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A dozen chances to do it right: Decision points for export compliance

When investigators are forming their view as to whether a non-US company should be criminally prosecuted for violations of US export controls and economic sanctions, they examine the company's choices at key decision points - how many times did the company choose to do the wrong thing when offered the opportunity to do the right thing. There are common decision points that can occur whenever a company becomes involved in exporting US goods and services. When decision points are reached, investigators expect a company to investigate, ask questions, be aware of red flags, turn down risky opportunities or report suspicions. While a decision not to conduct further inquiry may not seem significant at the time or perhaps can be rationalised in light of current more pressing considerations, the investigators will have the benefit of hindsight when those failures to act give rise to violations. The investigators will see the omissions as choices - part of a pattern of deliberate conduct or "willfulness" that signifies criminal intent.

What are those decision points that investigators will examine? Companies should understand that the examination will not be limited to transactional decision points, but will also include the decisions made long before an actual export occurs.

1. Decision to conduct business involving US-origin goods or services, hire US persons, or open US offices and facilities

All of these instances give rise to a critical nexus for potential liability under the US export control laws and economic sanctions. The investigators will view these events as "triggers" that should have raised awareness of the potential applicability of these laws. They will look for any instance in which the legal questions arose and more importantly, how and whether the company addressed them.

2. Initial contact with non-US customers

Before marketing materials are distributed or the customer is contacted related to US-origin goods or services, the company is expected to screen the potential customer and undertake due diligence to ensure that the potential customer is appropriate (e.g., not a Specially Designated National or entity otherwise barred from receiving the goods or services the company contemplates supplying to the customer). Any red flag should be investigated before the customer's name is linked to yours.

3. Receipt of Request for Proposal (RFP) and response

This is a very critical juncture in the life of a transaction as there are numerous touch points in an RFP that raise red flags. What the company is seeking, how it describes the product, its intended end-use, the ultimate end-user and the country of ultimate destination are all clues that should be carefully scrutinised and requested if not included in the RFP. The case law is littered with situations where an RFP to a controlled destination is rejected and thereafter replaced by an identical RFP from a different customer going to a known transshipment hub. Agents will question why a company failed to examine the RFP closely and will infer bad intent if obvious red flags are not resolved. For example, night vision goggles ordered by a pistachio warehouse would be considered an obvious red flag requiring additional due diligence.

4. Receipt of order

When your bid has been accepted and the order placed, ensure that the details are consistent with the RFP. Look for atypical conditions, disproportionately large quantities and irregular recipients/consignees. One of a series of red flags in the well-known "spark gap" case was the large number of units ordered for one hospital, despite the long lifespan of spark gaps.

5. Fulfilling order and supplier/vendor requests

If your vendors and suppliers warn you that the units they are supplying are controlled to certain destinations, ask you for end-user information, direct you to obtain licenses, or refuse to supply you with the goods you've requested, the investigators will expect you to pay heed to their warnings. Suppliers are generally experts regarding their own products and can provide valuable information regarding how to handle them. Even when the suppliers or vendors do not bring these issues to your attention personally, companies should be reading the invoices and shipping documents received from the vendors/suppliers to see if destination control statements are included, which will let the company know how they should proceed.

6. Financial arrangements

Is your customer making large payments in cash, refusing financing despite the cost? Is your customer in one country paying for delivery to another country - perhaps a well-known transshipment hub? Investigators rank cash payments as one of the top indicators that something is not right about a transaction and will wonder why unusual payment arrangements did not raise questions and trigger further inquiry.

7. Invoicing

Any irregularity in the invoices, such as mismatched pro forma and final invoices, will be carefully scrutinised by investigators who will seek an explanation. Why orders were separately invoiced or why the invoices were sent separately from the packing will be questions the investigators will ask and to which they will demand answers.

8. Shipping documentation

Investigators will scrutinise the shipping documents and will want to see copies of all the documents related to a particular shipment. Failure to have the required shipping documents will raise additional questions and could amount to a violation in and of itself. They will question who prepared the shipping documents, why they were prepared a certain way, who provided the information on the shipping documents, and who had responsibility for the shipment. If there are any deviations from a company's normal practices in preparing the shipping document, this will be questioned. A decision not to accurately complete the documents, mislabel the contents, use NLR instead of the ECCN, omit the true customer's name and country, or otherwise put inaccurate information on the documents will be seen as a deliberate decision unless there is a reasonable explanation,

9. Shipment

The actual shipment will be a critical point in the life of a transaction because the investigators will look at who is handling the shipment and why, how it is packaged and which documents accompany the shipment, the accuracy of those documents and the delivery route chosen. A circuitous route or listing a freight forwarder as the final destination will always be of concern. Separating an order into separate shipments, which has the effect of lowering the value per package will also unquestionably be of concern to the investigators.

10. Delivery confirmation

The investigators will expect that some sort of delivery confirmation and receipt will be requested by the company to ensure that the shipment arrived. If no such confirmation is received, questions will be raised as to why the company did not make an inquiry as to the delivery. A decision not to seek confirmation could be seen to indicate a desire not to know if a package arrived, or where a package arrived from, in order to insulate the company from knowing the ultimate destination. It may not be seen as a simple record-keeping failure but an unusual variance from normal business practices.

11. Additional orders

In some instances, an initial order will be placed to test the company's ability to obtain controlled goods, ship without a required license or ignore export restrictions. Additional orders will be placed to see how far the company is willing to go in not complying with export control laws. If a company continues a pattern of noncompliance, each additional noncompliant shipment will be viewed as seriously compounding the company's initial mistake and may be punished and/or fined separately.

12. Repair requests and resupplies

Each time the customer reaches out to the company to repair or replace a product or to restore their supply of a product, it is an additional opportunity to do the right thing. How a company proceeds when a follow- up request to repair is received, especially if it realises that it has mistakenly shipped a product without obtaining an export license or shipped to a prohibited country, will be important to the investigator. Additionally, waiving expected installation, repair or modification services by the customer can also be a red flag, as it indicates that the customer does not want the company to know where the item is permanently located.

At any of these decision points, the company's conduct will be examined by the investigators because they will expect the company to approach its business decisions carefully and mindfully, taking advantage of the opportunities to ensure that it makes the right decisions. How it approaches compliance at these critical junctures will make all the difference as to whether a company receives criminal sanctions, a civil penalty and in the best cases, no penalty at all.

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