

## **Essential Needs for Companies Exporting from the U.S.: An Export Compliance Program and Due Diligence—BIS and Others Are Watching**

*By Christopher M. Kane and Adonica-Jo R. Wada*

In today's rapidly expanding global economy, we are witness to an international arena that has no bounds, yet is tempered by concerns for national security. As businesses streamline their processes and develop innovative ways to tap new markets, having an export compliance program is not only important, but necessary.

Senior level management and executives need to set the tone for the company in making a corporate commitment to compliance with U.S. export laws. Setting forth this level of commitment requires the establishment of the basic principles of business conduct expected of the company and its employees, creating a culture of compliance.

The benefits of having an export compliance program are real. First, exporting is a privilege. If companies do not comply with U.S. and/or a host country's export controls, companies run the risk of being assessed severe administrative and criminal penalties, including the complete denial of all export privileges. Although a company may be able to satisfy a civil penalty, the subsequent damage to the company's public image may be irreparable.

Understanding how your company conducts business is key to the development of any efficient and effective export compliance program. What is being exported? Where is it being exported? Who are your customers? How will the product be used? Besides the Bureau of Industry & Security ("BIS"), what other governmental agencies may have jurisdiction over what the company is exporting and where it is being shipped? What are the form, fit and function of the exported item?

It is important to note that U.S. export regulations do not simply deal only with products and commodities shipped from the United States to a foreign country. A company must examine whether technology can be released to a foreign national, even if the foreign national is in the United States. The release of technology can be as innocuous as it just sitting on a desk where people can easily pass by or a telephone conversation in which information is exchanged. If a foreign national has access to such technology, it is considered an export—a "deemed" export—to the home country or countries of the foreign national and may well require a license.

An export compliance program is no longer "voluntary" or "optional." Companies not only must understand how they conduct business but, when acquiring other businesses, they must perform due diligence in scrutinizing and understanding the export control practices of the company they plan to acquire. Companies can and will be held liable for violations of the Export Administration Regulations

committed by companies they acquire. Performing due diligence may reveal skeletons in the closet. However, due diligence in advance of a purchase of an exporting company can protect the acquiring company, and it may also provide an opportunity to negotiate more favorable terms if issues and concerns regarding export practices are discovered.

The number of investigations, enforcement cases, and assessments of penalties, both administrative and criminal, have increased over the years and will continue to rise. The Bureau of Industry and Security, along with other U.S. federal agencies, looks to enable legitimate trade while preventing suspect transactions. An effective export compliance program will help distinguish the two.

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