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I. Introduction

Every product, service, and form of technology exported from the United States, as well as every exporter, is subject to export control. These controls dominate every aspect of the export from the product, to the customer, to how the exporter conducts and records his business operations. Numerous rules exist, that on a domestic level are simple, but become more complex when expanded to an international scale. Yet, it is common knowledge in this business that if you are big enough to export, you are big enough to play by the rules. This phrase emphasizes that every exporter, regardless of the size of the operation, is held accountable to comply with the regulations, no matter how complex they appear to be. If these regulations are violated, significant civil and criminal penalties may be imposed and/or the export may be prohibited from taking place at all. The level of control applied depends on: 1) what the export is, 2) to whom and where that export is going and 3) how it is exported.

To complicate things, many departments and agencies of the government play a role in controlling exports. These departments do not necessarily communicate with each other to discover any overlapping or redundancies in the various regulations. However, with the computer age, information sharing may be more prevalent.

The purpose of this paper is to provide a guide through this maze. It outlines the major items of which every exporter needs to be aware and provides general considerations for a model compliance program for an exporting company. Section II identifies the major statutes and the governmental departments and agencies controlling the export process. Section III then describes the start of the export process, product classification or *what* is exported. Section IV follows this with the licensing requirements and Section V with a focus on the issues regarding *to whom* the product is shipped, known as "customer restrictions" or "customer screening." Section VI discusses the Anti-Boycott Amendments, focusing

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on *how* the exports are completed, while Section VII discusses the Foreign Corrupt Practices Act, focusing on the *actions of the exporters.* In Section VIII, the article describes the criminal and civil penalties for non-compliance with these laws and Section IX suggests important items to include when drafting and negotiating international transaction contracts. Section X pulls these concerns together into a discussion of general considerations for an exporter's "compliance program", including the education and training required for an exporter's personnel to comply with the regulations and a review of what exporters should do when they discover a violation of the export laws in their operations. Section XI concludes the article.

II. U.S. EXPORT LAWS AND CONTROLLING AGENCIES

A. *The Export Administration Act (EAA) and the Export Administration Regulations (EAR)*

The primary statute governing U.S. exports is the Export Administration Act (EAA)[1] resulting in the Export Administration Regulations (EAR).[2] The EAA has three main objectives: 1) "to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country which would prove detrimental to the interests of the United States,"[3] 2) to restrict the exports "where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations,[4] and 3) to restrict the export of goods where "necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand."[5] The majority of the EAA focuses on the first two goals while the third goal, known as "short supply areas," is less important and makes up only a small portion of the export controls.

Adherence to the EAA regulations, as well as the other regulations to be discussed in this article, is essential if a company is involved in any international business. If exportation is to be a regular part of a company's business, programs must be enacted within the company to ensure compliance with all of the governmental controls regarding its exports.

The EAA designates the Bureau of Export Administration (BXA), under the Department of Commerce, as the agency to insure adherence to the EAA and EAR. The BXA, therefore, is the agency that plays the largest role in export and reexport activity. The BXA controls dual-use items, items that have civil uses but which can easily be utilized in military applications or which are deemed to have strategic significance. The term "items" is not to be misleading. It applies to all products, services, and

1. 50 U.S.C. § 2401 et seq. (1988).
2. 15 C.F.R. §§ 730-799 (1991).
3. 50 U.S.C. app. § 2402(2)(A) (1988)
4. *Id.* at 2(B).
5. *Id.* at 3(C).

technology.

The BXA is divided into three smaller offices: 1) the Office of Export Licensing (OEL), which receives applications for export authorizations, licenses and makes determinations consistent with the statute, 2) the Office of Foreign Availability (OFA), which determines what items should be decontrolled because of the product's ready availability within the world-wide community, and 3) the Office of Export Enforcement (OEE), which handles the actual enforcement of the EAA and the EAR.

The BXA works closely with three other government departments: 1) The Department of Commerce, 2) the State Department and 3) the Defense Department to develop policies regarding the treatment of various items, recommend changes to the EAR, and represent the U.S. at international export meetings held by the Coordinating Committee for Multilateral Export Control (COCOM).

COCOM, located in Paris, France, is a multinational committee composed of all NATO countries, except Iceland and including Japan and Australia.[6] Established in 1949, during the early stages of the Cold War, COCOM's purpose is to control items that are scarce, strategic or affect restrictions on trade with the Soviet Union, People's Republic of China, and their allies.[7] The delegation from the U.S. is chaired by an official from the State Department's Office of COCOM Affairs (OCA) and attended by the Department of Commerce's Office of Technology and Policy Analysis (OTPA) and the Department of Defense's Defense Technology Security Administration. (DTSA)[8]

B. *The Arms Export Control Act (ACEA) and the International Traffic in Arms Regulations (ITAR)*

A second statute governing U.S. exports is the Arms Export Control Act (ACEA) which deals with goods that are inherently military.[9] This statute was enacted to control the export of "defense articles and . . . services"[10] such as weapons, weapon components, and technical data regarding weapons. The purpose of the ACEA is to further world peace, security and the foreign policy of the U.S.

In the State Department, the Office of Defense Trade Control (DTC) administers the ACEA using the International Traffic in Arms Regulations (ITAR).[11] The ACEA and the ITAR are completely separate from,

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6. The current members of COCOM are: Australia, Belgium, Canada, Denmark, France, Germany, Greece, Italy, Japan, Luxembourg, The Netherlands, Norway, Portugal, Spain, Turkey, and the United States of America.

7. For a history of COCOM, *see* ROOT & LEIBMAN, U.S. EXPORT CONTROLS 10/1-10/10 (3d ed. 1991).

8. *See generally* EVAN R. BERLACK & CECIL HUNT, OVERVIEW OF U.S. EXPORT CONTROLS, 9 PLI Commercial Law & Practice Course Handbook Series No. A4-4366 (1992).

9. 22 U.S.C. §§ 2777-79; 22 C.F.R. § 120.1 -.3 (1995).

10. 22 U.S.C. § 2778(a)(1).

11. 22 C.F.R. § 120.

and in addition to the EAA or the EAR. The State Department's DTC works with the Defense Department's DTSA to review the applications that are filed.

III. PRODUCT CLASSIFICATION - A FOCUS ON WHAT IS EXPORTED

U.S. export control begins with product classification, a focus on *what* is being exported, not to whom or how. Classification of a product, service or technology involves every component of the product, as well as the technology that went into making the product and components. Several lists guide the classification process and all the lists must be checked before product classification is complete. These lists include: 1) COCOM's International Industrial and Munitions Lists, 2) U.S. unilateral regulations, 3) the U.S.'s Commodity Control List (CCL), and 4) the Munitions List of the AECA and the ITAR.

A. *COCOM's International Industrial and Munitions Lists*

COCOM's role is to periodically review and update: a) COCOM's International Industrial List, commonly known as the "Core List", and b) COCOM's Munitions List. These lists attempt to control scarce or strategic resources necessary to maintain world peace. COCOM debates and discusses multilateral compliance controls, but has no enforcement power of its own. However, COCOM's lists regarding restrictions of exports affect the U.S.'s export control laws by giving the U.S. guidelines on how to tailor their own lists.

B. *U.S. Unilateral Regulations*

There are many products and services that the U.S. deems to be strategically important and in need of regulation, but other countries, such as those in COCOM, do not agree. These positions are usually self-serving for almost all countries. When the U.S. is not able to control such products through international groups, it creates its own list of restricted goods or services. These are listed in the U.S.'s Unilateral Regulations.

C. *U.S.'s Commodity Control List (CCL)*

Every product, component and technology that is subject to U.S. export controls by the Department of Commerce[12] must be classified in the U.S.'s Commodity Control List (CCL) according to the EAR. The CCL, administered by the Departments of Commerce and Defense, is said to be "the complete listing of human knowledge."[13] The CCL is made up of both U.S. unilateral controls, as well as bilateral or multilateral controls

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12. As will soon be seen, many different departments control different areas of export law, sometimes overlapping exists and approval from one department does not relieve the exporter from the other department's statutory requirements.

13. Professor J. Triplett Mackintosh during lecture at University of Denver, College of Law, Fall 1993.

made in agreement with other countries under COCOM.

Exceptions to the CCL exist. For instance, if a product is classified as medicine or medical supplies, it is usually not restricted. Also, if the product is generally available in the world marketplace, it is usually not restricted. These types of exceptions, however, do not mean that classification is not necessary.

In 1991, the CCL was rewritten in accordance with the modifications of COCOM's controls that relaxed many restrictions. COCOM issued a new "Core List" which caused the Department of Commerce to revise the CCL to incorporate the Core List changes as well as the unilateral controls that the U.S. wished to maintain.[14]

The new CCL reorganized products and technology into new commodity groups to reflect industrial changes since World War II. The numbering system for Export Control Classification Numbers (ECCN) was also changed. The new system, now five digits instead of the previous four used, allows the reader to glean more information regarding the product from just the number alone. This helps the exporter classify the product more efficiently than previously.

An exporter's product must be classified correctly under the CCL. Generally this is accomplished by a two-step process. First, the engineers of the exporting company look at the CCL and determine which classification they believe the export, including all of its components, best fits. This is usually a difficult and ambiguous process because considerable overlap exists in the categories. The exporter's goal in determining the classification, however, is to get the product classified under the ECCN with the fewest restrictions, so that the exporter can, theoretically, send the export to the greatest number of customers.

The second step is to submit a commodity classification request to the Department of Commerce's Office of Technology and Policy Analysis (OTPA). Commerce's engineers then review the exporter's suggested product classification and make a final determination on the classification. This final ruling defines the product's assigned ECCN and determines which licenses are required to export the product and to which countries the product may be shipped.

D. *AECA/ITAR Munitions List*

The Defense Department's Munitions List defined in the ACEA is comparable to the Commerce Department's CCL and is based on COCOM's Munitions List.[15] This list is organized around 31 categories covering various types of weapons, delivery systems, and military training equipment. The ITAR lays out definitions and interpretations that are

14. 56 *Fed. Reg.* 42,824 (1991). Later codified as Commodity Control List and Related Matters, 15 C.F.R. § 799 (1995).

15. 22 C.F.R. § 121.1.

essential to working with and classifying a product under the Munitions List.[16]

It is necessary for the exporters to evaluate the products to see if they fall into any of these categories. If so, permission must be obtained from the State Department, regardless of any approvals that are granted by the Department of Commerce.

IV. LICENSING REQUIREMENTS

Once assigned, the ECCN determines what type of license the exporter will need to export the product. One of two types of licenses is required: 1) a "general license", or 2) a "validated license".

A. *General Licenses*

A "general license" is a blanket authorization established by the BXA to permit exports under certain conditions. This is the license used for most exports from the U.S., with over twenty different types of general licenses for goods[17] and two different types for technology.[18] The various types of general licenses cover different types of goods and their export destinations. To obtain a general license, no application or special documentation is required by the government. Instead, general licenses are self-authorizing.

B. *Validated Licenses*

If an export does not qualify for a general license under the regulations, then a "validated license" is required. There are five main types of validated licenses: 1) individual validated licenses, which allow "the export of technical data or a specified quantity of commodities during a specified period to a designated consignee;[19] 2) project licenses, which allow the exportation of all goods relating to a specific activity for approximately one year;[20] 3) distribution licenses, which allow "the export of certain commodities to approved consignees . . ." for the period of one year;[21] 4) special chemical licenses, which allow "the shipment by approved exporters of certain chemicals and chemical and biological equipment to approved consignees . . . .";[22] and 5) service supply licenses, which allow the export of needed spare or replacement parts for equipment that were previously made or exported.[23]

To obtain a "validated license" for a good or service, an application

16. 22 C.F.R., *supra* note 11.
17. 15 C.F.R. § 771.
18. 15 C.F.R. § 779.
19. 15 C.F.R. § 772.2 (b)(1).
20. 15 C.F.R. § 772.2 (b)(2).
21. 15 C.F.R. § 772.2 (b)(3).
22. 15 C.F.R. § 772.2 (b)(4).
23. 15 C.F.R. § 772.2 (b)(6).

with supporting documentation must be filed with the Office of Export Licensing (OEL).[24] Validated licenses are not self-authenticating but instead require written approval from the OEL. Validated licenses are not automatically granted to the exporter and can be denied in whole, or in part, to remain consistent with the purpose of the export regulations.

C. *Streamlining the Licensing Process — The Exporter's Bill of Rights*

To make it easier for exporters to obtain information regarding licensing, the Department of Commerce developed an Exporter's Bill of Rights.[25] This Bill states that those who export have the right to expect the following: 1) accurate and consistent licensing analyses, 2) prompt decisions regarding licensing determinations, 3) full access to licensing and regulatory information, and 4) responsive and courteous service.

To help raise the level of its office's performance, the BXA has significantly streamlined the licensing process, reducing the time in which exporters can expect to receive licensing decisions to an average of one to two weeks. Forms are read from an Optical Character Recognition System (OCRS) to enhance the speed of processing the form.

The BXA has also installed three electronic systems to help exporters: 1) the Export Licensing Automated Information Network (ELAIN), on which it is possible to submit an application electronically, 2) the System for Tracking Export License Applications (STELA), on which a digitized voice answering machine gives exporters current information on the status of their applications, and 3) the Export Licensing Voice Information System (ELVIS), which answers many commonly asked questions in a recorded message format. ELVIS addresses all aspects of licensing information, and if needed, allows the exporter to speak with an export counselor.

Information regarding ELAIN can be found by calling the Department of Commerce at (202) 377-2753. After authorization, the response is sent automatically, so the shipper need not be delayed awaiting further authorization. STELA can be reached by touch-tone telephone by calling the BXA at (202) 377-2752.

The BXA has also implemented seminars, publications, and the *OEL Insider*, a quarterly publication, to help the public understand what it means to be "in compliance" with the regulations.

In the event that an application is denied, and the exporter disagrees with the OEL's final determination, the BXA provides for an administrative appeal procedure and limited judicial review.[26]

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24. 15 C.F.R. § 772.1.

25. *See generally* Ian S. Baird, *The U.S. Department of Commerce Export Licensing System: Making Life Easier*, 606 PLI/Comm 81 (1992).

26. 15 C.F.R. § 789 (pertaining to administrative review). 50 U.S.C. app. § 2409(j)(3) (pertaining to limited judicial review).

D. *Technology Classification*

The export controls, classifications and licensing requirements discussed above, apply not only to products and services, but also to technology and "know-how". Congress realized that the sale of technology needed to make a product can be as damaging to U.S. interests as the product itself. Because of this, Congress restricted the export of technology through classification and licensing requirements.[27] This gives meaning to the ancient Chinese proverb "Give a man a fish he eats for a day. Teach a man to fish, and he eats for life."

The EAR define "technical data" as "information of any kind that can be used, or adapted for use, in the design, production, manufacture, utilization, or reconstruction of articles or materials. This includes technical data, technical assistance and software."[28]

Exports of technical data can occur whenever the data is transferred to a foreign person.[29] This can occur when: 1) any information regarding an export is sent to a foreign buyer, 2) product specifications are taken with a salesman to a foreign country, 3) a foreign buyer tours an American facility to either hear or see such data, or 4) an U.S. employee discusses the data with a foreign person, either in the U.S. or abroad. All of this underscores the fact that an exporter can violate the Regulations without ever conducting a sale. It is critical, therefore, that all departments involved with technical data in an exporting company be aware of these rules.

V. CUSTOMER SCREENING PROCESS — FOCUS ON TO WHOM THE PRODUCT IS EXPORTED

U.S. export regulations also exist which govern *to whom* the exports can be sent, and thus exporters must "screen" their customers to ensure that they do not violate these regulations. Tables and lists are produced by various departments of government, including the Department of Commerce, Department of State, and the Department of Treasury against which an exporter's customers must be screened. If a customer appears on a table or list, the U.S. exporter must refuse to sell the product to the denied party. Additionally, U.S. exporters may not service U.S. origin items owned or held by a denied party.[30] Therefore, they must screen customers for reexports of U.S.-origin goods and technology to a denied party. The laws and regulations in this area are very complex. To ensure compliance, U.S. exporters must establish careful procedures within their companies. This compliance program must involve all departments of the company. The sales department must obtain a certain amount of information from the customer and have it entered into the

27. 15 C.F.R. § 770.3(a).
28. 15 C.F.R. § 779.1(a).
29. 15 C.F.R. § 779.1(b).
30. 15 C.F.R. § 781.12.

customer base listings. Next, the customer's information must be compared against lists in the company's computer database. These lists must therefore be updated on a regular basis. Finally, when the item is ready to be shipped, a final check must be made by the shipping or delivering departments to ensure that the addressee was not recently placed on any list.

The relevant lists that must be consulted are: 1) the Department of Commerce's Table of Denial Orders, 2) the Department of Treasury's Office of Foreign Assets Control List of "Specially Designated Nationals", 3) any country embargoes that currently are in effect, and 4) Country Lists. These lists are generated by the various departments that enact the regulations. The laws and regulations that must be considered are: 1) the Trading with the Enemy Act and 2) the International Emergency Economic Powers Act. Updating all the lists for personnel that interact with customers is an essential function in this area as well. Having a plan, but not having it updated can get an exporter in as much trouble as if there was never a plan to begin with.

A. *"Table of Denial Orders" List*

The Department of Commerce prints a semi-annual "Table of Denial Orders" which lists companies and people that are barred from trade with the U.S. because of past infractions under the law or regulations.[31] Denial Orders vary in their scope and duration, but, in general, they prohibit the named person from participating in U.S. export transactions for a period of several years. The Commerce Department also prints daily updates of the Denial Orders in the *Federal Register*,[32] and exporters are deemed to be on notice of all denial orders printed in the *Federal Register* upon its publication. Accordingly, someone in the company will need to receive and read the *Federal Register*, extract any names that have to be added to the Table, and make sure that everyone's list is properly updated.

B. *"Specially Designated Nationals" List*

A similar list is published by the Department of Treasury's Office of Foreign Assets Control (OFAC) which lists the people or companies that OFAC considers to be "Specially Designated Nationals" (SDN) of countries under foreign policy embargoes. Transfer of items to these entities and individuals, located worldwide, is prohibited without authorization from OFAC. The SDN list is updated through the *Federal Register* in a fashion similar to the one described above for the Table of Denial Orders. Information regarding SDNs may be obtained from:

Office of Foreign Assets Control, U.S. Department of Treasury, 1500 Pennsylvania Ave. N.W., Washington, D.C. 20220, Tel: (202) 566-5021.

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31. 15 C.F.R. § 787.12(c).

32. 15 C.F.R. § 788. The Table of Denial Orders are usually updated in March and October, and are available from the Department of Commerce.

C. *Country Lists*

Country restrictions under the CCL are ranked according to the analysis of the political and military risks posed by each country. The list is temporary and changes periodically. This generalized system is meant to be a kind of preliminary screening of the country, no matter to whom within the country the exporter is exporting. This is also a point from which to start the customer screening section of a compliance program.

D. *The "Grey List"*

There is also a grey list compiled by the Department of Commerce, similar to the Table of Denial Orders, but not made public. Generally, the grey list contains the names of people and/or companies that may have their export privileges curtailed in the future and thus it alerts exporters to potential problem areas or customers.

E. *Trading with the Enemy Act (TWEA) and the International Emergency Powers Act (IEPA)*

The Trading with the Enemy Act (TWEA) was enacted at the start of World War I and has been amended several times since then.[33] It prohibits "trading" with the "enemy" or any "ally of the enemy". To violate the act, it is necessary

> to trade or attempt to trade, either directly or indirectly, . . . with knowledge or reasonable cause to believe . . . [that the trading partner] is an enemy, or ally of enemy, or is conducting or taking part in such trade . . . for, or on account of , or on behalf of, or for the benefit of . . . the enemy . . . .[34]

In 1976, the International Emergency Powers Act (IEPA)[35] was enacted, providing the President with authority to maintain export regulations without having to declare a national emergency. Most OFAC regulations are broad sweeping prohibitions on financial and trade transactions with targeted countries, sometimes accompanied by a freezing of foreign assets.

Treasury's OFAC administers both the TWEA and the IEPA. Under both statutes, the OFAC has promulgated regulations that restrict exports to Cuba, North Korea, Libya, Vietnam, South Africa, Iraq, Kuwait, Iran, and Cambodia. Embargoes are also usually included within the enactment of TWEA or IEPA. These can include prohibitions on exports and imports to and from the embargoed country. The assets of that country or its nationals can also be frozen, and not allowed to be removed

33. *See, e.g.*, Historical Notes following 50 U.S.C. app. § 9. *See generally* Swan, *A Road Map to Understanding Export Controls: National Security in a Changing Global Environment*, 30 AM. BUS. L. J. 607 (1993).

34. 50 U.S.C. app. § 3(a).

35. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b).

from the U.S.

Even when the President lifts all sanctions from a country, such as with South Africa, the regulations may still be on the books, technically making an exporting company liable if products are exported to the restricted country. The exporter must follow the regulations and lists available rather than take newspaper headlines as an indication that the lists have been altered.

The best way to accomplish the customer screening portion of the company's export compliance program is to incorporate the screening of each customer into a routine clerical task that is checked at each step of the export process. It is critical that every employee involved in the export process understands the importance of the reporting requirements and is aware of the required compliance procedures. This is a less technical area than product classification, but it is also an area that it is easier for the federal government to catch any illegal actions that a company might inadvertently make.

F. *Classification of Reexports*

Reexports are transactions in which the person receiving the item intends to transfer the item, or some portion of it, to a third person. The EAR defines reexports as "the reexport, transshipment, or diversion of commodities or technical data from one foreign destination to another."[36] Reexports can be: 1) to a third party within the same country or 2) to another country.

Any export controls that exist on an original product, service or technology also apply to all reexported portions of that item. For example: if the reexport is to a country where the item could have been shipped originally under a general license, then it is known as a "permissive reexport," requiring no prior approval from the OEA. However, OEA approval is needed for reexport if the material has been incorporated into a foreign-made product *even* if the original item has lost its identity, and regardless of whether it is only a minor part or amount of the total new product.

If the Office of Export Licensing (OEL) requires prior approval before exporting a commodity from the U.S., the exporter must: 1) notify the OEA of the reexport, 2) obtain authorization to reexport on the original license application form, and 3) inform the consignee on the Destination Control Statement that the consignee must also secure authorization from the U.S. prior to reexport. If an exporter discovers a violation from a consignee, and, in good faith did not know of the reexport beforehand, the exporter incurs no liability. Instead the liability falls to the foreign party, which is usually placed on the Table of Denial Orders, discussed above.

36. 15 C.F.R. § 770.2.

VI. ANTI-BOYCOTT LAWS - FOCUS ON HOW EXPORTS ARE HANDLED

A. *The Anti-Boycott Amendments*

Along with the regulations regarding "what products" and "to whom" exports can be sold, the Anti-Boycott Amendments to the EAA[37] regulate certain activities of exporters such as *how* and on *what terms* they can engage in international sales with another country. The Anti-Boycott legislation makes it illegal to deal with or participate in any boycott against a country with whom the United States has friendly relations. Compliance with this legislation affects the sales, purchasing, and marketing departments.

In the 1930's and 1940's, the Arab League initiated a boycott against the territory that was to become Israel. This boycott extended to three phases: primary, secondary and tertiary boycotts.[38] The primary boycott prohibited direct trade with Israel and Israeli companies. The secondary boycott prohibited business transactions with companies that had existing business relationships with Israel. The tertiary boycott encouraged companies that traded with Arab League members to boycott Israel and companies that traded with Israel. The secondary and tertiary boycotts actually shifted enforcement from the Arab League to foreign sellers[39] and these sellers, if American, were subject to United States jurisdiction. The Arab Boycott Office maintained a blacklist of companies that have traded with Israel and required that members of the boycott not trade with those companies.

The U.S. response to this boycott has intensified over time. Initially, the overall effect of the boycott was minimal because the Arab nations traded so little with the U.S. However, in the 1965 Amendments to the Export Control Act of 1949, Congress added a declaration that it was the official policy of the United States to oppose boycotts imposed against countries friendly to the U.S., and encouraged U.S. exporters to refuse to

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37. Codified at 50 U.S.C. app § 2402(5).

38. *See The Arab Boycott and American Business, Report of the Subcomm. on Oversight and Investigations, H.R. Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 10-11 (1976) at 10. In 1977, the three levels of boycott were explained as follows:
The boycott takes three forms. The primary boycott involves Arab countries and companies refusing to do business with Israel and Israeli companies. This form falls outside U.S. jurisdiction and is generally recognized as a legitimate type of economic warfare. . . .

The secondary boycott involves the Arab Central Boycott Committee and Arab nations refusing to do business with third-country companies that deal with Israel.

The tertiary boycott involves U.S. companies refusing to do business with other U.S. companies . . . because they fail to comply with the Arab boycott regulations or because of race, religion, or national origin. This type of boycott is clearly against the spirit and intent of U.S. law, including the civil rights and equal opportunity laws and the antitrust laws.
H.R. Rep. No. 190, 95th Cong., 1st Sess. 4-5 (1977) *reprinted in* 1977 U.S.C.A.A.N. 362.

39. Pamela P. Bread & Pleasant S. Bronax, III, *The Anti-Boycott Provisions of the Export Administration Act*, *in* THE COMMERCE DEPARTMENT SPEAKS 1990: THE LEGAL ASPECTS OF INTERNATIONAL TRADE (PLI Corporate Law and Practice Course Handbook Series 1990), at 781.

take any action pursuant to the boycott.[40] In addition, the President issued further encouragement, but did not actually prohibit U.S. firms from participating in the Arab boycott of Israel.[41]

In 1973, the price of oil increased upwards of 500%, resulting in the need for increased trade with the Arab countries. This resulted in the *U.S. v. Bechtel*[42] case which finally raised the question of whether it was illegal, under U.S. anti-trust laws, to participate in the Arab Boycott. The case was settled out of court, but it served notice that companies may be liable if they cooperated with the Arab boycott.[43] The EAA prohibited compliance only when it would have had a discriminatory effect on friendly countries. It also required reporting of others who joined the boycott. This was usually done when a company was asked to join a boycott or told that the sale was conditioned on the seller joining the boycott.

In 1977, as the boycott affected increasing numbers of U.S. businesses with greater impact, Congress concluded that mere encouragement not to participate was not good enough. Congress therefore added the Anti-Boycott provisions to the Export Administration Act of 1969.[44] This prohibited a U.S. person or business from willfully taking or agreeing to take actions to comply with any boycott imposed by a foreign country against a country that is friendly to the U.S.[45] This gave more teeth to the past provisions.

On January 18, 1978, the Commerce Department further issued regulations implementing the 1977 Amendments,[46] and the courts have upheld these regulations in various challenges.[47] If found guilty, the company can have their export license revoked and other civil and criminal penalties may apply.

B. *The Ribicoff Amendments to the Tax Reform Act of 1976*

As a further sanction, Congress enacted the Ribicoff Amendments to the Tax Reform Act of 1976.[48] Normally, U.S. taxpayers who pay taxes in another country are permitted to take that amount as a credit on their U.S. taxes. The Amendment, however, denies these tax benefits to those companies who "participate in or cooperate with an international boy-

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40. Pub. L. No. 89-63, 79 Stat. 209 (1965).

41. 30 *Fed Reg.* 12,121 (1965).

42. U.S. v. Bechtel, 648 F.2d 660 (9th Cir. (Cal.) 1981).

43. *See U.S., Bechtel Reached Accord on Boycott Case,* WALL ST. J. Jan. 11, 1977 at 14.

44. 50 U.S.C. app. §§ 2401-2420. The EAA sets forth the Anti-Boycott provisions at 50 U.S.C. app. § 2407.

45. *Supra* note 1. *See also* 50 U.S.C. app. § 2407(a) for prohibitions on actions in support of the boycott.

46. Restrictive Trade Practices on Boycotts, 15 C.F.R. Pt. 769 (1995).

47. *See, e.g.,* Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915 (7th Cir. 1984); Trane Co. v. Baldrige, 552 F. Supp. 1378 (W.D. Wis. 1983).

48. IRC § 999, the Revenue Act of 1971, § 501, 85 Stat. 497, codified at 26 U.S.C. § 861 (1988).

cott"[49] The Internal Revenue Service has issued regulations that help explain the applicability of these provisions.[50]

Many other differences exist between the tax and export control laws. Under the tax laws, a person loses tax benefits if he "cooperates or participates in an international boycott" in any way.[51] Under export control laws, U.S. persons are prohibited from refusing to do business with anyone pursuant to a request from or agreement with a boycotting country.[52] They are also prohibited from: 1) refusing to employ or otherwise discriminate against any U.S. person on the basis of sex, race, religion, or national origin;[53] 2) furnishing information regarding the race, religion, sex, or national origin of customers;[54] 3) providing information about someone's business relationships or membership in other organizations;[55] or 4) drafting letters of credit which request any of the above information.[56]

There are many exceptions to these rules that appear to allow the exporter some leeway in determining with whom he wants to deal. For example, U.S. persons are allowed to comply with requirements of a boycotting country which:

1) prohibits the import into that country of goods and services of another country,[57]

2) wants unilateral selection over carriers, insurers,[58] shipping docu-

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49. *Id.*

50. IRC § 999. IRS Temp. Reg. § 7-999-1 and Proposed Reg. § 1-999-1.

51. *Supra* note 37.

. . . A person participates in or cooperates with an international boycott if he agrees -

(A) As a condition of doing business directly or indirectly within a country or with the government, a company, or a national of the country -

(i) to refrain from doing business with or in a country which is the object of the boycott or with the government, companies, or nationals of that country;

(ii) to refrain from doing business with any U.S. person engaged in trade in a country which is the object of the international boycott or with the governments, companies, or nationals of that country;

(iii) to refrain from doing business with any company whose ownership or management is made up, all or in part, of individuals of a particular nationality, race, or religion, or remove (or refrain from selecting) corporate directors who are individuals of a particular nationality, race, or religion; or

(iv) to refrain from employing individuals of a particular nationality, race, or religion; or

(B) As a condition of the sale of a product to the government, a company, or national of a country, to refrain from shipping or insuring that product on a carrier owned, leased, or operated by a person who does not participate in or cooperate with an international boycott . . .

52. 15 C.F.R. § 769.2(a).

53. 15 C.F.R. § 769.2(b).

54. 15 C.F.R. § 769.2(c).

55. 15 C.F.R. § 769.2(d-e).

56. 15 C.F.R. § 769.2(f).

57. 15 C.F.R. § 769.3(a-1).

58. 15 C.F.R. § 769.3(c).

ments without negative certificates,[59] reshipments of exports,[60] and immigration or passport requirements,[61] or

3) governs only activities within that foreign country, especially if the U.S. exporter resides in the boycotting country.[62]

The jurisdiction of the tax and export control laws also differ. The tax laws apply to all U.S. companies and their foreign subsidiaries if the U.S. company owns more than 10% of the stock. In contrast, the export laws apply to U.S. taxpayers and foreign subsidiaries *only* in situations where they are engaged in U.S. commerce.[63]

In addition to the laws prohibiting boycott assistance, there are a series of laws requiring companies to report anyone attempting to recruit them to participate in a boycott.[64] The request, whether oral or written, must be reported to the Department of Commerce. It is irrelevant whether the request was for information or to join a boycott.[65] The request must be reported by the end of the month following the calendar quarter in which the request was received.[66] The report must include documentation of the request, disclosure of what action was taken, and a description of the commodities or technical data involved.

Compliance with these regulations involves training the marketing, sales, and purchasing departments to be aware of such boycott requests and how to handle them. Procedures need to be installed, and all questions should be referred to legal counsel.

C. *Record Retention Requirements*

Under the EAR, there are generally three main categories of transactions that are subject to record-keeping requirements.[67] These are: (1) transactions that involve restrictive trade practices or boycott requirements or requests, for example relating to the Arab boycott of Israel[68], (2) exports of known commodities or technical data from the U.S. and known reexports, transshipments or diversions of commodities from the U.S., or (3) any other transactions subject the EAR, regardless of whether the export or reexport is made, or proposed to be made, by any person with or without authorization by a validated license, general license, or any other export authorization.

The EAR require the following items to be retained[69]:

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59. 15 C.F.R. § 769.3(b).
60. 15 C.F.R. § 769.3(d).
61. 15 C.F.R. § 769.3(e).
62. 15 C.F.R. § 769.3(f).
63. *Supra* note 37.
64. 50 U.S.C. app. § 2407(b); 15 C.F.R. § 769.6.
65. 15 C.F.R. § 769.6(a)
66. 15 C.F.R. § 769.6(b).
67. 15 C.F.R. § 787.13(a).
68. *See infra* notes 36-65 and accompanying text.
69. 15 C.F.R. § 787.13(c).

1) export control documents

2) memoranda

3) notes

4) correspondence

5) contacts

6) invitations to bid

7) books of account

8) financial records

9) restrictive trade practices or boycott documents and reports

10) other written matter pertaining to the transactions described above

The EAA and EAR exempts many items from the record-keeping requirements, including:

1) export information pages

2) special export file lists

3) vessel logs from freight forwarders

4) certificates regarding inspection, warranties, guarantees, packing material, or the quality of goods

5) letters of indemnity

6) financial hold and release forms and reports

7) invoices for commission and engineering fees

Generally, required-records must be retained for at least two years after the "termination of the export".[70] Anti-boycott materials, however, must be retained for three years after the "termination of the export". The "termination of the export" has been interpreted as the latest time: (1) the good was exported from the U.S., (2) any known reexport or diversion of the goods took place, or (3) any other termination of the transaction occurred, whether formally or by other means.

While this limits the amount of time that a company must retain records, a company may want to retain clean and complete records longer, since the statute of limitations for criminal actions brought under the EAA is five years.

The time limits may also be extended if the Department of Commerce or any other governmental agency so requests. In such case, the records may be destroyed only with written authorization from the agency that originally requested the materials.

70. 15 C.F.R. § 787.13(e).

VII. FOREIGN CORRUPT PRACTICES ACT - FOCUS ON THE ACTIONS OF EXPORTERS

The Foreign Corrupt Practices Act[71] is not concerned with what the product is, what it is made out of, or where it is sold. Instead, the Foreign Corrupt Practices Act (FCPA) regulates the *actions of the exporters*, as individuals, and the operations of their companies, whether in the United States or not.

The origins of the FCPA started in 1976. The Securities Exchange Commission (SEC) submitted a report to the Senate Banking, Housing and Urban Affairs Committee revealing questionable and illegal corporate payments and practices.[72] The report stated that the SEC would, within its power, continue to demand disclosure of questionable and illegal payments to foreign government officials. However, the SEC stated that some "limited purpose legislation in this area would be desirable to demonstrate a clear Congressional policy with respect to a thorny and controversial problem."[73] This resulted in the SEC drafting proposed amendments to the Securities Act of 1934 to deal with this problem.[74] The amendments, called the FCPA, were meant to eliminate three basic problems: 1) off-the-book slush funds resulting from unrecorded transactions, 2) falsified records intended to disguise some aspect of a transaction, such as a payment to a different person, and 3) qualitative misrepresentations, such as part of $100,000 given to A, that was actually given to B. This third problem was the most difficult to correct.

Congress passed the FCPA and it was signed into law by President Carter on December 20, 1977.[75] The Foreign Corrupt Practices Act (FCPA) amended U.S. securities law by: 1) imposing accounting standards for corporate assets;[76] 2) prohibiting bribes in foreign dealings; 3) imposing the same anti-bribery requirements on "domestic concerns", enforced by the Justice Department, which include all companies not registered with the SEC; and 4) extending these regulations to U.S. citizens and residents, as opposed to only businesses and corporations.[77]

The FCPA[78] regulates primarily the accounting, sales and marketing operations of companies. In the accounting departments, the FCPA regulates the manner in which: 1) companies register with the Securities and

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71. Pub. L. No. 95-213 95th Cong., 91 Stat. 1494, codified in scattered sections of 15 U.S.C. § 78 [hereinafter referred to as FCPA].

72. Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, S. Comm. on Banking, Housing and Urban Affairs, Committee print, 94th Cong., 2d Sess. (May 1976), at 2.

73. *Id.* at 57.

74. *Id.* at 58.

75. *See supra* note 1.

76. This was in an attempt to eliminate "slush funds". Codified as amended at 15 U.S.C.A. § 78q(b).

77. 15 U.S.C.A. § 78dd-1 (1990).

78. The FCPA is codified under short title at 15 U.S.C.A. § 78A, note.

Exchange Commission (SEC), 2) keep their records and 3) audit their accounting systems.[79] The marketing and sales departments' activities are regulated through the Anti-Bribery provisions of the FCPA.[80] These provisions prohibit U.S. companies from paying bribes to a foreign official.

The FCPA governs all U.S. companies and individuals subject to the jurisdiction of U.S. law. The anti-bribery portion of the FCPA also applies to all companies that are engaged in international trade whether or not they are registered with the SEC. It uses the term "domestic concern" to define who is within its grasp. "Domestic concern" means: 1) any individual who is a citizen, national, or resident of the U.S.; or 2) any corporation, partnership, association, . . . which has its principle place of business in the U.S. or is organized under the laws of the U.S. Superimposed on this is the requirement that "interstate commerce" be involved in the violation. The term "interstate commerce" has been interpreted to include the use of telephone, mails, or other systems of communication.

The FCPA follows a two-track approach: 1) accounting mandates; and 2) anti-bribery prohibitions.[81] These are discussed below in greater detail.

A. *FCPA Accounting Mandates*

First, in the FCPA, Congress mandated that *all* companies: 1) make and keep books, records and accounts in reasonable detail so as to accurately and fairly reflect the transactions and dispositions of the company's assets; and 2) devise and maintain a system of internal accounting controls sufficient to provide assurances that: a) all transactions are executed in accordance with management's authorization; b) the transactions are recorded to permit preparation of financial statements in accordance with the General Accepted Accounting Principles; c) access to assets is permitted only with management's authorization; d) recorded accountability for assets is routinely compared with the existing assets; and e) appropriate action is taken with respect to any inconsistencies.[82]

The FCPA also contains an "internal accounting controls requirement" meant to regulate and guide the design and maintenance of a system of controls. These control systems are auditing systems, not accounting systems, meant to prevent off the book slush funds, not just find them after they happen. These provisions also are not limited to material amounts, but to any amount.

Compliance under this first part of the FCPA goes to ensuring that an exporter's system of record keeping and accounting is inspected, preferably by outside auditors, on a regular basis and that the personnel in

79. 15 U.S.C. § 78m.

80. 15 U.S.C. § 78dd-1 (for issuers of registered securities) and 15 U.S.C. § 78dd-2 (for domestic concerns that are not issuers of registered securities).

81. *See supra* note 78.

82. 15 U.S.C. § 78m, note.

these departments are well-trained to comply with the FCPA.

B. *FCPA's Anti-Bribery Provisions*

The second track of the FCPA contains the sections of the Act which have declared it illegal for any company, whether publicly traded or not, to bribe any foreign official or political party for the purpose of obtaining business.[83] Numerous interpretations evolved concerning what constituted a violation, but the Act requires that the payment must have been made to a foreign official who has "discretionary authority". "Grease payments", or payments made to a person who does not have any discretionary authority in order to simply expedite routine matters, are not covered by the statute.

At face value it would appear that these requirements were already being met, especially by publicly-traded corporations. However, considerable confusion and debate occurred regarding what was needed to comply with this new law. In addition to the confusion it created, the FCPA was criticized by some experts as a major disincentive to exports.[84] In 1980, the complaints were made in two General Accounting Office Reports[85] and to the President's Export Council of 1980.

C. *The FCPA's 1988 Amendments*

As a result of this confusion and criticism, Congress made several amendments to the FCPA in 1988. The amendments, enacted as part of the Omnibus Trade and Competitiveness Act of 1988 (OTCA)[86], were designed to: 1) remove ambiguities from the Act, 2) lessen the burden of the controls on the exporters and administrators,[87] and 3) clarify and narrow the scope of the FCPA by lowering the knowledge requirements".

The 1988 Amendments accomplished many important changes to help the Act function properly. First, the 1988 amendments cleared up confusion concerning whether the FCPA's accounting requirements applied to foreign subsidiaries, the issue of a parent corporation's responsibility for a subsidiary. The Amendments stated that if the U.S. company owns 50% or less of a foreign firm, and the parent reasonably and in good faith attempts to require that the subsidiary make and keep accurate books within a system of internal accounting controls, then the U.S. firm has no liability for the foreign firm's practices.

Second, the 1988 Amendments lowered the standard of "knowledge

83. *Supra* note 80.

84. *See* Julia Christine Bliss & Gregory J. Spak, *The Foreign Corrupt Practices Act of 1988: Clarification or Evisceration*, 20 L. & POL'Y INT'L BUS. 441, 442 at n.3 (1989).

85. *See* Conf. Report, Omnibus Trade and Competitiveness Act of 1988, H.R. Conf. Rep. No. 576, 100th Cong. 2d Sess. 916-917 (1988) [hereinafter OTCA Conference Report].

86. The FCPA amendments appear at Title V, subtitle A, pt. i §5001-5003 of the OTCA.

87. OTCA Conference Report, *supra* note 85, at 916.

that a payment was illegal or was a bribe" to only "knowing".[88] The prior 1977 standard was "knowing or having reason to know" that a payment would be used by a third party for a purpose unlawful under the Act." Since 1988, a person is deemed to "know" that the thing of value will be given to a foreign official if the person "is aware of a high probability . . . that the funds will be so used."[89]

Third, the 1988 amendments expanded the "grease payments exception". Originally, "grease payments" were allowed only if the official's duties were ministerial or clerical. After 1988, the FCPA allows payments to *any* foreign official for facilitating or expediting any routine nondiscretionary action. The Amendments also require that: 1) the payment be used to retain some business or 2) something be received in return.

Fourth, the 1988 Amendments clarified that, when enforcing the FCPA, the SEC would not impose criminal penalties for insignificant, technical, or inadvertent violations.

Fifth, while certain aspects of the FCPA were relaxed by the 1988 Amendments, the penalties for violation of the anti-bribery provisions of the FCPA were made significantly more severe by the 1988 Amendments. Congress raised the maximum corporate fine from $1 million to $2 million, and the maximum individual fine from $10,000 to $100,000. The maximum prison term remains at five years for any officers or directors who willfully violate these provisions.

Sixth, Congress strengthened the FCPA's regulations regarding the liability of individuals in international trade when it repealed the Eckhardt Amendment, which had required that a company actually be convicted of a FCPA violation before any of its directors or officers could be prosecuted under the Act. Now a company's employees or agents may be prosecuted regardless of whether the company has been convicted or prosecuted. Thus, the FCPA is an important statute for exporters to be aware of and to comply with.

VIII. PENALTIES FOR VIOLATIONS OF EXPORT LAWS AND REGULATIONS[90]

Violations or non-compliance of the above noted export laws and regulations are detailed and carry significant criminal and civil penalties. The Export Administration Act of 1979[91] (EAA) provides for criminal penalties and administrative sanctions for violations of the anti-boycott

88. Pub. L. No. 100-481, § 5003, 102 Stat. 1416, codified at 15 U.S.C. § 78dd-1(a)(3).

89. *Id.* at 102 Stat 1418 codified at 15 U.S.C. § 78dd-2(h)(3)(A).

90. *See* Cecil Hunt & Pamela P. Breed, *Export Administration Act: Penalties and Enforcement Process, in* THE COMMERCE DEPARTMENT SPEAKS 1990: THE LEGAL ASPECTS OF INTERNATIONAL TRADE, *supra* note 40, at 803. Murphy, *Export Controls Compliance and Enforcement: A Private Practitioner's Perspective*, 398 PLI/Comm 393 (1986).

91. 50 U.S.C.A. app. §§ 2401-2420, as amended by Pub. L. 100-418, 102 Stat. 1107. The EAA of 1979 was extensively amended by the Export Administration Amendments Act of 1985, Pub. L. 99-64, 98 Stat. 120 and by the Omnibus Trade and Competitiveness Act, Pub. L. 100-418, 102 Stat. 1107.

and export control provisions of the EAA. The Export Administration Regulations[92] (EAR) impose export control related requirements, specify offenses which are subject to sanctions and establish procedures for administrative enforcement proceedings. This is a section that hopefully a company will not have to refer to, but merely peruse to get a feeling of the harsh view that is taken toward export violations by the courts.

A. *Criminal Penalties*

Criminal penalties can be imposed for violations, attempts, or conspiracies to violate the EAA, or any regulation, order, or license under the Act. Criminal violations of export laws are broken into two groups: 1) "knowing" violations and 2) "willful" violations. "Knowing" violations include: a) the mere possession of goods or technology with the intent to export in violation of U.S. export control laws, or b) knowing or having reason to believe that the goods or technology would be so exported. For each "knowing" violation,[93] the exporter may be assessed a fine of up to $50,000 or five times the value of the export involved, whichever is more, imprisonment for up to 5 years, or both.

"Willful" violations[94] include each occurrence, with knowledge, that: a) the export will be used for the benefit of any country to which exports are restricted for national security reason or foreign policy purposes, or b) that the intended destination of the goods or technology involved is such a restricted country. The penalties for "willful" violations are even harsher than for "knowing" violations. For individuals, fines up to $250,000 or imprisonment for up to 10 years, or both can be assessed.[95] For companies, fines of $1,000,000 or up to five times the value of the exports involved, whichever is greater, may be assessed.[96]

The same penalties apply to a person or company, holding a validated license "for the export of any goods or technology to a controlled country, and who, with the knowledge" of its unauthorized use for "military or intelligence gathering purposes," fails to report the facts to the Secretary of Defense. However, the maximum prison term in this case is five years.[97]

Willful violations of the Arms Export Control Act (ACEA) provides criminal penalties of up to $1,000,000 and/or up to imprisonment for 10 years,[98] while violations of the Trading With the Enemy Act (TWEA)[99] provide for criminal penalties of up to $50,000 and/or imprisonment up to

92. 15 C.F.R. Pts. 768-799 (1995).
93. 50 U.S.C. app. § 2410(a); 15 C.F.R. Part 787.1(a)(1)(i).
94. 50 U.S.C. app. § 2410(b)(1)(A), 15 C.F.R. § 787.1(a)(1)(ii).
95. 50 U.S.C. app. § 2410(b)(1)(B), 15 C.F.R. § 787,1(a)(1)(ii).
96. 15 C.F.R. § 787.1(a)(1)(ii).
97. 50 U.S.C. app. § 2410(b)(2), 15 C.F.R. § 787.1(a)(1)(ii)(B).
98. 22 U.S.C. § 2778(e). The Arms Export Control Act (ACEA) also provides for administrative and civil sanctions.
99. 31 C.F.R. Parts 500-520.

10 years.[100]

In addition to the fines and prison terms, knowing and willful violators of national security controls face forfeiture of: a) their interest in the "goods or tangible items that were the subject of the violation,"[101] and b) the proceeds of the violation itself.[102] However, these severe penalties are not applicable to violations of short supply controls or to violations of the anti-boycott regulations.

B. *Civil Penalties*

In addition to criminal penalties, the EAR provide that a respondent found to have violated the Act or the Regulations is subject to any or all of many civil sanctions. The civil penalty for violations occurring before December 29, 1981 were up to $10,000. For violations after December 29, 1981, especially involving national security controls, the fines can be up to $100,000 per violation.[103] In addition to a fine, however, four additional sanctions may be levied against the respondent. First, illegal exports are subject to seizure and forfeiture, together with any vessel or aircraft used in the export or the attempt to export.[104] Second, "[a]ny outstanding validated export license affecting any transaction in which the respondent may have any interest . . . may be suspended or revoked."[105] Third, the respondent may be denied the privilege of participation, either "directly or indirectly, in any manner or capacity, in any transaction involving commodities or technical data exported . . . from the U.S."[106] This is known as a "general denial of export privileges." Fourth, the penalty that does the most damage is the "Denial Order",[107] which is in effect a blacklist. A denial order means the affected party and its affiliates are prohibited from participating, in any way, in any transaction involving the export of goods or technical data from the U.S. Other exporters and importers must also avoid all dealings with a person or company subject to a Denial Order. For this reason, the Department of Commerce publishes individual Denial Orders in the *Federal Register* and semiannually publishes a Table of Denial Orders. The effect of these are to notify anyone involved in international trade that they cannot deal with those persons or companies appearing on the lists.

To avoid problems leading to these penalties, companies should use: 1) a strong contract, and 2) an adequate compliance program. Each are discussed below.

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100. No civil penalties apply to TWEA violations.
101. 50 U.S.C. app.§ 2410(g)(1)(A).
102. 50 U.S.C. app. § 2410(g)(1)(C).
103. 50 U.S.C. app. § 2410(c)(1), 15 C.F.R. §§ 787.1(b)(3) and 788.3(a)(4).
104. 22 U.S.C. § 2401(g) (1994).
105. 15 C.F.R. Part 788.3(a)(1).
106. 15 C.F.R. Parts 788.3(a)(2).
107. 15 U.S.C.A. § 788.19.

IX. DRAFTING AND NEGOTIATING INTERNATIONAL TRANSACTIONS

International contracts, important to all exporters, vary greatly from domestic ones.[108] Considering that the negotiation of the contract is the building block that eventually leads to the actual export, it is in this area that the laws and regulations must first be adhered to in order to avoid further problems down the road. A solid, informed negotiation and well-written contract will start in the marketing and sales departments, since they are the ones who usually make the first contact with prospective buyers.

It must be kept in mind when negotiating a contract for the international sales of goods that there are a number of critical items which must be definitively addressed in the contract. These include:

1. Government Regulations - Approval of the Contract:

Government approval necessary to export a product, service or data is always a factor in international sales contracts. Any agreement that is contingent upon the grant of all government approvals and licenses should therefore always be stated upfront in a contract.

2. Licensing Requirements:

Any import licensing or restricting regulations should also be stated upfront in a contract. This is important to see if a validated license is required and if it can be attained in the time frame that the contract is outlining.

3. Shipment Using *Incoterms*:[109]

The International Chamber of Commerce publishes a manual of terms and provisions concerning issues of delivery, storage, shipment, insurance, and risk allocation when negotiating an international contract. This manual is called "*Incoterms*" and is often used by foreign parties. *Incoterms* defines common shipping terms and discusses protocols such as: 1) when the title passes, 2) apportionment of the risk of loss, and 3) the allocation of transportation and insurance costs. Use of *Incoterms* reduces the likelihood of mistakes and misunderstandings in international contracts.

4. Payment:

From the exporter's viewpoint, payment for the exported goods is the most important trade issue. The exporter wants to be assured of payment for the goods he ships. The best way is to have the money in hand before the goods leave port, but this is rarely acceptable to the purchaser of the contract. Instead, the most common method of payment in international

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108. *See generally* Eleanor Roberts Lewis, *Drafting International Sales and Agent/Distributor Agreements*, *in* THE COMMERCE DEPARTMENT SPEAKS 1990: THE LEGAL ASPECTS OF INTERNATIONAL TRADE, 9 (PLI Corporate Law & Practice Course Handbook Series No. 668, 1990).

109. International Chamber of Commerce, INCOTERMS (3rd ed. 1990).

sales contracts between a buyer and seller, without an established relationship, is the *letter of credit*.[110] The advantages of a letter of credit is that it offers security of payment to the seller and facilitates the transfer of funds between the buyer and seller. This is done by using the seller's documents, such as the bill of lading, invoices, and carrier's papers, as evidence of the delivery of the goods themselves. Payment is demanded upon seller's presentation of the documents to the buyer's bank where the letter of credit was issued. The seller receives payment earlier and shifts the buyer's credit risk onto the bank, who is in a better position to evaluate the buyer's credibility. The standards for this aspect of the transaction include the Uniform Customs and Practices for Documentary Credits.[111]

The two types of letters of credit are: 1) "revocable" and 2) "irrevocable". The latter is much better for the exporter because the bank unconditionally guarantees the letter. The United Nations Convention on Contracts for the International Sales of Goods (CISG), enacted in the U.S. on January 1, 1988, is also relevant here since it only allows for cancellation of the contract when a "fundamental" breach occurs,[112] which does not necessarily include "non-payment". To protect the exporter, if the CISG is being used, the contract should explicitly state that non-payment will be considered a fundamental breach.[113]

If the buyer will not agree to a letter of credit, the buyer may secure the transaction with a "sight draft" or "time draft", enforceable against the buyer independent of any original sales contract.[114] This "documentary credit" requires the buyer's bank to accept the draft and the risk of the buyer defaulting.

5. Currency To Be Used:

An export contract must always define in which currency payment will be made. In doing this, the exporter must be aware of any risks relating to the foreign exchange rates between the countries as well as any restrictions on converting the currency. If the currency of the buyer's country is not stable, the best thing for the seller to do is to demand payment in U.S. dollars. However, the buyer may not always agree. Some alternatives include: 1) accept payment in the foreign currency with the price put forth in U.S. dollars, requiring the buyer to match that amount regardless of the exchange rate, 2) require payment in a stable third country's currency, or 3) state an agreed upon exchange rate in the contract, although this provides less security against fluctuations for the seller.

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110. SHAUL I. EZER, INTERNATIONAL EXPORTING AGREEMENTS § 10.01 (1988).

111. International Chamber of Commerce, *Uniform Customs and Practice for Documentary Credits*, I.C.C. publication #400.

112. CISG, *infra* note 115, at Articles 59, 61-65.

113. ALBERT KRITZER, INTERNATIONAL CONTRACT MANUAL: CONTRACT CHECKLISTS (1990) note 46, 9-3.

114. HENRY HARFIELD, LETTERS OF CREDIT (1979).

6. Choice of Law and Jurisdiction - *The United Nations Convention on Contracts for the International Sales of Goods (CISG)*[115]

The choice of law governing the contract is critically important. If U.S. exporters desire to have U.S. law apply in an international contract, they must explicitly state, in the contract, that U.S. domestic law, and no other international or national law, applies. However, other parties may also request the use of their countries' laws.

If a contract does not expressly designate which country's law applies, the United Nations Convention on Contracts for the International Sales of Goods (CISG) will govern the contract. Enacted in the U.S. on January 1, 1988, the primary purpose of the CISG is to: 1) handle problems that arise in the formation of the standard international sales contracts, 2) expressly delineate the obligations and rights for parties on each side of the contract,[116] and 3) allow two foreign parties to negotiate a transaction under the CISG rather than under the laws of one particular country. The CISG is helpful for foreign parties because it codifies private international law that has evolved from both common and civil law jurisdictions.

Currently, many countries have acceded to the Convention,[117] and the trend is for most countries to follow. A current list of ratifying countries is available from the State Department (202/653-9851) or the United Nations (212/963-3918).

If nothing is said in the contract about which national law governs and all signatories to the contract are from CISG ratifying countries, the CISG will apply. However, if one party to the contract is from a non-ratifying country, then Article 2 of the Uniform Commercial Code (U.C.C.) applies, not the CISG, unless the parties agree otherwise. The CISG never applies, however, if the parties are a U.S. company and its foreign subsidiary because both parties are American companies and thus automatically subject to U.S. law. The CISG also does not apply to consumer transactions,[118] securities, goods sold by auction, or contracts concerning electricity or ships.[119] The CISG is a default provision that can be opted out through specific language in the contract, therefore disregarding the Convention. Such derogation need not be referenced in any way to the CISG. Therefore, the parties are able to retain flexibility in devel-

115. United Nations Convention on Contracts for the International Sales of Goods, April 11, 1980, 52 *Fed. Reg.* 6262 (1987), 15 U.S.C. app. at 29 (1994) *reprinted* in I.L.M. 668 (1980), also called the Vienna Convention [hereinafter referred to as CISG].

116. *Id.* at article 4.

117. As of May 1992, Argentina, Australia, Bulgaria, Byelorussian S.S.R., Canada, Chile, Czechoslovakia, Denmark, Ecuador, Egypt, Federal Republic of Germany, Finland, France, Guinea, Hungary, Iraq, Italy, Lesotho, Mexico, Netherlands, Norway, People's Republic of China, Romania, Russian Federation, Spain, Sweden, Switzerland, Syria, Uganda, Ukrainian S.S.R., United States, Yugoslavia, and Zambia.

118. CISG, *supra* note 115, at article 2(a).

119. *Id.* at article 2(b-f).

oping international contracts which best serve their needs.

The CISG is similar to the U.C.C. in its purpose, scope and most of the content, but there are also many differences about which the American exporter should be knowledgeable. For example, the Statute of Frauds at § 2-201 of the U.C.C. requires a contract be in writing and signed if the value is over $500.[120] Article 11 of the CISG rejects such formal requirements and allows a contract to be proved by any means, including witnesses.[121]

Similarly, the U.C.C. recognizes the mailbox rule when dealing with the timing of offers and acceptances, the revocability of an offer, the battle of the forms, the requirement of consideration in contract formation, and the right to recover for defective goods. Under the CISG, there are no such requirements.

A word of caution: In most U.S. contracts, if the CISG is not used every attempt should be made to have U.S. law govern. This will help because of the familiarity of the U.C.C. and will also greatly reduce expenses of having to hire local counsel in a foreign country where the exporter may be unfamiliar with the laws. The choice of jurisdiction also presents similar problems.

7. Unforeseeable "force majure" events:

Risks always exist in a contract which cannot be foreseen at the negotiating table. Therefore, the contract should allocate responsibility for *force majure* events including: war, riots, embargoes, acts of nature, changes of government, etc. If such responsibility is not allocated in the contract, the law governing the contract might fill in the gap. The U.C.C. § 2-615 makes reference to who will be excused. The CISG does not use the term *force majure*, but discusses impediments that are beyond the control of any one party to the contract.[122]

8. Warranties:

Warranties also need to be clearly laid out and explained. If no warranties exist, a disclaimer should be made to that effect in the contract. A well-drafted warranty clause in an international contract should contain: a) the scope of exactly what is warranted, b) how long the warranty will be in effect, c) what type of notice is needed to file a valid claim, and d) an identification of agreed upon remedies to satisfy the warranty.

9. Dispute Resolution:

A dispute resolution procedure should be clearly defined in the contract. Such methods can include: a) conciliation, b) renegotiation, c) mediation, or d) arbitration. Of these, arbitration is the most widely used method because it usually tends to be quicker and less expensive than a court proceeding or adjudication, and is conducted by a knowledgeable

120. U.C.C. § 2-201(1).
121. CISG, *supra* note 115, at article 11.
122. *Id.* at article 79.

person in that sector of the industry. Some of the international arbitration systems include: 1) the International Chamber of Commerce (I.C.C.), 2) the United Nations Commission on International Trade Law (UNCITRAL), and 3) the International Commercial Arbitration Rules of the American Arbitration Association. A contract's arbitration clause should discuss the forum for hearing the arbitration and the type of panels arbitrating. These dispute resolution alternatives are beneficial. Even though neither party has any negative intentions at the time the contract is formed, such a clause can keep the parties out of a potentially unfavorable court system if a dispute arises. Knowledge of the different forums available will better serve international negotiators.

X. GENERAL CONSIDERATIONS REGARDING EXPORT COMPLIANCE PROGRAMS

A. *Forming an Export Compliance Program*

While export regulations are detailed and specific, exporters generally are left to implement their own types of in-house compliance programs as long as all statutory requirements are met. An effective in-house program must be tailored to each individual company and involves participation, communication, decision-making, and a proper corporate attitude. The purpose of a program is to ensure that the company complies with all applicable laws and regulations pertaining to the export and reexport of goods, services and technology. However, it must also be practical. The goals of an exporter's compliance program include insuring that: 1) proper licenses cover all exports, 2) employees handle and report orders where special compliance problems arise, 3) exports are screened for special handling requirements, 4) an export manager holds ultimate responsibility over shipments, 5) reviews are made on a regular basis, and 6) the Office of Export Licensing receives the proper reports. To lay a foundation for a strong compliance program, there are some basic issues that must be addressed regarding the exporting company's practices and operations.

First, a company's top management must mandate compliance with the export laws and regulations. A cover letter from the CEO, discussing the necessity and importance of a compliance program, is a good starting point. The statement should be followed with a clear, in-depth description of the company's export compliance policy, stating the company's intent to export in compliance with all laws and regulations and communicating that intent to all levels of the firm. It should clearly: 1) state that each employee is responsible for compliance, 2) delineate the penalties employees face for violating the company policy, 3) describe the chain of command responsible for tracking compliance, and 4) provide an outside source, such as outside counsel, to whom employees can anonymously report violations.

Second, the compliance program should contain checklists for determining whether and how to export, including: 1) the Table of Denial Orders, 2) a list of proscribed countries, 3) a list of strategic products sold by the company, and 4) a list of *red flags* which alert the employee to suspicious circumstances. A list of red flags would include: a) receipt of unusual orders from companies not generally known in the trade, especially if the company has no obvious use for the items, b) order amounts, packaging or delivery routes which are unusual in the industry, c) reluctance to provide end-user information, d) willingness to pay cash, and e) a purchasing agent's refusal to accept installation or service contracts that are usually standard for the industry.

Third, export compliance must be integrated and visible in all departments as a routine task. The export manager, or a person in a similar position, must work with all departments to make sure that compliance regulations are adequately met. Experience has shown that involvement of the following departments is critical:

a) the marketing department, where initial contacts with customers are made and where most violations occur, must have export regulations incorporated in its earliest planning stages for new markets and product development,

b) the finance departments, which obtain information about customers and pass it along to determine if any customer screening problems exist,

c) the legal department, which must incorporate the laws and regulations into the various forms and contracts used by the company for exportation and licensing. A clause is needed to making all contractual agreements contingent upon receipt of the required license, so that the company remains in compliance with U.S. law,

d) the distribution department, which is the last opportunity for the company to control the export. Preparation of the final shipment instructions must be the last check before the product leaves the company's possession, and

e) it is also important that one department take responsibility for updating the compliance program.

B. *Education and Training*

Exporters must be aware of all the regulations relating to exports discussed above and put these into effect in their companies at the earliest possible time. The training of employees is crucial throughout the company. It is very easy to be confused by the regulations or simply to forget what is needed in order to comply. Therefore it is crucial for all officers and employees of a company, including new ones, to attend an educational program discussing the relevant laws and regulations. All employees, as a condition of employment, should sign an agreement stating that they received an export compliance manual and will conform, to the best of their ability, to the exporting requirements. This training program should develop an understanding of the EAR and EAA as they relate to the company's exporting activities. This training should contain information on the firm's procedures, destinations of the products, and an organizational chart for determining who is responsible for carrying out the different parts of the compliance program.

One goal of the training program is to make the employees realize this is an ongoing process. The procedures and any problems continually need to be discussed between counsel and the people involved with the exporting functions. A major part of compliance requires continual updating and education. This is done by updating the compliance program with changes from the *Federal Register*, Table of Denial Orders, and EAR using explanations, manuals, refresher courses, presentations, and seminars.

Compliance under the regulations work only if the company is properly organized and actions are taken quickly. Spot checks and audits need to be performed to insure that the actions of the company follow the program as originally conceived. If there is any discrepancy, immediate remedial action should be taken, and the damage should be controlled.

The export manager shall ultimately be responsible for compliance. He must transmit the important parts of the EAR to others in his company. He must also establish guidelines, with the help of outside counsel, and communicate the guidelines to the employees. The export manager will make the final determinations regarding licenses and shipping papers and documentation, as well as control periodic audits, and other things that relate to the exporting of goods, services and technology.

Outside counsel should be readily available and accessible to any employee or officer of the company.

C. *If There is a "Problem"*

Usually compliance programs get enacted long after the company has started exporting its goods or technology. This presents a problem of what to do when past or present violations are discovered. There are two plans of action. One is to voluntarily disclose the information regarding the violation. The other is to sit on the issue and hope that you do not get caught. There is no legal duty to come forward with violations other than anti-boycott requests or changes in a company's knowledge regarding a material fact.

It is often to the exporter's advantage to voluntarily disclose violations to the proper authorities. The EAR, the Office of Export Enforcement (OEE) and the Commerce Department encourage such action. It has numerous risks, but can also be beneficial if done correctly. There are no set rules in this area, but voluntary disclosure has been considered a mitigating factor when penalties need to be assessed. Whenever possible an internal investigation should be performed before making any disclosures, so the scope of any infractions is known and can be controlled.

If nothing is done about an infraction, or if one is simply not found, the company as a whole should know what to do if a representative arrives at the company headquarters to initiate an investigation. This does not necessarily mean that a violation has occurred, but there are several triggers that might send the OEE looking your way. Triggers include dealing with someone on the Table of Denial Orders, on the gray list, in a Middle Eastern country, or intelligence reports from another agency.

If a representative from the OEE arrives at the exporter's offices to conduct an investigation, the receptionist should know which person to immediately contact within the company, usually the general counsel or the export manager. The receptionist should be courteous and cooperative to the agent, and if the agent has a warrant, legal counsel should be notified immediately. If not, the agent should be taken to a conference room for the remainder of the meeting so that contact between the agent and the company's affairs can be minimized.

Once an investigation is underway, the exporter should try to minimize and contain the damage as much as possible. General guidelines include: cooperating, showing the government what the company has done correctly at every opportunity; making sure that the current stream of business is without violations; and taking remedial action immediately. An exporter can increase his likelihood of success by planning. Cooperation is necessary to avoid suspicion; give the agent what he wants without demanding a warrant. However, if the agent wants to remove any documents from the place of business, the exporter is entitled to copies of the documents.

XI. CONCLUSION

As is clear, the exporter needs to be aware of much information relating to any international exporting that is performed. The above article attempts to help define what the exporter's company and the different departments need to be made aware of to ensure compliance in the export control arena. It is important to remember that this area of law is in a state of constant flux. Therefore, exporters must remain aware of any substantial changes in the law that could affect their obligations.