



CONDUCTING EXPORT COMPLIANCE INVESTIGATIONS:

STRATEGIC CONSIDERATIONS RELATED TO INTERNAL vs. EXTERNAL INVESTIGATIONS

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REALITY: NO ONE IS 100% COMPLIANT!

- * Companies are subject to extensive laws, regulations, and codes of conduct
- * Breaches of those laws, regulations and codes *will* occur
- * Investigations of those breaches are an essential component of doing business

CONDUCTING INVESTIGATIONS

* General considerations:

- ◆ *WHO* committed;
- ◆ *WHAT* transgression;
- ◆ *WHEN*;
- ◆ *WHERE*; and
- ◆ *WHY*

* Specific considerations:

- ◆ The desired results of the investigation;
- ◆ The actual results of the investigation;
- ◆ The nature of the investigation: criminal *versus* civil; and
- ◆ The expected impact of the investigation

CONDUCTING INVESTIGATIONS

- * Nothing is more important than conducting an investigation through the appropriate channels with the proper resources
- * Needs or requirements:
 - ◆ Credibility
 - ◆ Objectivity
 - ◆ Expertise
 - ◆ Speed
 - ◆ Flexibility
 - ◆ Business Sense
 - ◆ Depth of "bench"

CONDUCTING INVESTIGATIONS

- * Given the high costs of violations, handling the investigation in the manner most advantageous to the company has long and short term benefits.

ADVANTAGES OF EXPORT INVESTIGATIONS

- * Evidence that an export compliance program is working
- * Demonstrates management's commitment to export compliance
- * Demonstrates the importance of compliance to employees involved in the investigation
- * Provides a baseline understanding of export compliance activities so that revisions to the compliance program can be made
- * Identifies what may be systemic issues that might otherwise not be obvious from a discovery and review of a discrete export problem

ADVANTAGES OF EXPORT INVESTIGATIONS

- * Potential mitigation in the event a disclosure is necessary
- * Costs of the investigation often are considered by the U.S. Government if violations result in fines and penalties
- * Avoids omissions and misrepresentations in license applications
- * Addresses certain Sarbanes-Oxley requirements
- * Minimizes potential for whistleblowers or, at a minimum, allows for the identification of the potential pool of whistleblowers a company may be facing

REALITY: REALLY NO CHOICE

One needs to conduct these types of investigations

CHOICES IN AN EXPORT INVESTIGATION

- * Who conducts the investigation?
- * What evidence is collected?
- * Who is interviewed?
- * What product (*e.g.*, reports, disclosures, memos to file) is produced?

EXPORT INVESTIGATIONS

- * Each choice produces consequences:
 - ◆ Pros
 - ◆ Cons
- * Consequences need to be thought through before the investigation begins

STANDARD PROCESSES THAT APPLY WHETHER AN INVESTIGATION IS CONDUCTED INTERNALLY OR EXTERNALLY

- * Company protocols for investigations
- * Fact finding
- * Suspension of certain company policies
- * Document collection
- * Interviews
- * Assessment
- * Temporary cessation actions
- * Disclosure or Board report or file memo

STANDARD PROTOCOLS

- * Companies should have established procedures for defining when and how investigations are handled:
 - ◆ Procedures should establish baseline “rules” for conducting investigations
 - ◆ Management personnel, often the General Counsel, should be responsible for instituting investigations
 - ◆ General Counsel should request and direct investigations to establish attorney-client privilege from the outset – revisit if voluntary disclosure results

STANDARD PROTOCOLS

- ◆ Immediate steps should be taken to preserve documents, in hard and soft copy (*e.g.*, stop work order; suspend document or e-mail destruction policies; seize computers; image hard drives)
- ◆ All analytical communications and legal documents involved in the investigation should be labeled “Attorney-Client Privileged” and/or “Attorney Work Product”
- ◆ Interim corrective action should be taken to prevent ongoing violations

DISCUSSION TOPICS: INTERNAL vs. EXTERNAL

* Factors to consider:

- ◆ *WHAT* is the scope of the investigation?
- ◆ *WHEN* are the relevant deadlines going to expire?
- ◆ *WHERE* should the investigation be centered?
- ◆ *WHY* is the investigation necessary?
- ◆ *WHO* is the most qualified to conduct the investigation?
- ◆ *HOW* will the investigation be structured?

WHAT IS THE SCOPE OF THE INVESTIGATION?

- * Type of problem or issue
- * Subject to one set of laws or regulations or more

TYPE OF PROBLEM OR ISSUE

- * "One-time" event
- * Administrative error
- * Violative actions conducted by a former employee
- * "Domino" event
- * "Rogue" activity
- * Negligent actions by self blinding
- * Willful action designed to intentionally violate laws or regulations

WHY IS THE INVESTIGATION NECESSARY

- * To determine whether a violation occurred
- * To respond to a U.S. Government directed disclosure
- * To determine whether the issue is a systemic or an isolated problem
- * To meet audit requirements
- * To prevent false certifications/misleading or inaccurate statements
- * To satisfy Sarbanes/Oxley requirements
- * To respond to a criminal Government investigative request

WHAT IS THE SCOPE OF THE INVESTIGATION?

QUESTIONS TO BE ANSWERED

- * What information is available at the outset?
 - ◆ What aspects of business appear to be involved?
 - ◆ Documents?
 - ◆ Information at more than one location?
 - ◆ Electronic files (e-mails, archived documents, imaged systems, forensic discovery)?

WHAT IS THE SCOPE OF THE INVESTIGATION?

- * How did this information come to your attention?
 - ◆ Government inquiry?
 - ◆ Anonymous report?
 - ◆ Hotline call?
 - ◆ Discovered during routine audit or review of export activities?
 - ◆ Identified by a third-party, such as a sub-contractor?
 - ◆ “Whistleblower” – competitor or disgruntled employee?

WHAT IS THE SCOPE OF THE INVESTIGATION?

PRACTICAL CONCERN

- * How to stop the “bleeding”?
 - ◆ On-going violations?
 - ◆ Interim corrective action?
 - ◆ Licensing?
 - ◆ Meeting with U.S. Government?

WHAT IS THE SCOPE OF THE INVESTIGATION?

- * What is the company's current compliance posture?
 - ◆ Is the company under a Consent Agreement with DDTC or has the company recently settled with Commerce?
 - ◆ Does the company have a Special Compliance Official? Internal or external?
 - ◆ Has the company submitted related or unrelated voluntary disclosures? Are they pending?
 - ◆ How many export authorizations would be affected by the investigation and its results?

WHEN ARE THE RELEVANT DEADLINES GOING TO EXPIRE?

- * Depending upon the nature of the investigation, good faith generally requires an initial inquiry followed by notification to the Government. Precise timelines for “good faith” or “reasonable actions” will vary depending on the Company and the exact export issue.

WHEN ARE THE RELEVANT DEADLINES GOING TO EXPIRE?

- * Consider:
 - ◆ Is the potential issue/violation ongoing?
 - ◆ What steps must be taken to halt violations?
 - ◆ What will be the associated business impact (e.g., contract suspension, stop work orders, licenses required)?
- * Once a company has a preliminary understanding of the basic facts that suggests a violation may have occurred, initial notification is generally recommended to secure potential mitigation and demonstrate good faith

INITIAL NOTIFICATIONS

- * Depending upon the Government agency involved, initial notifications receive mixed reactions:
 - ◆ Commerce: generally accepting
 - ◆ State: mixed approach
- * Nonetheless – it is prudent to get the information one has to the Government sooner, citing appropriately to the ITAR or EAR section related to initial notifications

WHERE SHOULD THE INVESTIGATION BE CENTERED?

- * How is the company structured?
 - ◆ Export personnel at all sites?
 - ◆ Export personnel at the site where a potential export occurred?
 - ◆ Export personnel at all sites where exports occur?
 - ◆ All export compliance run through corporate?
 - ◆ Corporate personnel/attorneys assigned responsibility for export compliance?

WHERE SHOULD THE INVESTIGATION BE CENTERED?

- * What is the scope of the investigation?
 - ◆ Reviewing a discrete event, *e.g.*, an on-site training session provided to a foreign person
 - ◆ Reviewing multiple events, numerous shipments on a program to a foreign person or entity that was not included on an export authorization
 - ◆ Misclassification of a product or technology that has been exported from the United States to foreign nationals or foreign destinations for years

WHERE SHOULD THE INVESTIGATION BE CENTERED?

- * Corporate more likely to lead the investigation where:
 - ◆ Issues appear to be systemic or potentially widespread across the company
 - ◆ Other parties are involved, *e.g.*, subcontractors, temporary agencies, universities, U.S. Government
 - ◆ Government already aware of the issues at the center of the investigation

WHERE SHOULD THE INVESTIGATION BE CENTERED?

- * Business unit more likely to lead where:
 - ✦ Issue is localized at the business unit – not company-wide
 - ✦ Business unit export personnel are available to investigate and not involved in the transaction or activity being investigated
 - ✦ Company is not in a sensitive export compliance posture

WHO IS MOST QUALIFIED TO CONDUCT THE INVESTIGATION?

IN-HOUSE PERSONNEL

PROS	CONS
Most knowledgeable about the company and available sources of information	Not immediately perceived to be independent
Potentially less expensive	Time investigating takes away from regular duties
Familiar with personnel involved	Potentially not a subject-matter expert

WHO IS MOST QUALIFIED TO CONDUCT THE INVESTIGATION?

EXTERNAL LEGAL PERSONNEL

PROS	CONS
Independent	Potentially more expensive
Greater resources for conducting in-depth investigation	Should not be perceived as "replacing" the company before cognizant agencies
Employees potentially more responsive to requests for information and documents	
Provides baseline comparison	
Privilege and work product issues	

WHO IS MOST QUALIFIED TO CONDUCT THE INVESTIGATION?

- * Issues to consider in assessing whether to handle an investigation internally or externally:
 - ◆ Is the investigation likely to require extensive resources, *e.g.*, interviews, site-visits, document requests and reviews, comprehensive report, and forensic analysis?
 - ◆ Are the internal personnel available and capable of conducting a thorough investigation?
 - ◆ Is bias an issue?
 - ◆ Are the internal personnel conducting the investigations the people who participated in the matter being investigated?

WHO IS MOST QUALIFIED TO CONDUCT THE INVESTIGATION?

- * Issues to consider in assessing whether to handle an investigation internally or externally:
 - ◆ Does the matter appear to be a discrete issue or a systemic problem?
 - ◆ What is the “attitude” of the business unit and personnel who will be involved in the investigation, *e.g.*, cooperative, resistant to export restrictions, history of similar problems?
 - ◆ Is management “part of the problem” being investigated

HOW WILL THE INVESTIGATION BE STRUCTURED?

- * Potential investigative avenues:
 - ✦ Document requests
 - ◆ Who may have relevant documents?
 - ◆ Electronic documents?
 - ◆ Deleted documents?
 - ✦ Document review
 - ◆ Checklists?
 - ◆ Organization and indices of documents discovered
 - ◆ Establishment of privileged lists
 - ◆ Identify “hot docs”
 - ◆ Establish “clean room” for potential Government review?
 - ◆ Establish “privilege logs”

HOW WILL THE INVESTIGATION BE STRUCTURED?

* Potential investigative avenues:

✦ Interviews

- ◆ Identify who will have relevant information
- ◆ Identify relevant documents to be discussed during the interview – provide in advance?
- ◆ Make clear that the company is conducting the investigation
- ◆ Interview memoranda/summaries – provide copies to the Government?

HOW WILL THE INVESTIGATION BE STRUCTURED?

- * Potential investigative avenues:
 - ◆ Follow-up requests and interviews
 - ◆ Based on initial rounds of information collection
 - ◆ Potential new avenues for the investigation
 - ◆ Analyze and identify conclusions
 - ◆ What are the key issues?
 - ◆ Were other areas identified for investigation?

HOW WILL THE INVESTIGATION BE STRUCTURED?

- * Potential investigative avenues:
 - ◆ Present results of investigation
 - ◆ Who is the company audience – Board, General Counsel, Audit Committee, Export Personnel, Internal Audit Personnel, U.S. Government?
 - ◆ Initial results in draft, work product form, pending any further clarification
 - ◆ Recommendation regarding voluntary disclosure

HOW WILL THE INVESTIGATION BE STRUCTURED?

* Potential investigative avenues:

- ✦ Determine whether to submit a voluntary disclosure
 - ◆ Potential for mitigation
 - ◆ Potential for fines and penalties
 - ◆ Good faith
 - ◆ Demonstration of company's commitment to compliance
 - ◆ Costs of not submitting a disclosure
- ✦ Finalize corrective action
 - ◆ Based on investigation, determine and implement formal corrective action

HOW WILL THE INVESTIGATION BE STRUCTURED?

- * Potential investigative avenues:
 - ◆ Plan future audits of corrective action
 - ◆ Ensures that corrective action prevents a “repeat performance”
 - ◆ Permits modifications to respond to changes in business

QUESTIONS?