

Foreign Third-Party Violations of U.S. Laws in International Transactions

Minimizing Exposure When Doing Business With Foreign Third Parties

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:

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Thursday, May 14, 2009

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

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Foreign Third-Party Violations of EAR and OFAC – Issues of Concern to the U.S. Person

Richard L. Matheny

May 14, 2009

Agenda

- Introduction to EAR and OFAC regulations
- How can foreign third-party actions implicate U.S. persons?
- Compliance considerations

Export Administration Regulations – “EAR”

Bureau of Industry and Security,
U.S. Department of Commerce

What does the EAR control?

- “Subject to the EAR”
 - Items in the US
 - US-origin items
 - foreign-made items incorporating US-origin items in more than *de minimis* amounts
 - foreign-made direct products of US technology
- Certain activities of U.S. persons

Items “subject to the EAR”

“Dual use” [CCL]

- 0 - Nuclear
- 1 - Materials
- 2 - Materials Processing
- 3 - Electronics
- 4 - Computers
- 5 - Telecom / Info Security
- 6 - Lasers, Sensors
- 7 - Navigation & Avionics
- 8 - Marine
- 9 - Propulsion Systems, Space Vehicles, Related Equipment

“EAR99” [*not on CCL*]

- Chopsticks
- Table lamps
- Gum drops
- Televisions
- Fancy hats

Most things

EAR prohibits – without a license or license exception – certain:

- Exports from the US
- Reexports from abroad
- Foreign in-country transfers to new end user
- Support of proliferation activities
- Facilitation of violations committed by others

General Prohibitions

- GP1 – Export / reexport controlled items
- GP2 – Reexport foreign item > *de minimis* US content
- GP3 – Reexport foreign product of US technology
- GP4 – Actions prohibited by denial order
- GP5 – Export / reexport to prohibited end user/use
- GP6 – Export / reexport to embargoed countries
- GP7 – U.S. person support of proliferation
- GP8 – In transit shipments
- GP9 – Violation of order, license, license exception
- GP10 – Acting with knowledge of violation

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**What about foreign
third parties?**

General Prohibition Ten

“You may not sell, transfer, export, reexport, finance, order, buy, remove, conceal, store, use, loan, dispose of, transport, forward, or otherwise service, in whole or in part, any item subject to the EAR and exported or to be exported with knowledge that a violation of the Export Administration Regulations, the Export Administration Act or any order, license, License Exception, or other authorization issued thereunder has occurred, is about to occur, or is intended to occur in connection with the item. Nor may you rely upon any license or License Exception after notice to you of the suspension or revocation of that license or exception.”

General Prohibition Ten

“You may not sell, transfer, export, reexport, finance, order, buy, remove, conceal, store, use, loan, dispose of, transport, forward, or otherwise service, in whole or in part, any item subject to the EAR and exported or to be exported with knowledge that a violation of the Export Administration Regulations, the Export Administration Act or any order, license, License Exception, or other authorization issued thereunder has occurred, is about to occur, or is intended to occur in connection with the item. Nor may you rely upon any license or License Exception after notice to you of the suspension or revocation of that license or exception.”

“Knowledge”

Knowledge . . . includes not only positive knowledge that the circumstance exists or is substantially certain to occur, but also *an awareness of a high probability of its existence or future occurrence*. Such awareness is *inferred from evidence of the conscious disregard* of facts known to a person and is also inferred from a person's willful avoidance of facts.

Know your customer – Be on the lookout for red flags!

- Screen customer against relevant lists.
- Anything about your transaction that would cause suspicion in the average person?
- May depend on what is customary in your industry – what information are you expected to know?
- Screening process: identify red flags, investigate, resolve, and document.

Where can you get into trouble with foreign third parties under the EAR?

- Denied, Entity, or Unverified Lists
 - Rescreening?
- Foreign customer reexports to third country
 - Definition of “knowledge”?
- Foreign in-country transfers
 - *E.g.*, export encryption to non-gov’t end user who sells to gov’t
- Foreign customer incorporates item into another
 - *De minimis* rules, foreign direct product of US technology rules
- License conditions / provisos
- “Deemed exports” of technology
 - Foreign visitors, subcontractors, outsourcing, etc.
- Reputation

Hotspots? Hot issues?

- Iran – IEDs used against the US war fighter in Iraq, Afghanistan
 - Mayrow Trading case
 - Entity List - contrary to NS/Foreign Policy int's of US
- UAE – diversion to Iran
- Hong Kong, Singapore transshipments
- China – NS-controlled items, electronics
- “Deemed exports”

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Office of Foreign Assets Control Regulations – “OFAC”

U.S. Department of the Treasury

OFAC – FACR

- U.S. sanctions against countries, governments, industries, persons, entities, vessels
- Covers exports, imports, services, and transactions, including facilitation
- Broad, extraterritorial reach; controversial
- Intentionally, maddeningly vague
- “Specially Designated Nationals” = “Blocked” List

OFAC Sanctions Programs

- Cuba
- Iran
- North Korea
- Sudan
- Syria
- Burma
- Balkans
- Belarus
- Cote d'Ivoire
- Democratic Republic of the Congo
- Former Liberian Regime of Charles Taylor
- Iraq
- Zimbabwe
- Nonproliferation (WMD)
- Terrorism
- Anti Narcotics
- Diamond Trade
- Persons Undermining Lebanon

The “facilitation” problem

- Prohibit US persons from “facilitating” transactions of foreign persons that would be barred if engaged in by U.S. person
- May not “approve, finance, facilitate, guarantee,” broker, or refer opportunities to another
- Limits? Very hard to draw bright lines.
- Knowledge or strict liability?

Reexport / Transshipment

- US person cannot export to France knowing item to be reexported to Iran
 - Inventory?
- Foreign person cannot reexport knowing item intended for Iran / Iranian government
 - Exceptions: substantial transformation, *de minimis* incorporation
- Services – where is benefit received?

The foreign subsidiary issues

- *E.g.*, independent foreign subs of U.S. co's can deal with Iran, provided U.S. parent/affiliate does not exercise control, influence, etc.
 - No bright lines, except for Cuba
 - Many U.S. co's instruct subs not to deal
 - Beware: cannot relax existing U.S. control to evade bar
- U.S. person employees in foreign co's?
- Exceptions:
 - No purchase of U.S. item with intent to sell to Iran
 - Don't forget EAR reexport controls

OFAC List-Based Blocking

- SDN list – updated very frequently
 - Applicable worldwide, even in U.S.
- “Property or interests in property”
 - “Interest” can be indirect and remote
 - SDN anywhere in transaction may implicate blocking provisions

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**EAR / OFAC
Compliance Strategies**

Risk Assessment

- How does your business implicate EAR and OFAC prohibitions?
 - Classify products, services
 - Understand your markets, customers, end uses
 - Who are your partners?
 - How can your customers get you into trouble?
 - What would you be expected to know about your customers?
And what do you know?
 - Benchmarking – what are your competitors doing?
 - What are the enforcement hotspots?

How to minimize risks?

- Formal, well-tailored compliance program is key !!!
- Education
- Contract for assurances?
 - The higher the risk, the more specific the clause
 - Not required, except under License Exception TSR; and some export licenses require end-user statements
 - How far down the chain? What business costs?
- Screen relevant lists
 - When to screen? Rescreen?
 - Who? *Customers, employees, joint-venturers, agents, suppliers, service providers, visitors, et al.*

Whether to Monitor Reseller?

- Hard judgment
 - may decrease risk of an unlawful reexport
 - but may increase regulatory risk for you by increasing your “knowledge”
 - similar issue re. facilitation of foreign subsidiary under OFAC regs
- Reputational harm from diversion of item – hard to quantify
- Many factors inform decision
 - what types of products?
 - what controls?
 - volume of product?
 - how much do you know? (installation, servicing?)
 - how long is the supply chain? how far down?

Documentation / Recordkeeping

- Document compliance measures:
 - Product classification under EAR (and ITAR)
 - Evaluation of foreign customers
 - Red flags and disposition
 - Audits and results
 - Correspondence with agencies
 - Licensing, reliance on license exceptions
 - Etc.
- Five-year document retention period corresponds to limitations period; integrate with existing retention program

Monitoring and Audits

- Defined intervals - but if you set it up, ***follow through!***
- Clear process leading to results
- Adjust program to remedy flaws - simplify
- Be prepared to take action
- BIS recently released an audit module

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Minimizing Exposure for Foreign Third Party Violations in International Transactions

Part I: Legal Requirements

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International Traffic In Arms Regulations

(“ITAR”)

ITAR

- Administered by U.S. Department of State, Directorate of Defense Trade Controls (“DDTC”)
- With limited exceptions, license always required to export or retransfer overseas USML items

USML ITEMS

- **DEFENSE ARTICLE:** Specifically designed, developed, configured, adapted, or modified for a military or satellite/ground control applications or otherwise listed on USML
- **TECHNICAL DATA:** Information required for design, development, assembly, production, operation, repair, testing, maintenance, or modification of defense article. (e.g., drawings, diagrams, specifications, instructions, or software)
- **DEFENSE SERVICES:** Assistance to any foreign person in the design, engineering, development, production, processing, manufacture, use, operation, overhaul, repair, maintenance, modification, or reconstruction of defense articles.

ITAR DEFINITION OF EXPORT

- Send/take out of U.S
- Disclose/transfer tech data to foreign person (anywhere)
- Disclose/transfer defense article to embassy, agency or subdivision of foreign government in U.S.
- Provide “defense service” to foreign person (anywhere)
- Reexport/retransfer: transfer defense article, tech data or defense service to new end use/user or destination

ITAR - PROHIBITED DESTINATIONS

BROADER THAN EAR/OFAC:

■ Prohibited

- Belarus, Burma, China, Eritrea, Ivory Coast, Lebanon, Liberia, Sierra Leone, Venezuela.

■ Limited Prohibitions

- Afghanistan, Congo, Cyprus, Haiti, Iraq, Libya, Vietnam, Somalia, Sri Lanka, Yemen, Zimbabwe

THIRD COUNTRY NATIONALS & DUAL CITIZENS (ITAR)

- Differs from EAR “Deemed Export”
- Disclosure of technical data to foreign national = export to his/her home country unless “Green Card holder”
- Applies to dual citizens (export to both countries)
- Even nationality of citizens in foreign countries can count
- U.S. Person representing foreign company

ITAR - BROKERING

■ REGISTRATION REQUIREMENT

- U.S. and foreign persons engaged in “brokering”

■ LICENSE REQUIREMENT

- NATO, Japan, Australia, or New Zealand exempt unless items listed in ITAR 129.7 or 129.8
- U.S. Person brokering foreign defense articles always require a license

ITAR - BROKERING

- **BROKER:** agent negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services in return for consideration.
- **BROKERING:** “financing, transportation, freight forwarding or taking of any other action that facilitates the manufacture, export or import of a defense article or defense service.”
- **EXCLUDED:** exclusive business activity is financing, transporting, or freight forwarding

Foreign Corrupt Practices Act

(“FCPA”)

Foreign Corrupt Practice Act (FCPA)

ANTI-BRIBERY PROHIBITION

- “Corrupt” offer, payment, promise (including through third parties)
- “Anything of value” to “foreign official”
- To influence act or decision of official, induce official to take or not take action, or induce official to use influence to affect official decision
- To obtain or retain business, or direct business to (or gain unfair business advantage for) anyone

FCPA

ACCOUNTING AND CONTROL PROVISIONS

- Apply to issuers (SEC)
- Must maintain accurate books & records in reasonable detail
- Must devise system of internal controls that:
 - Provide reasonable assurances transactions executed w/management authorization
 - Maintain accountability for assets
 - Limit access to assets to management's authorization
- Responsible for controlled foreign subs

FCPA: JURISDICTION

- U.S. and foreign issuers subject to both FCPA requirements
- Anti-bribery provisions also apply to:
 - Domestic concerns: U.S. person or business with principal place of business or organized in the U.S.
 - Domestic actors: Any person acting in furtherance of a corrupt payment within the territory of the U.S.
- Jurisdiction extends over acts of officers, directors, employees, and agents, and stockholders acting on company's behalf

FCPA: Foreign Official

- “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization”
- Includes state-owned or state-controlled business employees
- Examples: Airport officials (GE InVision); Physicians and lab employees at government-owned hospitals (DPC)
- Retired government officials who remain Communist Party members often serve as “consultants”?

FCPA: Corrupt Payment

■ CORRUPT

- **Quid Pro Quo:** To induce foreign official to take certain action in exchange for payment

■ PAYMENT

- **Anything of Value:** includes intangible benefits such as favors, commercial loans, promise of future employment
- Benefit to third parties - family and friends, charities

FCPA: Business Nexus

- FCPA prohibits payments made in order to assist the firm in obtaining or retaining business for or with, or directing business to, any person
- More than award or renewal of contract
- *U.S. v. Kay*: Any unfair benefit to business (e.g., reduce foreign income taxes, customs duties)
- Business need not be with a foreign government or foreign government instrumentality

Anti-boycott Regulations

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Anti-boycott Regulations

- Two sets of Regulations that vary slightly: EAR and IRC
- Prohibit or penalize U.S. businesses and foreign subsidiaries for certain acts of compliance with boycotts imposed by foreign governments.
- Both regulations have requirement to report boycott requests

Anti-boycott Prohibitions

- Agreements to refuse or actual refusal to do business with or in Israel or with blacklisted companies or to do business only with “white listed” companies.
- Agreements to discriminate or discrimination based on race, religion, sex, national origin or nationality.
- Agreements to furnish or furnishing information about business relationships with or in Israel or with blacklisted companies.
- Agreements to furnish or actual furnishing of information about race, religion, sex, or national origin of another person.
- Implementing letters of credit with boycott terms or conditions.

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Minimizing Exposure for Foreign Third Party Violations in International Transactions

Part III: Compliance Strategies

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ITAR

**ADDRESSING COMPLIANCE
CHALLENGES ABROAD**

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ITAR Compliance Challenges

- **Similar to EAR:** training, centralized control, written procedures, expertise
- **Differences affecting foreign third party relationships:**
 - Prohibited countries/persons
 - Third country nationals/dual citizens
 - Tight reexport controls
 - Agreement and proviso management
 - Brokering requirements
 - Services controlled

ITAR Compliance Challenges

■ Prohibited countries/persons

- Affects employees and relationships of foreign parties
- May need representations and warranties
- Need to make inquiries about involved affiliates

■ Third country nationals/dual citizens

- Can be sensitive topic for foreign companies
- Negative representations versus identification
- Broader authorizations in “agreements” have helped

ITAR Compliance Challenges

■ Tight reexport controls

- USML components (no *de minimis* content rule)
- Inability to retransfer to new use, new user, or different country without authorization
- Be alert for loose controls; obtain reps and warranties

■ Agreement and Proviso Control

- Foreign party is signatory; need to comply
- Provisos (imposed conditions) need to be shared if affect foreign party; training may be warranted; seek confirmation
- May want compliance audit rights

ITAR Compliance Challenges

■ Brokering issues

- Evidence of broker's registration and licensing
- Ensure brokers know they must avoid prohibited countries
- Make sure brokers are on separate export licenses if they will handle or receive technical data

■ Defense “services” controlled

- Assistance to foreign person regarding defense articles
- Even if assistance is public domain material; sales staff need to understand definition
- Responses to RFPs can provide defense service: may need export license (DSP-5) to respond

FCPA

**COMPLIANCE CHALLENGES IN
FOREIGN OPERATIONS**

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FCPA Challenge: Foreign Accounting Practices

- Local accounting deficiencies *not a defense*
- Not always trained in U.S. accounting policies
- Transparent accounting may not be the norm.
- Broad accounting categories, lack of official receipts, absence of written agreements, and off-the-books transactions
- For U.S. issuers, accounting problems create clear parent company liability for transgressions by majority-owned foreign subsidiaries

FCPA Challenge: High-Risk Environments

- Many hands held out in many developing or government-controlled economies
- Layered bureaucracies cause businesses seeking licenses to deal with multiple agencies
- Laws may be on the books but local practice continue because they are a way of life in some cultures

FCPA Challenge: Identifying Bribes in “Pay-to-Play” Environment

- Networks built on relationships essential to succeed in some countries: access may require gifts, entertainment etc.
- Lines between *bona fide* and *reasonable* business expense and corruption not well-defined:
 - Difference between traditional gifts (e.g., mooncakes) and other gifts—even lesser value—could be difference between symbolic gesture and bribery
 - Actions of “relationship companies” frequently suspect

FCPA Challenge: Use of Third-Party Agents

- Use of third-party agents and local partners is common business practice in many developing economies
 - Interaction with government officials may require local partner or “consultant”
- Small companies employing retired employees of potential client claim relationships with customer
 - “Commissions” frequently used to pay bribes
- May be held liable vicariously or for failing to maintain sufficient controls—for agent’s payments

FCPA Challenge: Use of Third-Party Agents

- Due diligence warranted in most cases
 - Nature of business? Reason for selection?
 - What services to be provided? Resources to provide?
 - Ownership? Relationships with Government?
 - Payment arrangements unusual? Commensurate to services? Pay up front? Large commission?
 - FCPA certification? Willing to allow auditing?
 - Any other “red flags”?
 - Independent diligence warranted?

FCPA: Red Flags

- Secret or nontransparent details
- Foreign official recommends agent
- Commission, margin, discount excessive in relation to the service rendered or going rate
- Large advanced payment
- Lack of sufficient resources (*i.e.*, staff) or competence to perform services offered
- Payments to third country, third person, or multiple accounts
- Requests for payments in cash or "bearer" securities;
- Agent's primary qualification is its influence over foreign officials
- Close family or personal relationships between agent and foreign official or relative
- Large increase in anticipated fee
- Requests to alter invoices
- Requests for political or charitable donations
- Unnecessary third parties or multiple intermediaries
- A third party is a shell company or has an unorthodox structure;

Preventing FCPA Violations

- Local training with language assistance if warranted
- Written guidance in local language and addressing local issues
- Close accounting oversight, internal audits, consider ex-pat CFOs
- Good receipt practices; require use of credit cards
- Local and/or parent approval for some high risk expenses (e.g., gifts, travel), certain amounts for M&E, and certain relationships
- Transparent contracts with agents, audit rights
- Avoid commissions to relationship companies

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Foreign Third-Party Actions Causing Liability Under US Export/Sanctions Laws: Common Scenarios and Recent Enforcement Actions

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May 14, 2009

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OVERVIEW

- Scenarios of compliance problems presented by foreign third-parties under the EAR, OFAC, ITAR and Antiboycott regulations
- Representative enforcement actions



EAR

Examples of Foreign Third-Party Compliance Risks



Foreign Third-Parties – EAR

- **Be aware of foreign third-parties who do not comply with re-export requirements**
 - E.g., a third-party distributor in South Korea orders items from a US company that it intends to re-export to China. The distributor does not realize the re-export needs a license under the EAR (or bother to obtain one). The US company makes the shipment to the distributor without knowledge of an unauthorized re-export, but is later asked to provide after-market services on the product. If the US company fulfills the service request, it would result in an EAR violation.

Foreign Third-Parties – EAR/OFAC



- **Be aware of foreign third-parties that put US companies at risk for unauthorized exports**
 - E.g., a foreign third-party in the UAE purchases items from a US company that it plans to sell to Iran. This is a permissible re-export of an EAR99 product. The US company's sales and compliance personnel are unaware of the intended re-export when the order is placed, but the UAE third-party consults with the US company's engineering staff about specifications and indicates the product will go to an Iranian end-user. The US engineer is not trained in export compliance and does not flag the Iranian end-user issue. When it makes shipment to the UAE, the US company has exported the product to the UAE with reason it is destined for Iran in violation of the EAR/OFAC.



Foreign Third-Parties – EAR

- **Be aware of foreign affiliates that lack a strong compliance culture**
 - E.g., a foreign affiliate in China places an order with a US company for items that will go to an end-user on the BIS Entity List. The US company has an end-user screening program that it assumes the foreign affiliate uses in placing orders. The Chinese affiliate needs to fill the order quickly and does not bother to screen the restricted end-user's name. The US company is put at risk for an unauthorized sale to a restricted party by its foreign affiliate.



OFAC

Examples of Foreign Third-Party Compliance Risks



Foreign Third-Parties – OFAC

- **Be aware of the prohibition against facilitation and approval**
 - E.g., a foreign affiliate plans to make a permissible sale to Iran involving no US person or US items. However, before doing so, the foreign affiliate must follow standard procedures to obtain pricing approval for the sale. This requires review by a sales manager at the US company. If the US manager becomes involved in the approval, it is prohibited facilitation; if the US manager departs from the standard procedures and hands off the matter to a non-US colleague, it also is prohibited facilitation.



Foreign Third-Parties – OFAC

- **Be aware of foreign affiliates that employ US persons**
 - E.g., a US company has operations in the UAE involving both a foreign subsidiary and a foreign branch. This structure is for tax reasons. The foreign subsidiary becomes involved in sales to Iran that do not contain US products. It also ensures that no US citizens at the UAE site are involved in the transaction. However, the logistics department at the UAE site uses branch employees to support all sales from that country. The US company is liable for facilitating the foreign subsidiary's sales to Iran.



ITAR

Examples of Foreign Third-Party Compliance Risks



Foreign Third-Parties – ITAR

- **Be aware of a supplier's use of foreign third-party manufacturers**
 - E.g., a US manufacturer makes ITAR-controlled products using another US company to supply low-level components specific to this application. The US component supplier wants to reduce costs and uses a Chinese facility to make the parts based on the US manufacturer's technical data. This is an ITAR violation. When the US manufacturer incorporates the Chinese-made components into its ITAR product, it is now using military components from a proscribed country – China – in violation of the ITAR.



Foreign Third-Parties – ITAR

- **Be aware of a foreign third-party's failure to comply with license/agreement restrictions**
 - E.g., a US company supplies ITAR-controlled technical data to a foreign manufacturer pursuant to a valid MLA. The foreign manufacturer shares the ITAR-controlled technical data with another foreign party that is not a signatory to the MLA. The unauthorized foreign party subsequently requests technical advice from the US company. Provision of such services to the unauthorized foreign party puts the US company in violation of the ITAR.



Foreign Third-Parties – ITAR

- **Be aware of a foreign third-party's request for modifications or services relating to a commercial item**
 - E.g., a US company supplies commercial equipment to the Brazilian Navy. The equipment has a performance issue. The Brazilian Navy requests the US company to trouble-shoot the problem and provides performance data relating to similar equipment, which is military. If the US company uses that data to fix the commercial equipment, it has provided defense services in violation of the ITAR.



Antiboycott

Examples of Foreign Third-Party Compliance Risks



Foreign Third-Parties – Antiboycott

- **Be aware of newly-acquired foreign companies that do not understand antiboycott requirements**
 - E.g., a US company acquires a French company, which becomes a controlled-in-fact foreign affiliate. The French company was not previously subject to antiboycott regulations and supplied certifications to its UAE customers affirming that its products contained no Israeli content. After acquisition by the US company, the French affiliate does not change its UAE selling practices and continues to provide the certifications. The French affiliate does not know to inform its US parent of these requests, and the US company fails to meet its reporting requirements under the antiboycott regulations.

Foreign Third-Parties – Antiboycott



- **Beware of foreign third-party banks that issue letters of credit with prohibited boycott language**
 - E.g., a US company makes foreign sales based on L/Cs issued by a third-country bank selected by the customer. The L/Cs include boycott-related language. The US company identifies the problem, reports the boycott-related request, as required, and instructs the bank to cease sending L/Cs with prohibited language. The bank does not completely change its template for L/Cs and continues to use the problematic language in some cases. The US company assumes the problem is fixed, does screen all of the L/Cs and ends up receiving payments based on acceptance of boycott-related terms.



RECENT ENFORCEMENT ACTIONS:

Foreign Third-Parties



Foreign Third-Parties – OFAC

- *Liability for Foreign Subsidiaries:* April 2009 – Verel Holdings, Inc., a Texan company paid \$110,000 to settle violations of CACR. Verel's foreign subsidiary made 11 unlicensed exports involving a Cuban property interest.
- *Liability when US company involved in transactions on behalf of foreign entities:* January 2009 – Stena Bulk LLC, a US subsidiary of a Swedish transportation company, paid \$426,286 to settle claims of prohibited facilitation by providing transportation services to in support of its parent's dealings with Sudan.



Foreign Third-Parties – OFAC

- *Liability for actions by employees in foreign branches:* May 2008 – York International Corporation paid \$669,507 to settle alleged violations of the Iran, Sudan and Iraq sanctions, which occurred when foreign nationals employed by York’s foreign branch sold air conditioning and refrigeration equipment to Iran and Sudan and made improper payments under the UN Iraqi oil-for-food program.



Foreign Third-Parties – EAR

- *Potential Liability created by foreign customer who raised red flags:* February 2009 – A Chinese national is found guilty of violating the EAR by procuring thermal-imaging cameras from a US company for unauthorized exports to China.
- The US company -- FLIR Systems, Inc. – recognized the “red flags” and reported the matter to BIS. This led to an investigation, arrest and conviction of the Chinese national. Not all US companies would pick up the “red flags” (order from a business that does not normally purchase thermal-image cameras and suspicious emails) and could become involved in an EAR violation.



Foreign Third-Parties – ITAR

- *Foreign third-party customer creates liability for US company:* July 2008 – Lockheed Martin enters into a consent agreement (\$4 million in penalties) with DDTC for unauthorized activity involving the UAE Air Force. The UAE had invited Lockheed to submit proposals for the sale of SME missiles, which Lockheed submitted without the required prior notification to DDTC (SME over \$14 million). The UAE also requested performance specifications, which Lockheed provided without DDTC authorization.



Foreign Third-Parties – ITAR

- December 2008 – Qioptiq S.a.r.l., a Luxembourg company, entered into a consent agreement with DDTC concerning unauthorized ITAR exports by foreign affiliates acquired from Thales France. Fines and remedial actions totaled \$25 million. Among the violations were impermissible foreign subcontracting and transfers of controlled technical data from Singapore to China.
- Key lessons – (i) US acquisitions of foreign companies can cause liability for legacy ITAR violations; and (ii) US companies may be liable when a foreign affiliate makes unauthorized/impermissible transfers of ITAR-controlled data.



Foreign Third-Parties – Antiboycott

- October 2008: Rohde & Liesenfeld, Inc., a Texas freight forwarder, agrees to pay \$108,000 after supplying invoices containing negative certifications regarding Israeli content to a Syrian party on 36 occasions. At least some of the invoices at issue involved a foreign third-party.
- November 2008: American Rice, Inc., a US company, agrees to pay \$30,000 civil penalty after failing to report boycott requests made by a UAE bank in connection with L/Cs issued over a four-year period.