2013 UPDATE

CONDUCTING BUSINESS ABROAD

What Every Small Business Should Know

Public Counsel LAW CENTER


Dear Business and Nonprofit Agency Customers:

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Legal information is crucial for the continued growth and development of successful businesses and non-profit agencies in our community.

We hope that you will find the information in this guide helpful and informative.

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For their volunteer efforts in updating this guide, special thanks go to attorneys Henry Scott, Deana Brown, Hao Huang, and Tom Quirxtner.
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Introduction

What Every Small Business Should Know About Conducting Business Abroad

Conducting business has become an increasingly international exercise. Globalization means that U.S. businesses are more likely to operate in foreign jurisdictions and to interact with foreign companies. As a consequence, small businesses in the United States cannot afford to focus exclusively on domestic laws when determining how to structure their transactions. Instead, they must understand the basics about the laws governing international business transactions. This manual aims to provide small business owners with an overview of how to navigate the U.S. legal and regulatory framework when conducting business abroad, and to direct small business owners to additional resources.

This manual is intended to provide general guidance for conducting international trade and business transactions. It does not cover all areas of U.S. or foreign law that might be relevant to your business, and it should not be used as a substitute for individualized legal advice. The information in this guide was updated in the first quarter of 2013.

Importing Into the United States

Many small businesses import merchandise into the United States. The U.S. Bureau of Customs and Border Protection ("Customs"), the agency that enforces U.S. import laws, is shifting the burden of compliance responsibility to importers. For this reason, it is essential that U.S. importers understand their responsibilities. Failure to comply with U.S. import laws can have serious, expensive, and long-term repercussions. This section focuses on providing importers with an overview of the basic Customs requirements. However, importation requirements vary significantly depending on each situation, and you may need to seek legal advice to answer more detailed questions.

OVERVIEW OF U.S. CUSTOMS PROCEDURES AND REQUIREMENTS

What Are My Responsibilities?

An importer must provide Customs with detailed information on the shipment of goods. The Customs Modernization Act ("Mod Act"), which became effective on December 8, 1993, shifted legal responsibility from Customs to the importer for declaring, among other things, the value, classification, and rate of duty applicable to imported merchandise. Importers must use “reasonable care” (described below) to comply
with Customs requirements and to provide Customs with accurate and timely data. For example, the importer must: (a) declare the value of merchandise; (b) determine the classification number of the merchandise being imported; (c) pay estimated duties and processing fees; and (d) ensure that the goods being imported meet admissibility requirements and that proper permits have been obtained.

Customs also enforces the requirements of other agencies such as the Environmental Protection Agency (“EPA”), the Drug Enforcement Agency (“DEA”), the Food and Drug Administration (“FDA”), and the Federal Communications Commission (“FCC”). For example, if Customs determines that a certain food shipment could be tainted, it can put a hold on the shipment until an FDA official can inspect it. It is part of an importer’s obligation of “reasonable care” under the Customs laws to ensure that any applicable requirements of other government agencies for the imported goods are satisfied.

An importer’s failure to exercise reasonable care can result in Customs’ assessment of significant monetary penalties (described below). Companies with significant import activity should have adequate procedures in place to ensure consistent compliance with the Customs laws. All importers are subject to compliance audits by Customs.

What Is “Reasonable Care”?

Customs does not define “reasonable care” because it depends on many factors. However, to provide guidance to importers, Customs has developed the following advisory points:

- As the importer, you should retain expert advice (e.g., lawyer, customs broker, accountant, or customs consultant) and make sure to review existing guidelines including the Customs Regulations, the Harmonized Tariff Schedule of the United States, the Customs Bulletin and Decisions, and look at the Customs website and the Customs Electronic Bulletin Board. However, you should be aware that retaining expert advice does not relieve you of legal responsibility for any mistakes that the expert might make.

- A responsible and knowledgeable individual within your organization should review Customs documentation to ensure that it is full, complete, and accurate. If the documentation is prepared outside your organization, such an individual should get copies, review them, and notify Customs of corrections in a timely fashion.

- If you use a customs broker, make sure to advise him or her in advance of all importations and provide the broker with complete and accurate information about the transaction.

Reasonable Care Checklist¹

Merchandise Description & Tariff Classification

1. Did you properly describe your merchandise to Customs in accordance with 19 U.S.C. 1481?
2. Did you properly classify your merchandise in accordance with 19 U.S.C. 1484?
3. Has Customs issued a “ruling” regarding the description of the merchandise or its tariff classification and, if so, has the ruling been followed?
4. Have you consulted the tariff schedules, court cases and Customs rulings to assist you in describing and classifying the merchandise?

5. Have you consulted with a Customs “expert” to assist in the description and/or classification of the merchandise?

6. Is the nature of your merchandise such that a laboratory analysis is suggested to assist in proper description and classification?

**Valuation**

1. Did you provide Customs with a proper declared value for your merchandise in accordance with 19 U.S.C. 1484 and 19 U.S.C. 1401a?

2. Has Customs issued a “ruling” regarding the valuation of the merchandise, and if so, has the ruling been followed?

3. Have you consulted the Customs valuation laws, Customs Valuation Encyclopedia, court cases and Customs rulings to assist you in valuing merchandise?

4. Have you consulted with a Customs “expert” to assist in the valuation of the merchandise?

5. If you purchased the merchandise from a “related” seller, have you reported that fact upon entry and taken measures to ensure that value reported to Customs is the correct “related party” value of the goods?

6. Have you taken measures to ensure that all of the legally required costs or payments associated with the imported merchandise have been reported to Customs (e.g., assists, commissions, indirect payments or rebates, royalties, etc.)?

**Country of Origin, Marking, Quota and Miscellaneous Questions**

1. Have you taken measures to ensure that the merchandise complies with other agency requirements prior to or upon entry (e.g., FDA, EPA/DOT, CPSC, FTC, Agriculture, etc.)?

2. Is the merchandise subject to an antidumping or countervailing duty order and, if so, have you complied with Customs reporting requirements upon entry?

3. Have you taken measures to verify the country of origin of the imported merchandise?

4. Have you taken measures to ensure that the merchandise is properly marked upon entry with the correct country of origin (if required) in accordance with 19 U.S.C. 1304?

5. Is the merchandise subject to quota/visa requirements and, if so, have you provided a correct visa for the goods upon entry?

**What Does a Customs Broker Do?**

There are specific documentation requirements associated with importing goods into the United States; in some cases, information must be transmitted to Customs before the goods even leave the foreign country. Most importers find it helpful to use a customs broker who can generate the necessary forms and documentation and transmit them electronically through an automated connection to Customs.

Customs brokers are licensed by Customs to act as agents (for a fee) for importers. A customs broker prepares and files the entry forms for the importer, based on information provided by the importer and the supplier. Custom brokers act in a fiduciary capacity as agents for importers and owe importers a duty of reasonable care. However, using a customs broker does not relieve the importer of any responsibilities under the Mod Act, including liability for failure to exercise “reasonable care.” As the principal, the importer remains liable for duties regardless of payment arrangements with a customs broker, and is entitled to demand, receive and enforce rights against third parties with whom the customs broker deals. Several international shipping companies,
such as FedEx and UPS, provide customs brokerage, trade management, and customs clearance services.

CLASSIFICATION AND VALUATION

What Is Classification?

Imported goods are classified according to their essential nature. Customs uses classifications to determine the rate of duty, whether goods are eligible for a duty preference program (discussed in more detail below), and—in cases where Customs has imposed a quota on a certain type of good—whether the goods are even admissible. Again, the importer is responsible for using “reasonable care” to ensure proper classification.

An importer must classify merchandise according to the U.S. Harmonized Tariff Schedule (“HTS”). The HTS is divided into chapters, headings, and subheadings that separate products into thousands of categories and subcategories by article descriptions. Each HTS category is coded with a ten-digit number. For example, for seeds used to grow sweet peppers, the corresponding HTS number can be found under Chapter 12: “Oil Seeds and Oleaginous Fruits; Miscellaneous Grains, Seeds and Fruit; Industrial or Medicinal Plants; Straw and Fodder,” Heading 1209: “Seeds, fruits and spores of a kind used for sowing,” Subheading 91: “Vegetable seeds,” Subheading 60: “Pepper,” Statistical Suffix 10: “Sweet pepper.”

Thus, the complete HTS number would be 1209.91.6010. The correct classification of a product determines the applicable duty, eligibility for preferential duty programs such as the Generalized System of Preferences, and other customs-related issues.

Determining an item’s classification can be much more complicated than looking up an item in an index and requires consulting numerous sources, including the General Rules of Interpretation, the World Customs Organization’s Explanatory Notes, and classification rulings issued by Customs on similar merchandise. Customs’ guidance on products is available online through the Customs Rulings Online Search System (CROSS) (http://rulings.cbp.gov/).

What Is Valuation?

Importers are responsible for reporting the correct value of the goods that they import. Because the rate of duty owed on a shipment of goods (determined by its classification) is often a certain percentage of the declared value, valuation assists Customs in assessing the proper duty applicable to a shipment of goods. Even where the duty rate does not depend on the product’s value, other import-related fees are assessed as a percentage of total value, and the importer must still exercise reasonable care in determining and reporting the correct value for customs purposes. The value is usually the price shown on the supplier’s invoice for the goods, but certain additions may be required (such as packing costs, selling commissions, and materials furnished free of charge to the manufacturer for use in making the goods). Trademark licenses and patent royalties may affect valuation and must be reported to ensure that duty is not underpaid. Where the invoice price includes transportation-related charges, these charges can be deducted if the importer has proper documentation substantiating the charges. In addition, the transaction value shown on an invoice may not be the
appropriate method of valuation in related party transactions. In such circumstances, valuation must be determined by alternative means.

**Is Any Merchandise Prohibited or Restricted?**

Yes. Many classes of merchandise are prohibited or restricted to protect the economy or security of the United States. Importation of such merchandise may be subject to special procedures or require permits or approval from another agency. This list of merchandise includes agricultural commodities; arms, ammunition, and radioactive materials; energy-related consumer products ranging from household appliances to paint to fireworks; electronic products; food, drugs, cosmetics, and medical devices; gold and silver currency and stamps; pesticides; toxic and hazardous substances; textile, wool, and fur products; goods protected by trademarks, trade names, and copyrights; wildlife and pets; alcoholic beverages; and motor vehicles and boats.

Many of these classes of merchandise are subject to specialized regulations and requirements from government agencies other than Customs. For example, the FDA controls all imports of cosmetic products, including toothbrushes and hair brushes; imports of alcoholic beverages must obtain a permit from the Bureau of Alcohol, Tobacco and Firearms; and motor vehicles must comply with all applicable motor vehicle safety and emissions standards.

**COUNTRY OF ORIGIN**

For imported goods, the country of origin affects the rate of duty, eligibility for special programs, and admissibility. The country of origin also determines whether the imported good is subject to quotas, antidumping and/or countervailing duties, and procurement regulations by government agencies. Again, the importer must use reasonable care in determining a good’s country of origin. Although there are some exceptions under the North American Free Trade Agreement (“NAFTA”) and for textiles, the country of origin is usually the country of manufacture, production, or growth of the article. Alternatively, if the good in question was produced in more than one country or contains materials from more than one country, the country of origin is the country in which it was “substantially transformed” into the product that is imported into the United States. Note that the country of origin is not always the same as the location from which the good is shipped.

**MARKING REQUIREMENTS**

Generally, imports into the United States must be clearly, legibly, and permanently marked in the English language with the English name of where a good was manufactured or produced. Marking must be conspicuous so that the ultimate purchaser can readily identify where a good was manufactured. Certain goods, such as items made of iron or steel, or clocks and watches, have specialized marking requirements. Common exceptions to the marking requirement include items incapable of being marked such as raw materials in bulk form, ball bearings, or wire. Goods produced twenty years prior to importation or goods originally made in the United States are also exempt.

**ENTRY TYPE**

Customs regulations provide for various types of entry, several of which are advantageous to the importer and provide for duty free entry. Five common special duty free entry types include (1) temporary importation under bond, (2) carnets, (3) foreign trade zones and warehouse entries, (4) trade fairs, and (5) drawback.
Temporary Importation Under Bond (TIB): Goods that are not imported for sale or for sale on approval may be imported under a bond in the amount of twice the estimated duties that would otherwise be owed. With the bond, payment of duty is not made at the time of importation and the goods must be exported within one year from the date of importation. The one-year exportation period may be extended for additional periods, but the goods may not remain in the country for more than three years. Goods which are imported under TIB must be exported or destroyed before the expiration of the allotted period. If the goods are not destroyed or exported, liquidated damages in the amount of the bond are assessed.

Carnet: A carnet is an international customs document that can be used for temporary duty-free importation of certain goods. The carnet serves in lieu of usual customs documents and is a guarantee against the payment of customs duties that may become due on goods temporarily imported and not re-exported as required. A carnet is valid for one year and can be used for all the trips made during that period. The United States allows carnets to be used for temporary admission of professional equipment, commercial samples, and advertising materials.

Foreign Trade Zones and Warehouse Entries: A Foreign Trade Zone (“FTZ”) is a secure area that is legally considered to be outside the customs territory of the United States. While goods or merchandise are in the FTZ they are not subject to entry requirements, payment of duty, tax or bond. It is only when the goods or merchandise are removed from the FTZ that duty is paid. The FTZ can be used by importers as a place to assemble finished products, as a showroom, or as a warehouse. Although the FTZ may be used as a showroom or warehouse, retail sales from the FTZ are prohibited.

Merchandise sent to a bonded warehouse may also have duty deferred. Duty on goods sent to a bonded warehouse is paid only when the merchandise is removed for consumption. Unlike a FTZ, finished products cannot be assembled in a bonded warehouse, but retail sales are permitted.

Trade Fairs: There are special regulations which facilitate the entry of goods for a trade fair. Trade fairs may be designated to allow certain goods to enter duty free. The fair operator files a bond and is responsible to pay any duties or taxes for any good declared an article for a fair that enters the stream of commerce.

Drawback: Drawback is a refund of monies for customs duties, certain taxes and other fees that were collected at the time of importation. There are several types of drawback, including three of interest to importers: (a) manufacturing drawback, (b) unused-merchandise drawback, and (c) rejected-merchandise drawback. Manufacturing drawback is a refund of duties paid on imported merchandise designated for use in manufacturing articles that are subsequently exported. Unused-merchandise drawback is a refund of duties paid on imported merchandise that is exported within three years or destroyed without undergoing any manufacturing operations and that is never used in the United States. Rejected-merchandise drawback is a refund of duties on imported merchandise that is exported or destroyed because it (1) did not conform to sample or specifications, (2) was shipped without the consignee’s consent, or (3) was defective at the time of importation.

ASSESSMENT OF DUTY

All goods are subject to a duty or duty free entry into the United States depending upon their country of origin and classification. The duty calculation is derived from four elements:
tariff classification, valuation, country of origin, and type of entry.

What Goods Are Duty-Free?

Many goods are duty-free under the HTS based solely on their classification and country of origin. Other goods that would ordinarily be subject to duty may qualify for a reduction in duties or duty-free treatment, if the importer can establish that the goods satisfy the requirements of a duty preference program.

Free Trade Agreements (“FTAs”): The North American Free Trade Agreement (“NAFTA”), the Dominican Republic-Central American Free Trade Agreement (“DR-CAFTA”) and other recent FTAs with countries including, but not limited to, Chile, Singapore, Bahrain, Morocco and Peru – and other trade agreements such as the Generalized System of Preferences, the Caribbean Basin Initiative, the Andean Trade Preference Act and the African Growth and Opportunity Act, known as Preference Programs – have eliminated or reduced tariffs on certain goods from eligible countries. An importer must look at the classification of the good, its country of origin, and the specific eligibility requirements to determine whether a shipment qualifies for one of these programs.

Generalized System of Preferences (“GSP”): One of the more frequently applied duty preferences occurs under GSP. The GSP provides for free rates of duty for certain merchandise from specific developing countries to encourage their economic growth.

The GSP includes a wide range of products classifiable under more than 4,000 different subheadings in the HTS that may qualify for duty-free entry if imported into the United States directly from one of the many designated countries or territories. To qualify for the duty preference under GSP, an imported product must be classified as GSP-eligible, must be imported directly from a GSP-eligible country, and at least 35 percent of its value must be attributable to materials and operations performed in the GSP country.

NAFTA: Most goods originating in Canada and Mexico are eligible for duty-free treatment when imported into the United States. The goods must “originate” in these countries under NAFTA rules of origin (usually requiring a shift in tariff classification and/or a regional value content requirement) and not merely be shipped to the United States through Mexico or Canada. To make a claim under NAFTA, you must have in your possession an official NAFTA Certificate of Origin from the producer or exporter of the goods in Canada or Mexico, indicating that the goods qualify as “originating.”

Other FTAs: In addition to the countries that are parties to NAFTA, the United States currently has FTAs in effect with 18 countries – Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Korea, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore. The United States is in the process of negotiating the Trans-Pacific Partnership Agreement (“TPP”), a regional Asia-Pacific trade agreement.

How Do I Declare That My Shipment Is Duty Free?

If the tariff classification of your product indicates that it is duty-free, then you need not make any special claim on the entry documents. (These documents will show the classification
and applicable duty rate.) If, however, you are claiming a duty preference under a special program (such as NAFTA or GSP) on a product that would otherwise be subject to duty, then the entry documents must specifically indicate that claim. An importer must exercise reasonable care in ensuring that the claim is accurate.

**OBTAINING GUIDANCE FROM CUSTOMS**

As noted above, there are many sources of guidance for importers in making legal determinations about classification, valuation, origin, marking, and duty preferences. These include published rulings issued to other importers on similar issues and also include the general publications listed in the resource section in Chapter 8. If you believe you need specific guidance from Customs on a particular proposed transaction in order to satisfy your duty to exercise reasonable care, you can submit a written request for a binding ruling. Rulings can be requested by submitting a letter and product information or samples to Customs. Classification can have numerous consequences, so it is often a good idea to enlist the aid of an experienced customs broker or attorney in filing the request. For more information about where to request a ruling, see Customs’ electronic ruling request website at www.cbp.gov/xp/cgov/trade/legal/rulings. A ruling from Customs will be binding on you and on Customs at all ports of entry unless revoked by Customs. While oral discussions with local port officials may also be helpful, oral responses by Customs officials are not binding.

**THE ENTRY PROCESS**

The importer of record is responsible for compliance with documentation requirements. The importer must ensure that the invoice contains all required information in the English language including the port of entry, the names and contact details of the seller and purchaser, a detailed description of the merchandise, quantity of goods, contents of each package, the price paid or payable (including type of currency), shipping costs (including inland freight to the port of lading), and insurance costs.

A bond is required for all formal entries to guarantee payment of duty to Customs. For importers with a low value of inbound traffic, single entry bonds are common. For more active importers, continuous bonds are more common.

**CUSTOMS’ ROLE IN ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS**

Antidumping and countervailing duties are additional duties used to offset the effects of two types of unfair trade practices that give imports an unfair advantage over competing U.S. goods. Antidumping duties are assessed on imported merchandise that is sold, or likely to be sold, in the United States at less than its fair value or less than the foreign market value of the merchandise based on the price at which the merchandise is sold in the home market. Countervailing duties are assessed to counter unfair government subsidies provided to merchandise exported to the United States. The International Trade Commission and the Department of Commerce determine whether Customs should assess these duties.

**PENALTIES AND ENFORCEMENT**

Violations of the standard of reasonable care can subject the importer to criminal and civil penalties.

**Criminal:** A criminal fraud statute provides for criminal sanctions on those who present false information to Customs officers. The criminal penalties for violating this statute include two years of imprisonment and/or a fine for each violation involving an importation or attempted importation.
Civil: Any person who by fraud, gross negligence, or negligence enters, introduces, or attempts to enter or introduce merchandise into the commerce of the United States by means of any material and false electronically transmitted data, written or oral statement, document, or act, or by any omission which is material, will be subject to a monetary penalty. Customs has the authority to seize the merchandise to ensure payment of the penalty. These penalties can range in amount up to the full value of the imported goods. Improper marking of a product’s country of origin can also lead to monetary penalties.

Civil penalties are imposed on a strict liability basis, which means that even in situations where the importer did not intend to violate the law but simply made a mistake, penalties can still be imposed. However, the statute provides that mitigating factors, such as voluntary disclosure, can be taken into account when deciding what penalties to impose.

Exporting From the United States

OVERVIEW OF EXPORT PROCEDURES AND REQUIREMENTS

What Are My Responsibilities?

As an exporter, you are responsible for determining whether it is legal to export an item from the United States to another country and also for ensuring that all the required documentation is accurate and complete and is filed with the appropriate agency. Your responsibilities include determining whether your product requires an export license and familiarizing yourself with the laws that apply to various types of products, destinations, and end-users. U.S. export controls vary depending on the country to which the product will be exported. In addition, certain due diligence requirements are imposed on exporters with respect to obtaining information about the customer’s identity and intended end-use of the product.

What Laws Apply to Exporters?

The primary U.S. laws affecting international export transactions by U.S. persons and U.S. companies (including foreign branches and foreign subsidiaries of U.S. companies) are:
The International Traffic in Arms Regulations ("ITAR"), administered by the Directorate of Defense Trade Controls ("DDTC"), Department of State ("State Department"). The ITAR restrict exports and re-exports of defense articles, defense services, and related technology. These regulations also impose registration requirements and reporting requirements on fees and commissions paid in connection with certain sales.

The Export Administration Regulations ("EAR"), administered by the Bureau of Industry and Security, Department of Commerce ("Commerce Department"). The EAR restrict the export and re-export of U.S.-origin goods and technology, including goods or data incorporated in foreign-origin goods and implement the Export Administration Act of 1979, as amended.

Economic sanctions, administered by the Office of Foreign Assets Control ("OFAC"), Department of the Treasury ("Treasury Department").

The antiboycott laws, administered by the Commerce Department and Treasury Department.

A list of other federal agencies with licensing authority covering specialized items (e.g., nuclear materials, controlled substances, etc.) is located on the Department of Commerce website at www.bis.doc.gov/about/reslinks.htm.

The International Trade Administration maintains a helpful website designed to assist U.S. companies export and maintain compliance with export regulations at http://export.gov/.

DETERMINING WHETHER AN EXPORT LICENSE IS REQUIRED

The majority of export transactions do not require specific approval from the U.S. government. Whether a license is required depends on the product's classification, end-user, and end-use.

What Is Classification?

In classifying a product, an exporter must determine whether the item is subject to the State Department’s ITAR or the Commerce Department’s EAR. This step is often referred to as the “commodity jurisdiction” determination and allows exporters to clarify the export licensing jurisdiction of a product or service. Once the commodity jurisdiction determination is made, the item must be properly classified under either the ITAR’s U.S. Munitions List (“USML”) or the EAR’s Commerce Control List (“CCL”). The USML regulates the export of defense articles, services, and related technology. The CCL regulates “dual use items” -- those that could be used for both military and commercial purposes. The Commerce Department maintains the CCL database on its website at http://beta-www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl.

If a product is not on the USML, an exporter classifies it by using an Export Control Classification Number (“ECCN”) based on the CCL to determine whether a license is needed to export the product. U.S.-origin items that are not listed on either the USML or the CCL are designated with the ECCN “EAR99.” While not always required, it is often prudent to obtain formal government commodity jurisdiction or classification rulings, particularly for new products or technologies, or for items that do not fall squarely into an established regulatory category. If you are not the manufacturer of the item to be exported, requesting the ECCN
from the manufacturer is often a useful means of obtaining an item’s export classification.

**Is an Export License Required Based on the Customer or End-User?**

The Commerce Department’s Bureau of Industry and Security (“BIS”) recommends obtaining information about the customer and its intended use of the product. An exporter should research not only the identity of the customer, but also that of the company’s owner. In addition to the customer, all parties involved in the shipment and sale of the product should be checked against the various “Prohibited Parties Lists,” noted in the next section.

**How Do I Avoid Dealing with “Prohibited Parties?”**

*Specially Designated Nationals (“SDN”) -* OFAC publishes the SDN List at [www.treasury.gov/resource-center/sanctions/SDN-List](http://www.treasury.gov/resource-center/sanctions/SDN-List). SDNs are individuals and entities located throughout the world that are blocked under diverse sanctions programs because they are owned or controlled by, or are acting for or on behalf of, targeted countries or groups. U.S. persons are prohibited from engaging in any transactions with SDNs and must block any assets under their control in which an SDN maintains an interest. Because the SDN List is frequently updated, exporters should check the OFAC website for updates on a transaction-by-transaction basis.

*Denied Persons List* - This list contains the names of individuals and entities who have been denied export privileges as a result of having violated U.S. export control laws. BIS prohibits U.S. exporters and foreign persons from exporting or in any way facilitating the export of U.S.-origin goods (which includes exports from the United States or foreign manufactured items containing a certain percentage of U.S. content) to denied persons. A current version of the list is available at [www.bis.doc.gov](http://www.bis.doc.gov).

*Entity List* - The BIS Entity List contains the names of foreign end-users engaged in the proliferation of weapons of mass destruction. Exports to these entities are generally prohibited without a license. A current version of the list is available at [www.bis.doc.gov](http://www.bis.doc.gov).

*Unverified List* - The Unverified List includes names and countries of foreign persons who in the past were parties to a transaction with respect to which BIS could not conduct a pre-license check (“PLC”) or a post-shipment verification (“PSV”). Any transaction involving a person on the Unverified List will be deemed by BIS to raise a “red flag.” An exporter must conduct sufficient due diligence or adopt sufficient safeguards to manage the risk that the product may be unlawfully diverted. A current version of the list is available at [www.bis.doc.gov](http://www.bis.doc.gov).

*Debarred Parties List* - The State Department maintains this list. It is comprised of the names of individuals and entities denied export privileges because they have violated the ITAR. Exports of U.S. defense articles, services, or technical data are prohibited to debarred parties. A current version of the list is available at [http://www.pmddtc.state.gov](http://www.pmddtc.state.gov).

A full list of recommended “Know Your Customer” guidelines for export transactions is available at [www.bis.doc.gov/Enforcement/knowcust.htm](http://www.bis.doc.gov/Enforcement/knowcust.htm).
Those guidelines advise taking into account abnormal circumstances and investigating suspicious circumstances.

**EXPORT “RED FLAGS”**

- The customer or its address is similar to one of the parties found on the BIS' Denied Persons List.
- The customer or purchasing agent is reluctant to offer information about the end-use of the item.
- The product’s capabilities do not fit the buyer’s line of business, such as an order for sophisticated computers for a small bakery.
- The item ordered is incompatible with the technical level of the country to which it is being shipped, such as semiconductor manufacturing equipment being shipped to a country that has no electronics industry.
- The customer is willing to pay cash for a very expensive item when the terms of sale would normally call for financing.
- The customer has little or no business background.
- The customer is unfamiliar with the product’s performance characteristics but still wants the product.
- Routine installation, training, or maintenance services are declined by the customer.
- Delivery dates are vague, or deliveries are planned for out of the way destinations.
- A freight forwarding firm is listed as the product’s final destination.
- The shipping route is abnormal for the product and destination.
- Packaging is inconsistent with the stated method of shipment or destination.
- When questioned, the buyer is evasive and especially unclear about whether the purchased product is for domestic use, for export, or for reexport.

**DOCUMENTATION**

**What Documents Are Required in Export Transactions?**

Three types of documents are required in export transactions: Commercial Invoices, an Automated Export System ("AES") record, and shipping documents such as a Bill of Lading, Air Waybill, or Shipper’s Letter of Restriction.

**What is a Commercial Invoice?**

Importing countries use this document to identify goods received and to assess duties. Commercial Invoices should contain the following information:

- Bill to/ship to address.
- Complete description of goods shipped. Letter of Credit shipments must conform to the description of goods in the Letter of Credit.
- Value. The amount to be invoiced (transaction price) OR the fair market value if the goods are shipped at no charge.
- Destination Control Statement.

Every Commercial Invoice issued by a company for defense articles (i.e., ITAR-controlled items) must contain the following statement:

**THESE COMMODITIES ARE AUTHORIZED BY THE U.S. GOVERNMENT FOR EXPORT ONLY TO [COUNTRY OF ULTIMATE DESTINATION] FOR USE BY [END-USER]. THEY MAY NOT BE TRANSFERRED, TRANSSHIPPED ON A NON-CONTINUOUS VOYAGE, OR OTHERWISE BE DISPOSED OF IN ANY OTHER COUNTRY, EITHER**
IN THEIR ORIGINAL FORM OR AFTER BEING INCORPORATED INTO OTHER END-ITEMS, WITHOUT THE PRIOR WRITTEN APPROVAL OF THE U.S. DEPARTMENT OF STATE.

Items not ITAR-controlled, but listed under an ECCN other than EAR99, must be accompanied by the following Destination Control Statement:

THESE COMMODITIES, TECHNOLOGY OR SOFTWARE WERE EXPORTED FROM THE UNITED STATES IN ACCORDANCE WITH THE EXPORT ADMINISTRATION REGULATIONS. DIVERSION CONTRARY TO U.S. LAW PROHIBITED.

What is an Automated Export System (“AES”) Record?

An AES record is a U.S. government document that declares the basis for a company’s authorization to export. (The electronically-filed AES records replace the paper versions that were accepted prior to 2008, known as Shipper’s Export Declaration records.) The U.S. Census Bureau also uses this document to determine quantities of U.S. goods exported for trade statistics purposes. An AES record is required under U.S. law for all shipments (1) where an export license is required or (2) where the value of the product or media (for libraries or customized software) being shipped is more than $2,500, except for exports to other U.S. Territories and most exports to Canada.

An AES record generally is not required for the export of technical data. However, companies must maintain a log of all exports of technical data for a period of five years from the date of export. The AES record must include, among other information, the following:

- Name, address, and federal tax identification number of shipper.
- Name and address of the ultimate consignee (recipient of the goods).
- Related or non-related parties (whether the recipient is related to the exporter).
- Domestic or foreign product.
- Schedule B number (export equivalent of an HTS number).

NOTE: The Schedule B number may not be identical to the HTS number due to minor differences between the two systems. See Chapter 2 for description of the HTS system.

- Quantities.
- Dollar value of shipment.
- License and expiration date or license exception.
- ECCN (Export Control Classification Number), when required.
- Signature of the exporter or authorized agent.

What Are the Necessary Shipping Documents?

Shipping documents (e.g., express delivery international shipping forms and air waybills) must, at a minimum, contain the following information:

- Commodity description.
- Destination Control Statement (see above).
- Either a proof of filing citation, indicating that the AES record has been transmitted and accepted, or an exemption or exclusion
legend, indicating the reason that no AES filing is required. A complete list of filing citations and exemption or exclusion legends can be found in Appendix D of the Foreign Trade Regulations (www.census.gov/foreign-trade/regulations/regs/regulations20080602-federalregister.html#AppendixD).

It is preferable for the exporting company to prepare the AES, bill of lading, and packing list and forward these documents to the freight forwarder. The freight forwarder is responsible for preparing the air waybill.

**PENALTIES AND ENFORCEMENT**

**Criminal:** Where an exporter willfully or knowingly violates or conspires or attempts to violate export control laws, criminal penalties of up to twenty years in prison and/or a fine of up to $1,000,000 per violation may be imposed.

**Civil:** Civil penalties may be imposed of up to $250,000 or two times the value of the exports, whichever is greater, for each violation. The federal government imposes millions of dollars each year in civil penalties for violations of export control laws. The Commerce Department’s Bureau of Industry and Security includes real-world examples of civil penalties in its “Don’t Let This Happen to You!” document, available at www.bis.doc.gov/complianceandenforcement/dontletthishappentoyou_2010.pdf. In addition to fines, U.S. export privileges may also be revoked, potentially resulting in more lost revenue than the monetary penalties.

**Country-Specific Economic Sanctions**

**OVERVIEW**

**What Are Economic Sanctions?**

Economic sanctions are U.S. government restrictions on a range of foreign trade, investment, and financial transactions. The Treasury Department’s Office ofForeign Assets Control (“OFAC”) has primary responsibility for administering most U.S. sanctions programs. Currently, the United States maintains trade and investment embargos against Burma (Myanmar), Cuba, Iran, Sudan, and Syria. In addition, there are narrower sanctions against the Western Balkans, Belarus, Cote d’Ivoire, Democratic Republic of the Congo, Iraq, Liberia, Libya, North Korea, Somalia, and Zimbabwe. Because sanctions programs change frequently, it is a good idea to check OFAC’s website (www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx) to assess whether a country is subject to sanctions prior to making any business commitments.

An exporting company and its employees are prohibited from doing business with the countries listed above as being subject to comprehensive sanctions programs. In addition,
U.S. persons are barred from facilitating, approving, or supporting virtually any transaction involving any such country. Accordingly, no export order may be accepted for any customer or end-user in a country subject to comprehensive sanctions unless an appropriate license or other authorization has been obtained. For non-comprehensive sanctions programs, prohibitions are against specific named individuals and entities (appearing on the SDN List discussed below), as opposed to being broad prohibitions on dealing with such countries.

OFAC’s enforcement authority extends to all U.S. citizens and permanent resident aliens (whether they are acting in the United States or abroad), companies or individuals acting in the United States, companies located in the United States, overseas branches of U.S. companies, and, in some cases, foreign subsidiaries of U.S. companies.

**Do the Same Rules Apply to Each Sanctioned Country?**

No two sanctions programs are identical because each one is based on a different set of foreign policy concerns. Each also has different levels of restrictions including prohibiting trade, blocking assets, prohibiting certain types of commercial, financial, and investment transactions, or a combination of those measures.

**Are Sanctions Always Country-Specific?**

Not all OFAC sanctions are country-specific. As noted above, OFAC also administers a variety of sanctions programs against individuals and entities, which are designated on the SDN List. The SDN List contains the names of individuals, companies, banks, charities, terrorist organizations, shipping lines, and freight forwarders throughout the world with whom U.S. persons are prohibited from engaging in a wide range of business transactions. To ensure full compliance with OFAC sanctions programs, exporters must evaluate all parties to a trade transaction, not only the buyer and the end-user. The categories of SDNs currently designated include: terrorists and terrorist organizations, narcotics traffickers, certain nationals or state-owned entities of embargoed countries, certain former members of the Yugoslavian government, members of the Zimbabwe government, members of the Burmese government, and former members of the Iraqi regime of Saddam Hussein.

**PENALTIES AND ENFORCEMENT**

**Criminal:** Criminal violations of the statutes administered by OFAC are punishable on a per violation basis by fines ranging from $50,000 to $10,000,000 and imprisonment ranging from 10 to 30 years for willful violations.

**Civil:** OFAC civil penalties range from $250,000 or twice the amount of each underlying transaction to $1,075,000 for each violation, depending on the applicable sanctions program.
Antiboycott Laws

OVERVIEW

What Are Antiboycott Laws?

The United States maintains “antiboycott” laws designed to prevent U.S. companies from supporting or participating in boycotts of countries friendly to the United States. While the antiboycott laws are drafted without reference to any particular boycott, their principal target is the Arab League’s long-standing economic boycott of Israel. U.S. antiboycott laws impose far-reaching restrictions on boycott-related actions, agreements, and even the furnishing of information, and the laws can apply to the activities of foreign subsidiaries of U.S. companies. Penalties for violations include civil and criminal fines, imprisonment, and loss of tax credits or export privileges. These laws are very complicated, sometimes counterintuitive, and whether or not an action is permissible can often turn on very subtle variations in language and circumstances.

The U.S. antiboycott laws are administered in part by the Commerce Department through the EAR. Under most circumstances, the EAR antiboycott provisions apply to the activities of U.S. companies, as well as foreign subsidiaries of U.S. companies. Although certain narrow categories of boycott-related actions are not prohibited, the range of boycott-related activity prohibited under the EAR is quite broad and includes, among other things, the following:

- refusing to do business with Israel, Israeli companies, or Israelis, in Israel, or with “blacklisted” companies.
- furnishing boycott-related information, including information about one’s business relationships with Israel, Israeli companies, Israelis, or “blacklisted” companies.
- discriminating against any person on the basis of race, religion, sex, national origin, or nationality.

U.S. antiboycott law is also implemented through Section 999 of the Internal Revenue Code, which is administered by the Internal Revenue Service. Section 999 requires U.S. taxpayers to report their operations in boycotting countries and penalizes any taxpayer who “participates in or cooperates with” an unsanctioned foreign boycott by denying them certain tax benefits. A taxpayer is deemed to be “participat[ing] in or cooperat[ing] with” a boycott if, as a condition of doing business, the taxpayer agrees to:

- refrain from doing business in Israel or with Israel, Israeli companies, or Israelis.
- refrain from doing business with U.S. persons who do business in Israel or with Israel, Israeli companies, or Israelis.
- refrain from doing business with companies owned or managed by individuals of a particular race, religion, or nationality.
- refrain from employing persons of a particular race, religion, or nationality.
refrain from shipping or insuring products on carriers owned, leased, or operated by persons who do not participate in or cooperate with the boycott.

To Whom Do the Antiboycott Laws Apply?

The EAR antiboycott provisions apply to all “U.S. persons,” defined to include individuals and companies located within the United States and those companies’ foreign affiliates. U.S. antiboycott laws apply only if the transaction includes a U.S. person and has a nexus with U.S. commerce. “U.S. commerce” is broadly defined to include activities relating to the sale, purchase, or transfer of goods or services (including information) within the United States or between the United States and a foreign country. Such activities include importing, exporting, financing, freight-forwarding, and shipping.

Section 999 of the Internal Revenue Code applies to U.S. taxpayers and companies required to pay U.S. taxes. These tax-related antiboycott laws consist mainly of reporting requirements and apply to taxpayers’ “operations” in, with, or related to boycotting countries or their nationals. The penalty provisions of Section 999 apply to taxpayers claiming foreign tax credit, foreign sales corporations or extraterritorial income benefits, or deferral of controlled foreign corporations income. Most small businesses are unlikely to be claiming such benefits.

REPORTING REQUIREMENTS

What Are the Reporting Requirements?

The EAR require U.S. persons (including U.S. companies and, in most cases, their foreign subsidiaries) to report on a quarterly basis the receipt of requests to take any action that has the effect of furthering or supporting the boycott. The specific deadline for reporting depends on whether the request was received in the United States or abroad. Boycott-related requests – whether oral or written – are generally reportable regardless of whether the requested action is prohibited or permitted and regardless of whether the recipient complies with the request. A number of exceptions to the reporting requirements are set forth in the EAR.

Section 999 of the Internal Revenue Code requires U.S. taxpayers and members of their “controlled groups” to report any business in or with any of the following boycotting countries: Iraq, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, Yemen, and the United Arab Emirates. In addition, they must report the receipt of any request to enter into an impermissible boycott-related agreement, whether or not the request came from one of the above-mentioned countries. Reports are filed in conjunction with the filing of the taxpayer’s annual return.

How Do I Report?

EAR reports are filed quarterly. Form BIS 621P is used for single requests and Form BIS 6051P is used for multiple requests. The forms are available at the Commerce Department’s Office of Antiboycott Compliance (“OAC”). These forms can be obtained online at www.bis.doc.gov/complianceandenforcement/antiboycottcompliance.htm#penalties or by calling OAC’s Report Processing Unit at (202) 482-2448.

Reports pursuant to Section 999 are filed with tax returns using IRS Form 5713. This form is available at any IRS office or at www.irs.gov.
PENALTIES AND ENFORCEMENT

Commerce Department

Violations of the EAR antiboycott provisions are subject to the full range of civil and criminal penalties available under the EAR, including fines, imprisonment, and denial of export privileges.

Criminal: Criminal violations can result in penalties of up to $1,000,000 and/or 20 years imprisonment per violation.

Civil: Civil penalties can range up to the greater of $250,000 or twice the value of the transaction, per violation.

Treasury Department (IRS)

Criminal: Willful failures to make required reports are punishable by criminal fines up to $25,000 and/or imprisonment up to one year.

Civil: Impermissible agreements to participate in or cooperate with an unsanctioned foreign boycott may result in the denial of certain tax privileges, including foreign tax credit, foreign sales corporations or extraterritorial income benefits, and deferral of controlled foreign corporations income.

Obtaining Additional Information

Where Can I Find the List of “Boycotting” Countries?

The Department of Treasury publishes this list on a quarterly basis. The current list is comprised of: Iraq, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, Yemen, and the United Arab Emirates. This list is not exhaustive, and it is not uncommon to receive boycott-related requests from other countries not on the official list, such as Bangladesh, Pakistan, Indonesia, Malaysia, and Nigeria.

Where Can I Find More Information?

U.S. Department of Commerce
BIS/Office of Antiboycott Compliance
Room 6098
1401 Constitution Avenue, N.W.
Washington, DC 20230
Phone: (202) 482-2381
http://www.bis.doc.gov/complianceandenforcement/antiboycottcompliance.htm

U.S. Department of the Treasury
Office of the General Counsel
Room 2004
Washington, DC 20220
Phone: (202) 622-1945
Money laundering is the process by which the proceeds of illegal activities are moved through legitimate businesses and the world banking system to remove or hide their illegal source. Criminals are most likely to succeed in money laundering when they avoid leaving a “paper trail” of transactions linking the money back to their crime, since law enforcement can follow such a trail created from reports and records of financial institutions. The United States has enacted a series of laws that outlaw financial transactions using such proceeds and impose certain reporting requirements and restrictions on specific types of money transfers.

The U.S. anti-money laundering laws are based primarily on two statutes: (1) the Money Laundering Control Act of 1986 (“MLCA”) and (2) the Bank Secrecy Act of 1970 (“BSA”). In October 2001, Title III of the Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (“USA PATRIOT”) Act of 2001 amended both the MLCA and the BSA.

CRIMINAL MONEY LAUNDERING LAWS

What Is the Money Laundering Control Act?

The principal criminal anti-money laundering laws in the United States were enacted with the passage of the MLCA. The MLCA makes it a crime for any individual to conduct a financial transaction knowing that the funds involved were derived from a “specified unlawful activity.”

What Crimes Are Considered “Specified Unlawful Activities?”

The crimes that satisfy the “specified unlawful activity” element are wide-ranging and encompass hundreds of U.S. federal felony crimes including: narcotics trafficking, wire fraud, Racketeer Influenced and Corrupt Organizations (“RICO”) Act crimes, copyright infringement, environmental offenses, conducting financial transactions with intent to engage in violations of the Internal Revenue Code, smuggling or export control violations involving items controlled under the EAR or the ITAR, and certain customs violations.

BANK SECRECY ACT

What is the Bank Secrecy Act?

The Bank Secrecy Act (“BSA”) was enacted by Congress in 1970 to fight money laundering and other financial crimes. The main purpose of the BSA is to provide law enforcement with access to information directly from financial institutions about suspicious financial activity, customer identity, and certain types of domestic and foreign transactions.
The BSA requires “financial institutions” and nonbank businesses (in certain circumstances) to create “paper trails” by keeping records and filing reports on certain transactions, and it imposes record-keeping, reporting, customer due diligence, and compliance program requirements on certain U.S. financial institutions. These reports are submitted to the Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”).

What Is a Financial Institution?

Under the BSA, the Treasury Department is permitted to issue regulations that apply to “financial institutions,” a broad term that is defined as including any: insured bank; commercial bank or trust company; private banker; agency or branch of a foreign bank in the United States; credit union; thrift institution; broker or dealer registered with the Securities and Exchange Commission (the “SEC”) under the Securities Exchange Act of 1934; broker or dealer in securities or commodities; investment banker or investment company; currency exchange; issuer, redeemer, or cashier of travelers’ checks, checks, money orders, or similar instruments; operator of a credit card system; insurance company; dealer in precious metals, stones, or jewels; pawnbroker; loan or finance company; travel agency; licensed sender of money or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system; telegraph company; business engaged in vehicle sales, including automobile, airplane, and boat sales; persons involved in real estate closings and settlements; U.S., State or local government agency carrying out a duty or power of a business described in this paragraph, and the United States Postal Service; casino, gambling casino, or gaming establishment with an annual gaming revenue of more than $1,000,000 (whether state-licensed or licensed under the Indian Gaming Regulatory Act); other business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage; other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters; and futures commission merchant, commodity trading advisor, or commodity pool operator required to register under the Commodity Exchange Act.

What Reporting and Compliance Requirements Exist Under the BSA?

The BSA reporting and compliance obligations address four areas, namely, Currency Transaction Reports, Suspicious Activity Reports, Know Your Customer principles, and anti-money laundering compliance requirements, which are examined in detail below. The Treasury Department has imposed reporting and recordkeeping requirements on some but not all “financial institutions”; however, it eventually may choose to extend the requirements to all such institutions. Private sector institutions can obtain additional information on the requisite compliance programs from industry associations such as banking or insurance associations.

Currency Transaction Report

The BSA and the Internal Revenue Code additionally require financial institutions to file a Currency Transaction Report (“CTR”) with respect to cash transactions in excess of $10,000 or multiple related transactions if in the aggregate they exceed $10,000 in a single day. The law also requires the reporting of certain non-cash transactions from companies involved in consumer durables, collectibles,
entertainment and travel. Finally, U.S. law requires individuals to report the physical transport of monetary instruments - cash, travelers’ checks, and other negotiable instruments - in excess of $10,000 into and out of the United States.

Additional information on **Currency Transaction Report** requirements can be found on FinCEN’s site at [www.fincen.gov/whatsnew/html/20090224.html](http://www.fincen.gov/whatsnew/html/20090224.html). The CTR forms, which also provide additional details regarding filing, are available at [www.fincen.gov/forms/bsa_forms/index.html#FinCTR](http://www.fincen.gov/forms/bsa_forms/index.html#FinCTR).

**Suspicous Activity Report**

The purpose of a Suspicious Activity Report ("SAR") is to report known or suspected violations of law or suspicious activity observed by financial institutions. SARs help law enforcement to initiate or supplement money laundering or terrorist financing investigations and present FinCEN with a method of identifying emerging trends and patterns associated with financial crimes. Currently, the following types of “financial institutions” are required to file a SAR: banks, insurance companies selling permanent life insurance policies, annuity contracts or other insurance products with cash value or investment features, mutual funds, casinos, broker-dealers in securities, futures commission merchants and introducing brokers in commodities, non-bank residential mortgage lenders or originators, money transmitters, currency dealers or exchangers, money order issuers, sellers, or redeemers, travelers’ check issuers, sellers, or redeemers, and the U.S. Postal Service.

SARs must be filed after becoming aware of any suspicious transaction. In addition, the business must maintain a copy of the report and any supporting documents for five years from the time of filing the report.

Specific reporting requirement details for **Suspicious Activity Reports** are available at [www.fincen.gov/news_room/rp/sar_guidance.html](http://www.fincen.gov/news_room/rp/sar_guidance.html). The SAR forms are available at [www.fincen.gov/forms/bsa_forms/index.html#FinSAR](http://www.fincen.gov/forms/bsa_forms/index.html#FinSAR).

**Know Your Customer Principles**

The Know Your Customer ("KYC") principles help protect companies against doing business with entities and individuals conducting monetary transactions with funds derived from unlawful activity. A company should be alert to the money flow in every transaction and question any payment methodology outside the norm. All such transactions should be screened for “red flags,” including: large cash transactions, loans secured by obligations to offshore banks, and established financial relationships with tax haven countries. Additional information on red flags is available at: [www.fincen.gov/news_room/advisory/](http://www.fincen.gov/news_room/advisory/) (FinCEN advisories) and on the Financial Action Task Force site at [http://search.fatf-gafi.org/search/C.view=default/results?q=red+flag&s=&sa=0&hf=10](http://search.fatf-gafi.org/search/C.view=default/results?q=red+flag&s=&sa=0&hf=10).

Moreover, the BSA, as amended by the USA PATRIOT Act, requires certain financial institutions to make reasonable efforts to be reasonably certain of the identity of their customers and the beneficial owners of the accounts. The regulations impose a duty on banks, savings associations, credit unions, and certain non-federally regulated banks; securities brokers and dealers; mutual funds; and futures commission merchants and introducing brokers in commodities to implement customer identification programs (“CIPs”) that go beyond previous KYC requirements. The expanded KYC principles add a number of mandatory elements, such as screening prospective customers against U.S. government lists of known terrorists. For example, U.S. financial institutions are now required to ascertain the identity of the nominal and beneficial owners of,
and source of funds deposited into, all private banking accounts held by non-U.S. persons, in order to guard against money laundering and to report any suspicious transactions.

Anti-Money Laundering Compliance Requirements

The BSA, as amended by the USA PATRIOT Act, requires implementation of anti-money laundering compliance programs that include, at a minimum: (1) internal policies, procedures, and controls; (2) designation of a compliance officer; (3) ongoing employee training; and (4) an independent audit function to test programs. The requirement applies to all “financial institutions,” other than U.S., State, or local government agencies and the following types of financial institutions (which are temporarily exempted): pawnbrokers; travel agencies; telegraph companies; sellers of vehicles, including automobiles, airplanes, and boats; persons involved in real estate closings and settlements; private bankers; commodity pool operators; commodity trading advisors; or investment companies.

USA PATRIOT ACT

Congress passed the USA PATRIOT Act on October 26, 2001, following the 9/11 terrorist attacks, after discovering that the hijackers had made extensive use of the U.S. financial system to fund their activities in the United States. The USA PATRIOT Act included substantial revisions to both the BSA and the MLCA.

The USA PATRIOT Act requires the Treasury Department to expand the application of the BSA’s reporting, recordkeeping, and compliance program requirements to cover additional types of financial institutions. The USA PATRIOT Act expands key domestic anti-money laundering laws and suspicious activity reporting requirements, among many other things. In addition, the anti-money laundering laws are increasingly being used in conjunction with other export and international trade restrictions, including export laws, sanctions, anticorruption laws, and customs laws. The majority of companies should review their programs to ensure that they meet the requirements of Title III of the USA PATRIOT Act (the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001) and otherwise comply with U.S. laws due to this expansion of U.S. anti-money laundering laws to reach a broader range of U.S. financial institutions.

How Did the USA PATRIOT Act Amend the Money Laundering Control Act?

The USA PATRIOT Act added several crimes to the domestic and foreign lists of “specified unlawful activities,” mentioned above. The USA PATRIOT Act also added a provision criminalizing the giving of material support or resources to an organization designated by the Secretary of State as a “foreign terrorist organization.”

In addition, the USA PATRIOT Act amended MLCA’s penalty provisions to provide for long-arm jurisdiction over foreign persons, including foreign banks, with respect to civil actions brought to enforce criminal judgments.

How Did the PATRIOT Act Amend the Bank Secrecy Act?

The Treasury Department and other relevant agencies issued numerous regulations in the year following the passage of the USA PATRIOT Act, substantially modifying the BSA by expanding reporting, customer identification, and compliance program requirements for a broad range of “financial institutions.”

The USA PATRIOT Act also imposed heightened KYC and anti-money laundering compliance requirements on financial institutions.
PENALTIES AND ENFORCEMENT

What Penalties Exist Under the MLCA?

Criminal: The criminal penalty for a violation of the MLCA provision that criminalizes knowingly conducting or attempting to conduct a financial transaction with funds that were derived from a “specified unlawful activity” is a maximum fine of $500,000 or twice the value of the property involved in the transaction, whichever is greater, and/or imprisonment for up to twenty years. Further, the property involved in a violation of the MLCA is subject to seizure or forfeiture.

Civil: In addition, violations of the remaining MLCA provisions are subject to a civil penalty in an amount not to exceed the greater of: (1) the value of the property involved in the transaction or (2) $10,000 per violation. Civil penalties are imposed on a strict liability basis.

What Penalties Exist Under the BSA?

Criminal: Violations of the BSA can result in criminal penalties of up to $500,000 and/or imprisonment up to ten years for individuals and up to $1,000,000 for financial institutions.

Civil: FinCEN can bring an enforcement action for violations of the reporting, recordkeeping, or other requirements of the BSA. Enforcement matters may result in a variety of penalties, including the assessment of civil monetary penalties up to $100,000 per violation or 50 percent of the transaction amount, whichever is greater, for individuals, and up to $1,000,000 for financial institutions or agencies.

How Can I Protect Myself from Anti-Money Laundering Statutory Penalties?

First, determine if your company qualifies as a “financial institution” subject to the BSA. Next, take steps to ensure your company complies with BSA regulations targeting non-banks, such as currency reporting. A company can also insulate itself from the severe penalties that may arise from even inadvertent violations of the anti-money laundering criminal legislation by diligently screening and monitoring customers and counterparts (particularly resellers and distributors).

OVERVIEW

The making of payments to foreign government officials to obtain, retain, or direct business, or secure an improper advantage, is an important international problem. Although this practice is common in many countries, the Foreign Corrupt Practices Act ("FCPA") makes it illegal for covered U.S. entities and individuals to engage in this practice. The U.S. government takes FCPA restrictions very seriously and aggressively enforces FCPA provisions, imposing stiff penalties for any FCPA violations. This section provides an overview of FCPA compliance issues.

GENERAL INFORMATION

What Is the FCPA?

The FCPA is a criminal statute that makes it illegal for U.S. companies or U.S. individuals acting anywhere in the world, and for foreign nationals, both individuals and entities, acting in the United States, to make use of the mails or any means or instrumentalities of interstate commerce or otherwise act to pay, offer to pay, or promise to pay (or to authorize someone else’s payment, offer to pay, or promise to pay) “foreign officials” to secure an improper advantage to obtain, retain, or direct business to any person. The FCPA applies to the worldwide business activities of U.S. corporations, including joint venture activities. In addition to being responsible for any payments they make themselves, U.S. companies can be held responsible for payments made by third parties even if the U.S. company is not actually aware of the payment or offer but is aware of a high probability that such payment or offer was likely to be made. For example, if a U.S. company hires a consultant who shares part of his compensation with a foreign official, the company may be held responsible for the payment. The FCPA bars payments even if: (1) the benefit is for someone other than the party making the payment; (2) the business sought is not with the government; (3) no business is awarded; or (4) the foreign official initially suggests the payment.

The FCPA also includes accounting provisions with two primary components. First, the FCPA requires “issuers,” defined as any public company that is registered on a U.S. securities exchange, to make and keep books and records in “reasonable detail” to “accurately and fairly reflect” transactions and disbursements of the issuer’s assets. The SEC’s enforcement policy is to treat any illicit payment as material, per se; that is, no other information regarding the payment is relevant to the question of whether it must be recorded. Second, the FCPA requires issuers to devise and maintain a system of internal accounting controls that, among other things, “provide[s] reasonable assurances that transactions are executed in accordance with the management’s general or specific authorization.” In short, the controls must be adequate to protect against off-book accounts and disbursements and other unauthorized payments.
To Whom Does the FCPA Apply?

The antibribery provisions of the FCPA apply to a citizen, national, or resident of the United States or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship with its principal place of business in the United States or organized under the laws of the United States or a territory, possession or commonwealth of the United States. It also applies to certain foreign issuers of securities and foreign firms and persons who take any action in furtherance of an unlawful payment while in the United States.

The accounting and recordkeeping provisions directly apply to all “issuers.” As noted above, “issuers” are defined to include any companies that are registered on a U.S. securities exchange or that are subject to certain SEC reporting requirements, whether a company is a U.S. or foreign company. Foreign companies with American Depository Receipts that are listed on a U.S. exchange are also considered to be issuers. The FCPA requires issuers to ensure that all of their majority-owned affiliates comply with the accounting requirements. The FCPA also requires issuers to use reasonable good faith efforts to ensure that their minority-owned affiliates comply.

Even if the company is privately held and not an “issuer,” U.S. enforcement posture is to require functionally equivalent compliance with the accounting provisions. A failure to maintain complete and accurate books and appropriate internal controls can be used by enforcement officials as evidence of corrupt intent, even where SEC remedies are not applicable.

ANTIBRIBERY PROVISIONS

What Kind of Payments Are Prohibited?

The law prohibits giving “anything of value” to a foreign official with a corrupt intent to obtain, retain or direct business or secure some other advantage. Illegal payments include many different types of payments, including money, gifts, entertainment, excessive “business promotional” activities, reimbursement or payment of an official’s expenses (such as travel expenses), beneficial interests in a business, or in-kind contributions.

Who Is a “Foreign Official”?

A “foreign official” includes not only elected or appointed government officials but any government employee. It also includes officers, directors, and employees of departments, agencies, government-owned companies or other instrumentalities. U.S. enforcement authorities construe the FCPA to cover gifts or payments to employees of companies in which the government has any ownership. In some circumstances, U.S. authorities also apply the FCPA to cover payments or gifts to members of an official’s family, although relatives of foreign officials are not foreign officials themselves. Likewise, the FCPA covers giving anything of benefit to a candidate for office, an official of a political party, a political party, or to officers of public international organizations, such as the World Bank.

Are Payments to Officials Ever Legal or Defensible Under the FCPA?

The FCPA recognizes that U.S. companies will sometimes confront bureaucratic delays and may need to make small payments to low-level officials to secure or speed up “routine governmental action.” The FCPA provides a narrow exception for these “facilitating or expediting” payments. They are not payments
to influence an official to make a decision that helps the company obtain or retain business. They are simply payments to secure or speed up a routine government action that, because of red tape, is sitting on a desk waiting to be done. It is important to note that a payment permitted under this exception may still violate local law.

These routine governmental actions, meaning actions commonly and ordinarily performed by a foreign official, include: (1) obtaining permits, licenses, or other official documents to qualify a person to do business in a country; (2) processing governmental papers, such as visas and work orders; (3) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspection related to transit of goods across country; (4) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (5) actions of a similar non-discretionary nature.

In addition to this exception, the FCPA recognizes two affirmative defenses. First, the FCPA recognizes an affirmative defense when the payment at issue “was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country.” Second, the FCPA includes an affirmative defense for “reasonable and bona fide expenditure[s], such as travel and lodging expenses,” incurred by or on behalf of a foreign official and “directly related” to the “promotion, demonstration, or explanation of products or services” or “the execution or performance of a contract with a foreign government or agency thereof.”

ENFORCEMENT AND PENALTIES

Who Enforces the FCPA?

The Department of Justice (“DOJ”) is responsible for all criminal enforcement and for civil enforcement of the antibribery provisions of the FCPA with respect to domestic concerns and foreign companies and nationals acting within the territory of the United States. The SEC is responsible for the investigation and civil prosecution of the antibribery and accounting provisions with respect to issuers. These agencies investigate virtually all allegations that come to their attention.

What Are the Penalties for Violating the FCPA?

FCPA violations carry stiff criminal and civil penalties. Companies can be fined millions of dollars for violations. Individuals can be fined and even serve jail time. Compounding the potential penalties, FCPA prosecutions often include charges of other criminal violations, such as money laundering, mail and wire fraud, and conspiracy. Those actions can move forward even if the company is not convicted of the FCPA offense.

Criminal: For each violation of the antibribery provisions, a corporation or other business entity is subject to a fine of up to $2,000,000. An officer, director, stockholder, employee, or agent is subject to a fine of up to $100,000 and/or imprisonment for up to five years. For each violation of the accounting provisions, a corporation or other business entity is subject to a fine of up to $25,000,000. Individuals are subject to a fine of up to $5,000,000 and/or imprisonment up to twenty years. A related act allows for a fine of up to twice the benefit that the defendant sought to obtain by making the corrupt payment.
Civil: The DOJ or the SEC may bring a civil action to enjoin any act or practice of a business entity when it appears that it is, or will soon be, in violation of the SEC. In addition, the DOJ or the SEC may impose a fine of up to $16,000 against a business entity or officer, director, agent, or stockholder of the business entity per violation of the antibribery provisions. For violations of the accounting provisions, the SEC may impose a civil penalty not to exceed the greater of (a) the gross amount of the pecuniary gain as a result of the violation or (b) a specified dollar limitation, ranging from $75,000 to $725,000 for a company and $7,500 and $150,000 for an individual. In an SEC enforcement action, the court may also impose additional fines. Civil penalties are imposed on a strict liability basis, which means that monetary penalties will be imposed even when a company did not intend to violate the law but simply made a mistake.

A company can suffer devastating consequences even if it is not convicted and the statutory penalties are not brought into play. A person or firm merely indicted for allegedly violating the FCPA (as well as those convicted of the offense) may be barred from doing business with the U.S. government. Additionally, a person or firm found guilty of violating the FCPA may be ineligible to receive export licenses. The SEC may suspend or debar persons from the securities business, and the Commodity Futures Trading Commission and Overseas Private Investment Corporation may suspend or debar FCPA violators from agency programs.

Can I Be Held Personally Responsible for FCPA Violations?

Yes. If you are an officer, director, stockholder, employee, or agent of a business entity that has violated the FCPA, you may be subject to a fine of up to $100,000 and/or imprisonment for up to five years for violating the antibribery provisions, and a fine of up to $5,000,000 and/or imprisonment for up to twenty years for violating the accounting provisions. If the court imposes a fine on you for FCPA violations, your employer may not pay the fine. Under the U.S. Sentencing Guidelines, prison sentences are increasingly likely for persons found to have violated the FCPA. Several recent cases have resulted in prison sentences for corporate executives, including foreign nationals.

Do I Have to Follow Local Law or International Conventions?

It is important to remain equally attentive to compliance with applicable domestic bribery laws. FCPA violations can trigger, or stem from, investigations by foreign governments, risking both penalties under local law and loss of good will. These laws include U.S. laws other than the FCPA, including state, local, and municipal laws. They also include the local laws of each of the countries in which the company operates or seeks to operate.

Moreover, under a series of international conventions signed in recent years under the auspices of the Organization for Economic Cooperation and Development (“OECD”), the Organization of American States (“OAS”), and others, more than sixty countries now maintain laws that mirror the FCPA. The conventions have also created extradition rights and other intergovernmental cooperation mechanisms to facilitate better cross-border enforcement of corruption cases.

Will I Actually Get Caught?

The international movement against official corruption has spawned new cooperation mechanisms between U.S. enforcement officials and their foreign counterparts, which significantly increase the risk of investigation and prosecution. For example, the SEC has entered into bilateral information-sharing and/or cooperation agreements with more than thirty foreign securities regulators. The SEC also
maintains a website for tips, which, according to recent statements by SEC enforcement officials, averages several hundred hits per day. The DOJ maintains a similar website and regularly teams with foreign enforcement officials to pursue corruption cases. The OAS, Council of Europe, and OECD anticorruption conventions all require countries to cooperate on extradition, mutual assistance in obtaining evidence, asset freezes, and records.
ANTI-MONEY LAUNDERING LAWS

U.S. Department of Treasury’s ‘FinCEN’ page:
www.fincen.gov/

THE FOREIGN CORRUPT PRACTICES ACT

Foreign Corrupt Practices Act Opinion Procedure: The DOJ established this procedure by which an issuer or domestic concern may request a statement from the DOJ regarding its present enforcement intentions under the antibribery provisions of the FCPA with respect to any proposed business contact. Under the FCPA, DOJ must respond within thirty days.


Other FCPA Compliance Resources:

