

Export Controls – The Forwarder’s Perspective

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The international forwarding community was not immune from headlines, advisories, and rulemaking dealing with U.S. export controls and economic sanctions in 2020 despite never-ending attention due the global COVID-19 pandemic. Those developments include the issuance of a Final Rule by the U.S. Department of Commerce’s Bureau of Industry and Security (“BIS”) on April 28 that further restricts exports to military end users and tightens the Electronic Export Information (EEI) filing requirements among other changes. Shortly thereafter, a Sanctions Advisory issued by the U.S. Department of Treasury (among other agencies) warning on May 14 against illicit global shipping and sanctions evasion practices particularly dealing with trade involving proscribed countries such as Iran and North Korea.

Now is the time to evaluate and improve upon trade compliance programs, operating procedures, and internal controls - rather than in defense of a regulatory investigation that could find its way to both bottom lines and the headlines. Forwarders have always held a unique position in the export of goods from the United States. As a community, Forwarders neither have close contact with all parties to the transaction nor have intimate knowledge of cargoes and their potential use. The obligations for compliance with international trade restrictions such as export controls and economic sanctions can nonetheless lay a trap for even the most diligent operators. Changes in the regulatory landscape, particularly during the worst global health crisis in living memory, make this moment in time uniquely challenging for international forwarders.

A level-set is always helpful as we look to take stock in our current operations for purposes of risk assessment and improvement. The U.S. regulatory landscape is complex although, in general, all parties involved in the export of goods must pay close attention to three government agencies: the Department of Commerce, the Department of State, and the Department of Treasury. Key programs maintained and enforced by each of those agencies are summarized below.

Export Administration Regulations - BIS enforces the Export Administration Regulations (“EAR”) found at 15 CFR Parts 730 to 780. Those export controls principally restrict the export and reexport of items and technology, including participating in or facilitating such export, based on item, country-specific embargoes, and end users. Items under control include any non-military goods, software, or technology that are physically located in the U.S. or of U.S. origin, of foreign origin but containing more than de minimis U.S. content, or of foreign origin but a direct product of U.S. technology or software. The EAR applies to U.S. persons but also foreign subsidiaries that are controlled, directly or indirectly, by a domestic entity (15 CFR 760.1). Importantly for transportation and logistics providers, one of the Ten General Prohibitions found in the EAR makes it unlawful to proceed with transactions with the knowledge that a violation has occurred or is about to occur (General Prohibition Ten, found at 15 CFR 736.2). General Prohibition Ten has appeared as a specific area of enforcement against service providers in recent years.

International Traffic in Arms Regulations - The Department of State's Defense Directorate of Trade Controls ("DDTC") enforces the International Traffic in Arms Regulations ("ITAR") found at 22 CFR Parts 120 to 130. Those export controls restrict the import, export, and temporary import or export, of defense articles, technical data, and defense services. The ITAR applies to any items designated on the United States Munitions List ("USML") found at 22 CFR 121.1 including firearms, ammunition, missiles, explosives, training equipment, military electronics, optics, and spacecraft systems. The DDTC requires registration of certain actors involved in the trade of arms including, from time to time, service providers particularly where their activities may be considered brokering of defense articles and services. Unlawful brokering and participation with knowledge of violations have been areas of exposure for service providers in recent years.

OFAC Economic Sanctions - The Treasury Department's Office of Foreign Asset Controls ("OFAC") administers approximately 30 different sanctions programs against countries and persons. Those programs generally prohibit the transfer of property or funds, including participating in or facilitating such transfer, to restricted parties. All U.S. Persons must comply including any non-US entities owned or controlled by a U.S. person as determined under the country specific sanction (See 31 CFR 535.329). A service provider's mere participation in a restricted transaction has been an area for exposure in recent years. Traffic involving Cuba and Iran have been a unique area of difficulty for industry due to the swift evolution of U.S. policy over the last decade.

The task for each forwarder is to assess risk for the operation and tailor an appropriate program together with training and process controls. There is neither a one-size-fits-all approach to trade compliance nor any real benefit in adopting compliance programs and practices that will not be followed. The tactical elements of a strong compliance program include: developing internal leadership and subject matter expertise on trade controls; sticking to process fundamentals such as denied parties screening; and watching for the gamesmanship among shippers that can cause liability for even the most well-meaning of operators.

An awareness of weaknesses and "red flags" help personnel to remain vigilant and to escalate issues where they arise. The best example of this tactic is found in the "Know Your Customer Guidance" published by the Department of Commerce in Supplement No. 1 to Part 732 of the EAR. That guidance amounts to: (1) deciding whether "red flags" exist; (2) inquiring further if necessary; (3) avoiding self-blinding against bad facts; (4) training sales and operations staff; (5) re-evaluating situations as new facts are learned; and (6) consulting with the respective agencies or counsel before proceeding if "red flags" or other risks cannot be resolved. A few important "red flags" for transportation and logistics providers to guard against as part of trade compliance programs include:

- The customer is reluctant to offer information about the end-use of a product.
- The product's capabilities do not fit the buyer's line of business.
- The product ordered is incompatible with the technical level of the country to which the product is being shipped.
- The customer has little or no business background.
- Deliveries are planned for out-of-the-way destinations.

- A freight forwarding is listed as the product's final destination.
- The shipping route is abnormal for the product and destination.
- Packaging is inconsistent with the method of shipment or destination.

If historic violations come to light during the development or updating of a compliance program, or during day-to-day business operations, then options are available for determining the path forward and potentially limiting exposure. Real or potential violations can arise for even the most well-meaning of operators. Exposure for these and similar regimes can often extend five years in the past, which is a relatively long tail to consider when a history of violations is found. One of the most useful tools for consideration is the use of voluntary self-disclosures to those agencies having jurisdiction, which are available for the regulatory regimes described here and others that maybe implicated. Giving notice to an agency should not be taken lightly although it can serve as a pathway for closing out a file with mitigated financial exposure (and often little or no exposure).

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