

EXPORT CONTROLS AND INTERNAL INVESTIGATIONS: AN OUTSIDE COUNSEL'S PERSPECTIVE ON HOW TO INVESTIGATE SUSPECTED EXPORT VIOLATIONS



PATTON BOGGS LLP
ATTORNEYS AT LAW

INSTITUTE FOR INTERNATIONAL AND COMPARATIVE LAW
4th Annual Program On International Corporate Compliance
Washington, DC

February 26-27, 2009

Giovanna M. Cinelli
Senior Partner and Chair,
Export Compliance & Investigations Practice Group
703-744-8075 (direct dial) gcinelli@pattonboggs.com (e-mail)



THE CHANGING “FACE” OF INTERNAL INVESTIGATIONS

- * Internal investigations have become less a matter of choice and more a matter of necessity
- * The role outside counsel plays in the advice provided to companies on a routine basis has changed
- * The U.S. Government has increased its concurrent civil/criminal investigations
- * The likely results of a Government or internal investigation have expanded— e.g., policy of denial, suspension or onerous licensing processes
- * The need to draw a “line” between the provision of legal advice as opposed to business advice has been emphasized



ROLE OF OUTSIDE COUNSEL

- * To determine the scope of issues to be addressed in conjunction with in-house personnel not involved in the suspected violations
- * To gather facts and place them in context
- * To recommend strategic courses of action in presenting, correcting and addressing the suspected export violations
- * To interface, where appropriate, with U.S. Government agencies



ROLE OF OUTSIDE COUNSEL

- * Is the process “content neutral?”
- * When does objectivity shift to “advocacy?”
- * Within the role, where do issues arise?
 - ◆ Inadequate definition or scope to the investigation
 - ◆ “Rushed” investigation



ROLE OF OUTSIDE COUNSEL

- * Within the role, where do issues arise?
 - ◆ Parties involved in the potential or perceived violations spearhead or guide the investigation internally
 - ◆ Disagreements between in-house and outside counsel
 - * Legal issues
 - * Scope of disclosure



INADEQUATE DEFINITION OR SCOPE TO THE INVESTIGATION

- * Depends on goal of investigation
- * Depends on parties involved
- * Depends on “how” the possible violations come to company’s and outside counsel’s investigation



“RUSHED” INVESTIGATION

* Driven by a number of factors

- ◆ ITAR §127.12(c)(1): “initially notify [DDTC] immediately after a violation is discovered...” [emphasis added]
- ◆ ITAR § 127.12(c)(1)(i): “...a full disclosure must be submitted within 60 calendar days of the notification...” [emphasis added]
- ◆ ITAR § 127.12(c)(1)(iv): “Failure to provide a full disclosure within a reasonable time” risks loss of voluntary disclosure status [emphasis added]



“RUSHED” INVESTIGATION

* Definition of the terms:

- ◆ “immediately” – *Hughes Network Systems/DirecTV Consent Agreement (2005)*
- ◆ “discovered” – *Hughes Network Systems/DirecTV Consent Agreement (2005)*
- ◆ 60 “calendar” days” – how to calculate “calendar” days?
- ◆ “within a reasonable time” – how to define “reasonable time?”



“RUSHED” INVESTIGATION

* Countervailing Government Considerations:

- ◆ Unreasonable delays in submission of final disclosures
 - * Initial notification filed but final disclosure submitted 2 or 3 years later
 - * Final disclosure not filed until Government requested disclosure report
- ◆ Incomplete or misleading disclosure
 - * Overly “generous” description of scope of issues
 - * Minimization of national security impact
 - * Material information omitted



“RUSHED INVESTIGATION”

* Solutions:

- ◆ Understand the initial issues perceived to be violations
- ◆ Leave open the possibility that other issues may be discovered during the investigation
- ◆ Determine, in advance, when and how these additional issues will be disclosed and to whom
- ◆ Communicate with the Government candidly and in a timely manner
 - *The DirecTV Group and Hughes Network Systems Consent Agreement (2005)*; *ITT Corporation Consent Agreement (2007)*; *Qioptiq Consent Agreement (2008)*



INVOLVEMENT OF IN-HOUSE PERSONNEL IN TRANSACTION/ACTIVITY UNDER REVIEW AND IN THE INVESTIGATION

- * Objectivity is key:
 - ◆ To conduct the investigation
 - ◆ To accurately reflect the issues discovered during the course of the review

- * Creates difficulties when in-house personnel involved in both the possible violations and in spearheading the investigation control how outside counsel interprets the export laws for purposes of determining the scope of issues



INVOLVEMENT OF IN-HOUSE PERSONNEL IN TRANSACTION/ACTIVITY UNDER REVIEW AND IN THE INVESTIGATION

* Examples:

- ◆ ITAR issues versus NISPOM issues
- ◆ Empowered Official is also in-house counsel
- ◆ “Responsible” official is also in-house counsel



DISAGREEMENTS BETWEEN IN-HOUSE AND OUTSIDE COUNSEL

- * Distinction between “good faith” and “unjustified” professional disagreements
- * Legal interpretation issues
 - ◆ “aggressive” versus “assertive”
 - ◆ “assertive” versus “conservative”
 - ◆ “conservative” versus “unjustified”
 - ◆ “unjustified” versus “wrong”
- * What to include in a disclosure?
 - ◆ “full” disclosure
 - ◆ “partial” disclosure with caveats
 - ◆ “advocacy” disclosure



DISAGREEMENTS BETWEEN IN-HOUSE AND OUTSIDE COUNSEL

- * Impact of *U.S. v. Optrex America, Inc. (CIT 2008)*
 - ◆ Outside counsel provided written advice with which the client disagreed
 - ◆ Company submitted “official” filings to the U.S. Customs Service regarding product classification – the filings did not follow outside counsel’s advice



DISAGREEMENTS BETWEEN IN-HOUSE AND OUTSIDE COUNSEL

* Court held:

- ◆ In-house personnel were not competent to address classification issues under the Customs law
- ◆ Outside counsel provided competent advice which placed the Company on notice as to its obligations
- ◆ Company/client's decision not to follow outside counsel's advice resulted in their failure to exercise "reasonable care" and appropriate due diligence based on the advice provided



DISAGREEMENTS BETWEEN IN-HOUSE AND OUTSIDE COUNSEL

* *Optrex* court held:

“[T]he court assigns considerable weight to the... carefully considered professional advice... [thereby] placing an affirmative duty on *Optrex* to actively respond. The fact that *Optrex* seems to have disregarded the advice of its attorneys demonstrates a lack of reasonable care and outweighs its arguments that the continued misclassification... constitutes a good faith professional disagreement.” *Optrex* at p. 23.



VOLUNTARY DISCLOSURE AT DDTC AND/OR BIS

- * Decision to disclose made
- * Investigation complete
- * Documents collected and analyzed
- * Drafting begins



DISCLOSURES IN THE NEW ENFORCEMENT ENVIRONMENT

- * What is new?
 - ◆ What constitutes a “voluntary disclosure?”
 - ◆ What efforts reflect sufficient diligence when conducting investigations to satisfy the concerns BIS and DDTC have raised regarding systemic noncompliance?
 - ◆ How much detail concerning specific actors responsible for export and decisionmaking conduct is adequate?



DISCLOSURES IN THE NEW ENFORCEMENT ENVIRONMENT

- * What is new?
 - ◆ What is the impact of the apparently increasingly coordinated efforts of the criminal and civil agencies handling export enforcement?
 - * What is the impact, if any, of the ***U.S. v. Stringer*** case?
 - * How does one handle the attorney-client privilege in voluntary disclosures?
 - * How can one handle multi-fronted investigations – an onslaught from the civil side at the same time that search warrants and subpoenas are issued on the criminal side?



DISCLOSURES IN THE NEW ENFORCEMENT ENVIRONMENT

- * What constitutes a “voluntary disclosure?”
 - ◆ The ITAR and Export Administration Regulations (“EAR”) both outline the requirements for voluntary disclosures: ITAR § 127.12 and EAR §§ 764.4-764.5
 - ◆ The regulations include “common sense” elements regarding the type of detail to be included in any voluntary submissions
 - ◆ The regulations, however, remain sufficiently broad to permit varied interpretations
 - ◆ Precedent consent or settlement agreements provide a strong basis for understanding what concerns DDTC/Compliance and BIS/OEE in the disclosure and enforcement context



DISCLOSURES IN THE NEW ENFORCEMENT ENVIRONMENT

- * What constitutes a “voluntary disclosure?”
 - ◆ In the disclosure context, the interpretations used can impact directly whether the Government considers the disclosures “voluntary” or “directed”

- * Examples where interpretations can and do make a difference (*i.e.*, “Don’t let this happen to you!”):
 - ◆ Too narrowly construing the scope of violations

 - ◆ Asking the right questions of the wrong people and then using the answers to prepare the disclosure



DISCLOSURES IN THE NEW ENFORCEMENT ENVIRONMENT

- * Examples where interpretations can and do make a difference:
 - ◆ Narrowing the investigation to limit business-related disruptions
 - ◆ Aggressively or unjustifiably interpreting ITAR or EAR provisions – *i.e.*, the definition of technical data; the use of an exemption; the definition of recordkeeping



DISCLOSURES IN THE NEW ENFORCEMENT ENVIRONMENT

- * Examples where interpretations can and do make a difference:
 - ◆ What constitutes public domain – *e.g.*, DDTC assertion that photographs published on the Internet may be or are technical data
 - ◆ Hiding behind the cloak of other Government agencies' authorizations – *e.g.*, “Government agency X issued us a certification and we thought that would cover us for exports”
 - ◆ “Unavailable” records – either by not searching extensively or by destroying them – *e.g.*, “We’ve looked in the offices already and there really isn’t anything more in that warehouse where we stored 9000 boxes of old documents, files and e-mails”



DISCLOSURES IN THE NEW ENFORCEMENT ENVIRONMENT

- * Examples where interpretations can and do make a difference:
 - ✦ Management and empowered officials' reactions to the investigation do not support the effort:
 - * "Support without support"
 - * "We know we did something wrong, but we need to move beyond this. We've spent enough money already on this effort. Just tell us how much to write the check for."
 - * "Just answer the exact question the Government asked – no more and no less."



DISCLOSURES IN THE NEW ENFORCEMENT ENVIRONMENT

- * Government's reactions to voluntary disclosures
 - ◆ DDTC Consent Agreements:
 - * Hughes Network Systems (2005)
 - * ITT Corporation (2007)
 - * The Boeing Company (2008)
 - ◆ BIS Settlement Agreements:
 - * EPMed Systems, Inc.
 - * Dresser Italia, S.r.l.



QUESTIONS?