming more advanced issue-spotters. And together with a panoply of innovative tools and resources, we enhanced the effectiveness of our program; no mean feat for an organization with a workforce that has exceeded over 500,000 people all over the world.

By making the subject matter understandable and accessible to the entire workforce, we were able to focus on the most important part of the “sizzle”: relevancy. What are the benefits of following the trade compliance program? Well, that’s just another way of asking how is this relevant to me?

Once people understand that trade compliance is an integral part of our business process – that it begins with a simple ongoing awareness of the

WHERE, the WHO, and the WHAT of our business activities – then they can understand what’s in it for them.

For starters, they recognize that the program helps protect them as much as the company. And because it’s so user-friendly, they are poised to follow the requirements as effectively as possible, which in turn protects the whole enterprise. But perhaps as importantly, they see opportunities; opportunities to show clients that we can be trusted to handle sensitive cross-border work with confidence. We’ve learned to use our program as a differentiator in the marketplace; an asset that we can use to do work in a manner that protects both the client’s interest and ours, with reduced drag and in a manner better than what our competitors have to offer.

For example, we have used innovative licensing strategies to obtain export approvals in cases where we were able to conduct regulated activities out of low-cost offshore delivery centers. Also, we have designed dedicated ITAR-compliant delivery centers to deliver outsourcing services to US-based clients. Our strong but practical controls give our financial services clients peace of mind that we are a trusted service provider in the face of international sanctions risks. We use effective compliance as a business credential in the same vein that we are proud to be named one of the “World’s Most Ethical Companies” by Ethisphere year after year. We know that effective compliance is good for business and we are able to articulate this in a compelling manner both internally and externally. That’s how we sell the “sizzle”.

But...we never lose sight of the most important fact: the “sizzle” means nothing unless the steak lives up to its reputation... ■

About the author, John Pisa-Relli:

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How well do you know your customers?

Do you know exactly how effective the system and software you are using to screen for restricted parties is? Pablo LeCour and Julia Bell offer guidance on steps to greater confidence.

Companies operating in a global market run a higher risk of transacting with persons or entities subject to sanctions. Regulatory authorities, such as the US Department of Treasury Office of Foreign Assets Control ('OFAC') and the UK Office of Financial Sanctions Implementation ('OFSI'), have increasingly focused on imposing large penalties, some amounting to millions of dollars, on companies dealing with sanctioned entities. Most often, these companies had established inadequate internal controls to manage the screening of their business partners and transactions for sanctions concerns. The financial sector has been particularly subjected to significant enforcement which has resulted in financial institutions enhancing their Know Your Customer ('KYC')/Customer

Due Diligence ('CDD') programs, and extending these to more robustly cover sanctions compliance risks. Consequently, customers of the financial sector have been impacted as their transactions have become subject to greater scrutiny. As a result, many companies are either reassessing the effectiveness of their screening solutions or seeking to implement more effective screening processes to reduce the risk of transacting with restricted parties through direct and indirect dealings.

RPL screening

Restricted Party List ('RPL') screening is the common term used to describe the overall business process that companies implement to reduce the risk of dealing with parties that appear on various restricted party lists. These lists are

published and regularly updated by various government agencies, and in order to keep up with additions of newly sanctioned parties, a number of data providers aggregate the different lists and sell these in electronic form. For global businesses, it is important to identify the restricted party lists that apply based on the jurisdictions where they operate.

There are multiple RPL service providers and trade-management solutions that can be used to screen business partners. These solutions compare the business partner details (i.e., name, address, etc.) against the entries in the selected restricted party lists. Hits are analyzed and then subsequently released or blocked depending on the outcome of the analysis.

Screening solutions regularly evolve

and providers are constantly seeking to advance the screening logic by, for example, using combinations of artificial intelligence, distance matching, phonetics, transliteration, and various other techniques, as opposed to straight character text string matches as percentages. However, risks in the efficacy of screening solutions currently on the market do exist, particularly in the areas of software configuration and list management:

- **Configuration:** While many existing screening applications are configurable, others come with preconfigured settings where changes are managed by the software vendor. For preconfigured solutions, companies are dependent on the efficacy of the screening solution, but may not be in direct control, and may not have a full understanding of how the collective settings impact the screening capability. Where companies are in control of the configuration, it is important to fully understand the impact of making changes to a subset of configuration settings, which can have a knock-on effect where there may be gains in some areas (for example, fewer false positives) but which may compromise the adequacy of the screening.

- **List management:** There may also be issues from a list-management perspective. For example, the addition of Russian/Ukrainian sanctioned parties caused a number of problems for financial institutions because the solutions struggled to handle the long company legal forms and their variants (e.g., closed joint stock company ('CJSC') etc.). Additionally, when new terms are added, financial institutions go through a process of measuring the impact of newly added terms on their customer/transactions population before implementing the changes into their business as usual ('BAU') environments. Depending on outcomes, changes may be required to the configuration of the solution to manage the volume of alerts that will be generated.

The implementation of screening solutions will normally be subject to rounds of integration and user acceptance testing, which is a critical step to gauge the overall effectiveness and efficiency of the solution being deployed. However, depending on the initial testing

Apple DOO-doo muddle led to fine for screening failures

In November 2019, Apple, Inc. agreed to pay just short of \$470,000 to settle its potential civil liability for apparent violations of the Foreign Narcotics Kingpin Sanctions Regulations, 31 C.F.R. part 598 ("FNKSR").

OFAC said that Apple appeared "to have violated § 598.203 of the FNKSR by dealing in the property or interests in property of SIS d.o.o. , a Slovenian software company previously identified on the SDN list."

Apple had entered into an app-development agreement with SIS in 2008. On 24 February 2015, OFAC designated SIS and Savo Stjepanovic, a director and majority owner of SIS and provided identifying information.

OFAC said in a release that, "On the same day that OFAC designated SIS and Stjepanovic, Apple, in accordance with its standard compliance procedures, screened the newly designated SDNTKs [Specially Designated Narcotics Trafficking Kingpin] against its app developer account holder names using its sanctions screening tool.

"During this screening, Apple failed to identify that SIS, an App Store developer, was added to the SDN List and was therefore blocked. Apple later attributed this failure to its sanctions screening tool's failure to match the upper case name 'SIS DOO' in Apple's system with the lower case name 'SIS d.o.o.' as written on the SDN List."

As part of its compliance commitments to minimize risk of recurrence of similar conduct, Apple:

"Increased the role of the Global Export and Sanctions Compliance Senior Manager in the escalation and review process;

Reconfigured the primary sanctions screening tool to fully capture spelling and capitalization variations and to account for country-specific business suffixes, and implemented an annual review of the tool's logic and configuration;

Expanded sanctions screening to include not only app developers, but also their designated payment beneficiaries and associated banks."

For the full settlement information see: https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20191125_apple.pdf

performed and contingent on data-quality controls (e.g., the use of acronyms and abbreviations), it is possible that a company could be engaging with potentially restricted parties, despite having invested in an (often costly) automated screening solution.

In order to reduce risk exposure, some companies conduct regular testing of their screening solutions to assess their effectiveness. The tests performed include exact and inexact (fuzzy) tests, with the results analysed against other screening algorithms. Performing this type of analysis can highlight when a screening solution is not performing as effectively as intended – allowing companies to consider changes to the screening processes and/or solution configurations to either reduce the potential risk of restricted parties not being identified or improve the efficiency of the screening solution to reduce false positive hits.

The bigger picture

While the effectiveness of screening solutions is continually improving as a

result of technology innovation, certain restricted parties are also becoming more sophisticated at evading appearing as a hit during the screening process using various techniques. In some cases, restricted parties seek to be removed from a few tiers in the supply chain or work with business partners that do not have a robust screening solution to avoid detection. Consequently, there is a trend for companies to take a more comprehensive approach to third-party risk management, where the application of a screening solution becomes one element of the overall approach. ■

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5 questions you need to ask when choosing a screening solution

When it comes to investing and choosing the best IT-based screening solution, preparation is the key to making the right systems and investment decisions.

Amongst the various criteria that will be assessed, there are critical questions a company should ask of itself:

1) Who and what does the company want to screen?

Screening tools are not all the same and they do not screen the same data. In fact, it depends on what “entity” the company needs or wants to screen: corporations, individuals, both? It also depends on the company’s internal policies. For example, some will consider that the screening of applicants for a job or their existing employees is a must under the OFAC rules, and it is true that these rules would also apply to European firms in many circumstances. Typically, a screening tool to do this would check the OFAC Specially Designated Nationals (“SDN”) and Blocked Persons list.

2) How does it impact the national and local privacy regulations?

Validation of an individual’s identity may have to take place whilst at the same time protecting personal privacy in compliance with national and local privacy regulations. To ensure compliance with the latter, a company should check on the location of the screening tool’s server, where the search results are stored, as well as the nationality of the screening tool’s administrators. This is important as some

countries do not allow personal data to be stored or exported beyond their borders.

3) Does the tool include a sanctions and embargoes module?

Sanctions can be applied to countries, individuals, groups or companies. Not only do the related lists constantly evolve but there are new types of sanctions that apply from time to time, such as narrative

Each sanctioning body publishes its own sanctions which brings more complexity to the screening exercise.

and sectoral sanctions, targeting specific sectors. Each sanctioning body publishes its own sanctions which brings more complexity to the screening exercise. It has now become a “must do” to complete sanctions screening not only with regards to customers but also by verifying the ownership structures of customers’ partners and affiliates.

4) Does the company have certain specific requirements regarding the lists it needs to screen against?

Most of the existing tools offer a basic module with most common lists (The EU consolidated list; The EU Financial Sanctions; OFAC SDN; Interpol recently wanted; UN consolidated terrorism list; EU Official Journal restrictive measures; HM Treasury Consolidated list of financial sanctions...). However, they

also provide a variety of lists as additional modules that the company may or may not require. It is essential to assess which lists need to be verified according to the company’s business, geographies and products. By doing so, it will prevent invalid matches.

5) How does the tool record the screening evidence?

All the tools have a record-keeping functionality; however, not all the applications meet the company’s or country’s regulatory requirements or deliver compliance with the best practices the company has decided to implement. The objective here should be to record all evidence of the screening process and the workflow from the screening itself. This should be an auditable trail of the evidence that leads to the unblocking of a potential transaction going through the screening solution, including the resolution of a potential match. The decision made by the company must be fully recorded. Some tools will provide reports of the screening activity, others will record the decision-making process, showing which employee was involved in the process, when, and why he/she made that decision.

And don’t forget...

There are other criteria and features to consider such as selecting a “user-friendly” and intuitive tool, a cloud-based solution, a tool capable of batch screening, easy interfacing with the ERP, dynamic real-time screening, the re-screening of previous results against changes made to the list, warnings via an immediate email to the Compliance Department, and so on.

Not all the tools available provide a comprehensive and state-of-the-art solution. Not every solution suits the company’s business, needs and expectations. The selection of an IT-based screening solution is a process that requires an assessment of the business’ activities so that the tool that will be chosen is perfectly fit for purpose and is capable of evolving so that it lasts long enough to generate a good return on investment. ■

About the author:

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The Swedish Export Control Society

The Swedish Export Control Society celebrated its 25th anniversary in 2019. Since the time in 1994, when four future members recognized the need for an organization to bolster the profile of trade compliance in Sweden, the society has grown to more than 350 members. "The purpose of the society has been to support export control professionals at companies with responsibilities for adhering to mainly Swedish and EU export controls, but also the important US and other countries' export control regulations," says board member Torbjörn Spector, also of the Confederation of Swedish Enterprise.

Over the years, the society's development has mirrored the regulatory and political evolution of the world. In the early days, the focus was on conveying to members why and how export controls exist and providing hands-on support in discussions with Swedish and foreign regulators. The society recognized early on the need to cooperate with the regulatory authorities for export controls in Sweden, the Inspectorate of Strategic Products ('ISP'), and today the two organizations are good partners. "We also noticed early on there was a great need for education," says Spector. "And we thought a more comprehensive program was necessary to increase people's knowledge." The relationship with ISP paid off, with the latter instrumental in helping to establish the training academy and certification program the society organizes, with participants obtaining a Certified Export Control Manager ('CECM') designation.

The CECM program has been running since 2006 and consists of a four-part training over nine days. Each part concludes with a test of the participant's knowledge. Students receive presentations from society members from companies active in export controls, as well as from the ISP, Swedish Customs, the Swedish Radiation Safety Authority, and from US export controls experts.

If you would like to feature your society in these pages, please contact katherine@exportcompliancemanager.com

Specific training for higher-risk industries also exists, such as for defense industry suppliers. "This training covers the Swedish regulations when it comes to



The 2019 graduates of the Certified Export Compliance Manager program with chairman of the society, Mrs. Annette Eriksson from Saab AB (middle of the front row in a black dress).

military equipment and what sub-contractors within this sector should adhere to," says Spector.

Update, Swedish-style

The society hosts an annual conference "Swedish Update", where government, regulatory bodies, experts and industry meet to discuss the latest trends and policies in trade regulation. The conference has become well attended by trade compliance professionals from other Nordic countries. A highlight of the conference is the presentation of the new Certified Export Controls Managers' certificates co-signed by the Director General of ISP.

At last year's Update, sessions included an ISP presentation on recent changes within export controls and the political situation in Sweden; the Ministry of Foreign Affairs, which represents Sweden in the dual-use negotiations in Brussels, providing a heads-up on its ongoing work in those discussions as well as on EU sanctions and United Nations Security Council issues; the Swedish Security Service discussing its work with companies and its international crime fighting collaboration; the Swedish Institute of International Affairs discussing global security and politics and the Swedish security policy; and the Confederation of Swedish Enterprises providing a review of the recent changes in the EU parliament and the challenges the parliament are facing. The 2020 Swedish Update will take place on 17-18 September. Apart from Swedish Update, meetings throughout the year will address such critical issues as Asia-Pacific and US export controls.

The society aims to play an active role in the export control field in Sweden and globally. It acts as a referral body to regulatory entities, providing comment on export control matters. Spector, himself, travels regularly, presenting on Swedish trade and working to widen knowledge of export controls both at home and abroad.

The society keeps abreast of critical topics of concern to export control teams and provides opportunities to engage on these topics. Most recently, the society has been participating in roundtable discussions and seminars in different countries with the Saferworld NGO, which aims to "build safer lives and prevent violent conflict" through helping countries at risk with policy advocacy and conflict resolution. "The Swedish Export Control Society considers that Saferworld is carrying out an important program to enhance knowledge on strategic trade controls in the world and the society has recently participated in the Asian program with them," confirms Spector.

Here's to another 25 years..

From humble beginnings, the society has come to play a full and active role in the development of trade compliance in Sweden, establishing itself as influential in training and education and support for the developing profession. "The Society is looking forward to the coming 25 years of activities on export controls," says Spector says. It would appear that the future here is in good hands. ■

For further information, visit www.exportkontrollforeningen.se

Time for a *de minimis* refresher

Reports early this year that the Trump administration was considering lowering the *de minimis* threshold for the re-export of items to Huawei from 25% to 10% (and thus a security risk on a par with Iran) make a reminder of the workings of the rule timely. Step up, Jeremy Page and Shannon Fura...

Staying compliant with the ever-evolving rules and regulations governing the export of items from the United States presents particular challenges to companies with global sourcing, production and distribution operations. Although most legal oversight ends at a country's borders, where US export controls are involved, the reach of US law can (sometimes begrudgingly) extend extraterritorially to non-US operations as well.

The *De Minimis* Rule

As a result of this extended reach, one transaction flow that can be particularly challenging concerns US export controls imposed upon "items"¹ that incorporate previously exported US controlled components, software or technology that are themselves then re-exported to a third country. Issues may also present themselves where foreign-produced goods intended for re-export are the product of US technology.

Generally known as the *De Minimis* Rule, this provision maintains a continuing nexus to US origin "commodities", "software" or "technology" wherever located – even though those items may have been substantially transformed as a result of further production overseas.

De minimis only applies to items subject to the jurisdiction of the Bureau of Industry & Security and not to defense articles under the control of the Directorate of Defense Trade Controls. As set forth at Section 734.4 of the Export Administration Regulations,² the *de minimis* standard generally addresses two scenarios:

1. The re-export of foreign-produced items incorporating US-origin commodities, software or technology to countries identified in Country Groups E:1 and E:2;³ and
2. The re-export of such items to other destinations worldwide.

As with any rule, there are certain exceptions that should be considered. Those are beyond the scope of this overview but may be found at Section



734.4(a) of the EAR (15 C.F.R. §734.4(a)). Readers are cautioned to review those exceptions carefully, particularly where the incorporation of U.S.-origin 9x515 or "600 series" items or encryption-related products are concerned.

Issues may present themselves where foreign-produced goods intended for re-export are the product of US technology.

Where re-exports to Country Group E:1 and E:2 countries are concerned, *de minimis* provides that any item that contains US-origin controlled content equal to more than 10% of that item's

total value cannot be re-exported without first securing an export license from the US government unless a license exception otherwise applies. Where re-exports to the remainder of the world are concerned, the *de minimis* threshold is higher, at 25% or less US-origin controlled content of that item's total value. Those thresholds are set out in the table below.

For purposes of this calculation, total value must be based on "the fair market price of such product in the market where the foreign product is sold", which, in general terms, should "be the same as the actual cost to a buyer of the foreign-made product".⁴

More significantly, not all US-origin content is considered in determining whether the *de minimis* ceiling has been crossed. Instead, it is only US-origin

De Minimis calculation – permitted controlled content

Country Groups E:1 & E:2	10% or Less of Total Value				
	Cuba	Iran	North Korea	Sudan	Syria
Other Country Groups	25% or Less of Total Value				
	Rest of World				

content that is considered “controlled” that is of concern.

For re-exports to most countries, whether content is “controlled” depends on the export control classification number (“ECCN”), if any, applicable to that item. Where one applies, if a license would be required to export that component to the country of re-export, then that content is considered “controlled” and its value must be considered from a *de minimis* perspective. For re-exports to Cuba, Syria, North Korea and the Crimean region of Ukraine, all content, whether classified under a specific ECCN or EAR99, is considered “controlled” for *de minimis* calculation purposes.

How to calculate *de minimis* value

Generally, and as summarized by BIS in the **De minimis Rules and Guidelines** found on its website,⁵ calculating *de minimis* involves six core steps:

1. Determine the ECCN of each US-origin commodity in the non-US product;
2. Identify which of those US-origin commodities would require an export license to the destination country where the non-US product will be exported or transferred;
3. Determine the fair market value (“FMV”) of the controlled US-origin commodity in the market where the non-US product is being produced;
4. Determine the FMV of the non-US product in the market where it is to be sold;

5. Divide the total value of the US-origin controlled commodity by the value of non-US product, then multiply the resulting number by 100; and
6. If the resulting percentage value is equal to or less than the applicable *de minimis* level, then the non-US product is not subject to the EAR.

This calculation is illustrated through the following example:

A 25-pound portable battery-powered electric generator classified under ECCN 2A994 is manufactured in Turkey using a US-origin “specially designed” magnetic alternator similarly classified under ECCN 2A994. The generator is valued at \$1,000 with the alternator valued at \$200.

The producer receives two orders, one from Sudan and the other from China. Based on the ECCNs, both the generator and the alternator are controlled solely for anti-terrorism purposes. From a re-export perspective, therefore, only the generator intended for Sudan must first secure a license as the 10% *de minimis* ceiling applicable to shipments destined for a Country Group E:1 country is exceeded, whereas the 25% *de minimis* ceiling applicable to shipment to China – which is found in neither Country Group E:1 nor E:2 – is not.

While this simple example can readily be evaluated utilizing the back of an envelope, oftentimes the calculation and resulting determination of *de minimis* is more complicated. Fortunately, BIS has developed a “decision tool” which can be

Links and notes

¹ An “item” is defined as “any commodity, software, or technology”. See 15 C.F.R. §772.1. A “commodity”, in turn, consists of “any article, material, or supply except technology and software”; “software” consists of “a collection of one or more ‘programs’ or ‘microprograms’ fixed in any tangible medium of expression”; and “technology” is defined as “information necessary for the ‘development,’ ‘production,’ ‘use,’ operation, installation, maintenance, repair, overhaul, or refurbishing” of an item. Id.

² 15 C.F.R. §734.4.

³ Country Group E:1 identifies terrorist-supporting countries which currently consists of Iran, North Korea, Sudan and Syria; Country Group E:2 identifies those countries against which the United States imposes a unilateral embargo, which currently embraces Cuba. See Supplement 1 to Part 740 of the EAR (15 C.F.R. Part 740). Country Group E:2 was only made subject to the 10% *de minimis* ceiling as of 21 October 2019 through publication of a Final Rule by BIS in the Federal Register. See: <https://www.govinfo.gov/content/pkg/FR-2019-10-21/pdf/2019-22876.pdf>.

⁴ See Subparagraph (a)(3)(i) to Supplement No. 2 to Part 734 of the EAR (15 C.F.R. Part 734).

⁵ <https://www.bis.doc.gov/index.php/documents/pdfs/1382-de-minimis-guidance/file>

⁶ 50 U.S.C. §§ 4801-4852

found on its website that exporters/re-exporters may refer to in confirming whether an intended re-export requires advance authorization. For on-going reference, that tool may be found at: <https://www.bis.doc.gov/index.php/de-minimis-direct-product-rules-decision-tool>.

Penalties for violating the EAR

While it is not as readily apparent to BIS when a re-export of an item incorporating US-origin components, software or technology is concerned, that does not absolve re-exporters of their obligation to confirm any licensing requirements before they proceed with order fulfillment. The penalties BIS can assess for violating US export control requirements can be severe, with a maximum civil fine of \$300,000 per violation or two times the value of the underlying shipment, whichever is greater, under the recently enacted authority of the Export Control Reform Act.⁶ Although the extraterritorial jurisdiction imposed by the United States is not always well received, re-exporters should carefully consider the risk and scope of such fines before proceeding to re-export any products incorporating controlled US-origin content. ■



Essential reading for all exporters of dual-use goods

Visit www.worldecr.com/books for more information and to order

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