

# EXPORT ENFORCEMENT: THE SEVEN THINGS YOU NEED TO KNOW



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# EXPORT ENFORCEMENT AND COMPLIANCE

- “Living processes”
- Symbiotically related
- Impact more than the narrow area of export licensing



## SEVEN IS A STARTING POINT

- Based on the number and types of regulations involved, companies need to be aware of at least “seven” key areas as they navigate the export laws
- “Seven” is not a magic number, but a starting point



# SEVEN THINGS YOU NEED TO KNOW ABOUT EXPORT ENFORCEMENT

- Know your business
- Know the laws and regulations that apply
- Know what to investigate
- Know how to investigate
- Know the trends
- Know your “legal” theories
- Know your stance on conflicting issues



## KNOW YOUR BUSINESS

- Not just “existing” business
- Know your employee base
- Know your computer systems
- Know your acquisitions, mergers, joint ventures, and divestitures
- Know your international operations and laws
- Know your patent and intellectual property portfolio
- Know your collaborative efforts, including university relationships



# KNOW THE LAWS AND REGULATIONS THAT APPLY

- Export laws and regulations
  - ❖ EAR/Antiboycott
  - ❖ AECA/ITAR
  - ❖ OFAC/TWEA/IEEPA
  - ❖ BATFE
  - ❖ CDC
  - ❖ FCPA



## KNOW WHAT TO INVESTIGATE

- Define the issue in a relevant and usable manner:
  - ❖ Avoid or limit “tunnel vision” or “myopia”
  - ❖ Not so expansive it’s unmanageable or unlikely to be investigated
  - ❖ Think in “macro” and “micro” terms
  - ❖ Identify the resources that were instrumental in bringing the “violations” to the company’s attention



## KNOW WHAT TO INVESTIGATE

- Think in terms of other areas of the company to be affected:
  - ❖ Board of Directors
  - ❖ Senior Management
  - ❖ Empowered Officials
  - ❖ Export Compliance Personnel
  - ❖ IP Function
  - ❖ Law Department



# KNOW HOW TO INVESTIGATE

- Who should investigate
  - ❖ In-house export personnel
  - ❖ In-house counsel
  - ❖ Outside consultants and/or counsel
- Establish a scope of review



## KNOW HOW TO INVESTIGATE

- Balance considerations *before* you investigate:
  - ❖ Privilege – existence and waiver
  - ❖ Cooperation with the Government as opposed to “directed cooperation”
  - ❖ Ability to obtain information
  - ❖ Ability to solve the issues raised



# KNOW HOW TO INVESTIGATE

- Balance considerations *before* you investigate:
  - ❖ Cost
    - resources
    - money
    - time
  - ❖ Unintended “domino” consequences
    - other laws or regulatory obligations implicated – e.g., Sarbanes-Oxley
    - cessation of business
    - reputation
    - individual liability



## KNOW THE TRENDS

- What is the Government doing?
- Select focus:
  - ❖ Unauthorized exports of technical data, defense services - #1 for State
  - ❖ Unauthorized exports of articles or items - #1 for Commerce
  - ❖ Unauthorized exports of technical data and technology - #8 for Commerce
  - ❖ Material omissions or false statements - #4 for State, #2 for Commerce



## KNOW THE TRENDS

- Results
- How much should these trends impact a company's approach to compliance?
  - ❖ Limited resources
  - ❖ Limited financial commitment
  - ❖ Competing “objectives”



## KNOW YOUR “LEGAL” THEORIES

- Important to key in on basic point: ***In general, the Government holds all the cards***
- Even with that situation, it is critical to determine
  - ❖ When to challenge
  - ❖ When to “hold” or “acquiesce”



# KNOW YOUR “LEGAL” THEORIES

- Theories to consider:
  - ❖ Due process
  - ❖ Strict liability
  - ❖ Abuse of discretion *versus* discretionary authority
  - ❖ Successor liability
  - ❖ “Fruit of the poisonous tree”



# KNOW YOUR STANCE ON CONFLICTING ISSUES

- Which laws supercede:
  - ❖ Citizenship
  - ❖ Business operations
  - ❖ Employment
  - ❖ Intellectual property – *e.g.*, NDAs
  - ❖ Jurisdiction
  - ❖ Export classification and jurisdiction



# KNOW YOUR STANCE ON CONFLICTING ISSUES

- Compliance in the “breach”
  - ❖ Laws that are “followed,” but not really “followed”
- Cooperation and consistency within the company
- Focus on legal consistency



QUESTIONS?