

# TRADE COMPLIANCE RISK: WHAT YOU DON'T KNOW CAN HURT YOU!

SCCE CEI

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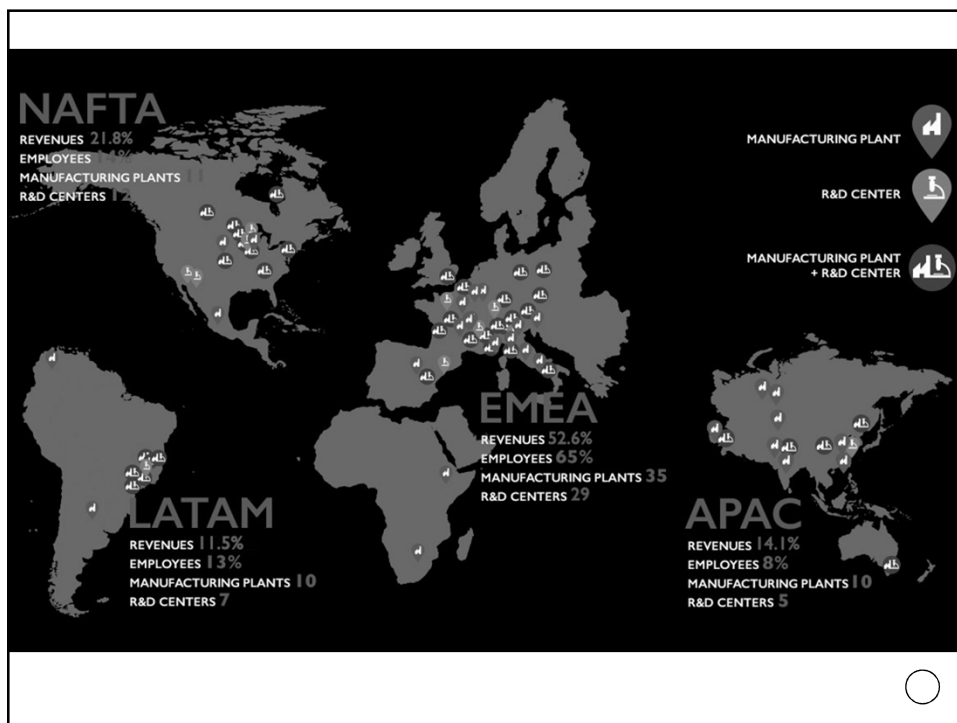


## ABOUT ME



- Managing Counsel - Global Compliance for CNH Industrial
  - \$28B company with 70,000 employees worldwide selling into 180 countries
  - Third largest capital goods manufacturer in the world (agricultural and construction equipment, military vehicles, buses, trucks and engines).
- Based just outside of Chicago at Company's North American Headquarters
- Responsible for operation of global compliance program overall
  - Compliance risk assessment, monitoring, policy, code of conduct, education, communication, global helpline, investigations and third party due diligence
- Also serve as Legal Counsel for all global trade and anti-corruption matters
- 21 years of in-house practice
- Certified Compliance and Ethics Professional (CCEP)





# WHAT THE HECK IS GOING ON?!

Donald J. Trump  
@realDonaldTrump

We are in the NAFTA (worst trade deal ever made) renegotiation process with Mexico & Canada. Both being very difficult, may have to terminate?

6:51 AM - 27 Aug 2017

19,130 Retweets 82,424 Likes

27K 19K 82K

Donald J. Trump  
@realDonaldTrump

Tariffs are the greatest! Either a country which has treated the United States unfairly on Trade negotiates a fair deal, or it gets hit with Tariffs. It's as simple as that - and everybody's talking! Remember, we are the "piggy bank" that's being robbed. All will be Great!

7:29 AM - 24 Jul 2018

8,868 Retweets 41,228 Likes

19K 19K 41K

Donald J. Trump  
@realDonaldTrump

If the E.U. wants to further increase their already massive tariffs and barriers on U.S. companies doing business there, we will simply apply a Tax on their Cars which freely pour into the U.S. They make it impossible for our cars (and more) to sell there. Big trade imbalance!

9:50 AM - 3 Mar 2018

24,798 Retweets 96,314 Likes

30K 13K 96K

Donald J. Trump  
@realDonaldTrump

The European Union, wonderful countries who treat the U.S. very badly on trade, are complaining about the tariffs on Steel & Aluminum. If they drop their horrific barriers & tariffs on U.S. products going in, we will likewise drop ours. Big Deficit. If not, we Tax Cars etc. FAIR!

5:29 PM - 20 Mar 2018

19 Retweets 21 Likes

4K 1K 21K

Donald J. Trump  
@realDonaldTrump

Turkey has taken advantage of the United States for many years. They are now holding our wonderful Christian Pastor, who I must now ask to represent our Country as a great patriot hostage. We will pay nothing for the release of an innocent man, but we are cutting back on Turkey!

11:30 PM - Aug 16, 2018

54.1K 27K people are talking about this



Donald J. Trump  
@realDonaldTrump

The U.S. has a 60 billion dollar trade deficit with Mexico. It has been a one-sided deal from the beginning of NAFTA with massive numbers...

REPLIES 26,289 LIKES 106,809

2:51 PM - 26 Jan 2017

Donald J. Trump  
@realDonaldTrump

Why should I, as President of the United States, allow countries to continue to make Massive Trade Surpluses, as they have for decades, while our Farmers, Workers & Taxpayers have such a big and unfair price to pay? Not fair to the PEOPLE of America! \$800 Billion Trade Deficit...

1:17 AM - Jun 11, 2018

109K 43K people are talking about this

## How Did We Get Here?!

## TWO BIG ISSUES:

- 1. Tariffs/Withdrawal from FTAs
  - China
  - EU
  - Canada
  - Mexico
  - Turkey
  - India
- 2. Sanctions
  - Iran
  - Russia
  - Turkey



What is a Free Trade Agreement?



# FREE TRADE AGREEMENTS

## Free Trade Agreement

### Definition

Sovereign nations join together, usually on a regional scale, to create free trade agreements.

### Purpose

Free trade agreements are created to lower trade barriers and to stimulate trade between member countries. Member countries belonging to the free trade area trade freely with each other while maintaining trade barriers and tariffs for non-member countries.



## NAFTA NO MORE?



- May 2017, USTR submits notice to Congress of intent to renegotiate
- August, agreement in principal reached with Mexico
- Canada has NOT reached an agreement yet but talks continue
- U.S.-Mexico Agreement:
  - Automobile Industry changes related to rules of origin, regional content value and factory worker earnings
  - Intellectual property protections
  - Tariff-free digital products
  - Mexican recognition of collective bargaining rights
  - No tariffs on agricultural goods, no export subsidies
- Must be approved by Congress



## WHAT ABOUT CANADA?



- No agreement reached (as of 9/17)
- Trump tweets
- Animosity
- Trump threatens tariffs on Canadian built cars
  - 2.5M Canadian jobs on the line
  - “I’ll leave Canada out”
  - Dispute over Canada’s dairy industry protections



## LATE-BREAKING UPDATE



- October 1, 2018
- United States-Mexico-Canada Agreement (“USMCA”) announced
  - Rules on dairy imports
  - New dispute resolution methodology including intellectual property issues
  - Limits on tax-free online purchases
  - Limits on threatened auto tariffs
- Must be ratified by Congress
  - Vote won’t be held until 2019
  - Democrats unlikely to be happy to with lack of environmental controls, lack of labor standards
  - Mid-term elections will be of key importance



## TRANS PACIFIC PARTNERSHIP NO MORE

- Trump withdrew from this shortly after being elected
- In its place, remaining countries signed new agreement, “Comprehensive and Progressive Agreement for Trans Pacific Partnership”
  - Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam



## TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP)

- Negotiations halted by President Trump in 2017
- “Truce” called in July, 2018
- New negotiations started that appear similar to TTIP, will they be successful?
- Original intent, comprehensive and broad trade agreement covering multiple sectors and providing market access between Europe and the U.S.



# Tariffs



## WHAT IS A TARIFF?

### Tariff

A tax or duty that a government charges on goods coming into or going out of their country



## “TRADE WAR” TARIFF TIMELINE

- <https://news.sky.com/story/trumps-trade-war-a-timeline-11406176>



## TRADE WAR



- March 1, 2018, President Trump announces 25% tariff on steel and 10% tariff on aluminum citing national security grounds (estimated to cover \$48B of imports overall and \$2.8B of Chinese imports specifically) Effective date March 23<sup>rd</sup>.
- March 7, 2018, EU announces intent to “rebalance” trade with its own 25% tariff on \$3.4 B of US exports including cranberries, Harley Davidson motorcycles, bourbon and jeans
- March 25, 2018, Turkey imposes retaliatory tariffs on \$1.8B of U.S. exports including agricultural goods
- Exemptions granted to the EU and other allies until June 1, 2018
- April 2, 2018, China retaliates with tariffs on aluminum, pork, fruit, nuts and other U.S. products worth \$2.4B



## TRADE WAR



- June 1, 2018, “exemptions” from tariffs end for EU, Canada and Mexico. 25% tariff now in effect.
- June 15, 2018, Both U.S. and China each issue “List 1” representing \$50B in products from the other that will now be subject to 25% tariffs. Two phase approach.
- June 22, 2018, EU Retaliates with list of \$3.2B of U.S. products. Steel, aluminum, agriculture, food, bourbon, corn, peanut butter, motorcycles, boats and more
- June 25, 2018 Harley-Davidson announces it is shifting its production outside of the United States to avoid retaliatory tariffs
- July 1, 2018, Canada retaliates with list of \$12.8B in tariffs on steel (25%), aluminum, agriculture, food and consumer goods (10%)



## TRADE WAR



- July 6, 2018, first phase of “List 1” \$50B in U.S./Chinese tariffs go into effect against the other.
- July 10, 2018, U.S. issues list of an additional \$200B of Chinese imports to be subject to 10% tariff (“List 2”)
- July 20, 2018, President Trump threatens tariffs on ALL imports from China
- August 1, 2018, President Trump increases tariffs from 10% to 25% on “List 2”
- August 3, 2018, China threatens \$60B in tariffs
- August 10, 2018, U.S. announces that tariff rate imposed on Turkey is increasing from 25% to 50%. Also announces (by Tweet) that aluminum tariff for Turkey is increasing from 10% to 20%.



## TRADE WAR



- August 14, 2018, Turkey retaliates with new tariffs on U.S. cars, alcohol and tobacco
- August 23, 2018, U.S. and China both impose the “second phase” of the “List 1” tariffs announced on June 15
- August 23, 2018, U.S. threatens new tariffs on \$16B of imports from China
- September 18, 2018, U.S. announces “List 3” with two phased implementation of the \$200B in addition to the tariffs announced on July 10. Phase one effective September 24, 2018 with an additional tariff of 10%, then phase two effective January 1, 2019 when that tariff will increase to 25%. President Trump threatens tariffs on an additional \$267B in imports from China if China retaliates.



## TRADE WAR



- September 19, 2018, China retaliates immediately enacting \$60B in additional tariffs effective September 24, 2018, through the use of four lists:
    - Lists 3A and 3B subject to 10% tariff
      - 3,500 items
      - Chemicals, meat, wine, wheat, natural gas
    - Lists 3C and 3D subject to a 5% tariff
      - 1,600 items
      - Small aircraft, computers, textiles
  - “List 4” expected any day
- “China has openly stated that they are actively trying to impact and change our election by attacking our farmers, ranchers and industrial workers because of their loyalty to me.” – President Donald Trump 9/19/18



## WTO DISPUTES



- U.S. files cases in the WTO against these countries challenging the counter-tariffs as being contrary to the WTO's GATT (General Agreement on Tariffs and Trade)
- 8 countries (China, India, the EU, Canada, Mexico, Norway, Russia and Switzerland) file WTO actions against the U.S. in response
- South Korea and China file other WTO actions against the U.S. related to other tariffs
- Canada, China, the EU, Turkey and Mexico also initiate counter tariffs against the U.S.



## DO AS I SAY, NOT AS I DO



- U.S. is challenging counter-tariffs for not having followed the WTO consultative process
- At the same time, U.S. has imposed tariffs without using the WTO consultative process either
  - Claiming "National Security" exception to process
- Other countries believe "National Security" exception is not defensible
- President Trump threatening to withdraw from the WTO if they rule "against him"



## CHINA ASKS WTO FOR SANCTIONS AGAINST THE U.S.

- September 11, 2018 China requests permission to sanction the U.S. based on how the U.S. records and treats Chinese exports
  - U.S. alleges China is “dumping” goods on the U.S. market at undercut prices
  - China accuses the U.S. of “trade bullying”
- President Trump threatens to “quit” the WTO if they don’t “shape up”.



## COLLISION COURSE?



- WTO rules against the U.S. and for China, President Trump decides to withdraw
- “Wild, Wild West”
- 98% of world trade currently governed by the WTO
- U.S. would lose “most favored nation status”
  - A few trade agreements still in place, but less than 40% of U.S. trade is currently covered by a trade agreement and the percentage is dropping
- 163 other countries that ARE members of the WTO are free to impose whatever tariffs they like against us subjecting more than 60% of our trade to higher tariffs and higher prices



## ON THE OTHER HAND...



- If the WTO rules in favor of the U.S., that means they are affirming the “National Security” exception
- Does this open Pandora’s Box?
- This could encourage other countries to start using this exception as well
- Everyone starts claiming “National Security” exception, so our tariffs apply but so to everyone else’s!
- Bottom line: Higher prices for everything



## WHAT DOES THIS MEAN FOR YOUR COMPANY?

- Do you import goods?
- Do you export goods?
- Do you buy raw materials/parts from people who import?

Then you will see:

- Shrinking markets and higher costs!



## PREDICTED IMPACT OF TRADE WAR

- Reduction in productivity
- Disruptions to supply chains
- Significant declines in crop and livestock prices
- Delayed corporate investment
- Cut back on hiring, higher unemployment
- Weakening in the housing sector
- Increase in oil prices



\* Source: Minutes of Federal Reserve Meeting July 31 – August 1, 2018



## RECESSION?

- Director General of the World Trade Organization urges President Trump not to impose tariffs and warns:

“An eye for an eye will leave us all blind, and the world in a deep recession.”



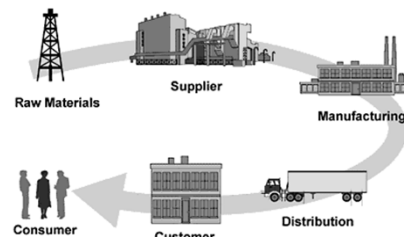
## CANADA EXAMPLE



- Apollo Machine Works in Canada
- Must use steel spec'd by customers
- Much of it only made in the U.S.
- Retaliatory Tariffs enacted by Canada against U.S. produced steel/aluminum of 25%
- Estimate of \$3M cost increase annually for this business only
- Need for new systems and controls to track inventory, country of origin and regional content value for tariff calculation also a new cost.
- Government relief programs slow to process requests



## MY COMPANY EXAMPLE



- We manufacture in China
- We manufacture in Canada
- We manufacture in the U.S. and Mexico
- We purchase raw materials from China for use in Canada
- We purchase raw materials from China for use in the United States
- We ship manufactured sub-assemblies to be incorporated into machines in other countries.
- Line-by-line analysis of raw materials and trade flows to determine tariff impacts (current estimate tens of millions)



## ALUMINUM EXAMPLE



- Hurricane shutters ordered in April
- Usual lead time, 2-3 weeks
- Not delivered until mid-September
- Another customer ordered in May, told nothing available until December
- Prices going up by 25% for all new orders because of tariffs
- Shortage of aluminum, hurricane shutters are 95% aluminum
  - “Prices from beer to Bentleys could increase. If you drink beer, if you drive a car, if you buy clothes, it (the Trade War) will affect everyone.” – Peter Quinter, Chairman of the ABA International Section Customs Committee



## SUGGESTED FIRST STEPS



- Determine whether your products are subject to foreign retaliatory tariffs
- Determine whether your raw materials/parts are subject to U.S. tariffs
- Talk to your purchasing and logistics teams
  - Do they have “maps” of your trade flows? If not, create one!
- Consider whether goods can be sourced elsewhere
- Consider whether manufacturing/sales can be moved elsewhere
- Look at your supply contracts
  - Can tariffs be “passed on” to your customers?
  - Can tariffs be “passed on” to you as a buyer of raw materials?



## CALCULATE IMPACT

- Team-up with your purchasing, manufacturing and logistics teams to determine the impact
- File for an exception or waiver from the tariffs
  - If you can prove impact on U.S. jobs, you may have a chance
  - Product exclusion requests deadline: December 18, 2018



## EXCLUSION REQUEST



- Get good trade counsel!
- Must include:
  - Specific product identification including materials composition, dimensions – will be publicly available information.
  - 10 digit subheading classification
  - Annual quantity and value of Chinese-origin product you purchased in each of the past 3 years
  - Whether product can be obtained elsewhere
  - Whether tariffs will cause “severe economic harm” to requesting company
  - Whether product is “strategically important” to China’s “Made in China 2025 Plan”
  - % of total gross sales (2017) the sales of the Chinese-origin product account for
  - % of total cost of producing your final product that the Chinese-origin product accounts for



# Sanctions

## SANCTIONS - IRAN



- ITSR (Iranian Transactions and Sanctions Regulations)
  - Prohibit U.S. persons from exporting goods and services to Iran
- JCPOA (Joint Commission Plan of Action)
  - Relaxed “secondary sanctions” against non-U.S. Persons
  - Allowed non-U.S. incorporated companies and persons to transact business with Iran without risk of U.S. sanctioning them for trading with the country
  - Created a few exceptions for U.S. trade including sale of commercial aircraft and parts to Iran and purchase of certain goods (carpets and others) from Iran.
- May 8, 2018 – President Trump terminates participation in the JCPOA. Announces intent to re-impose U.S. second sanctions on Iran.

## SANCTIONS “SNAP-BACK”



- Two “Wind-Down” Periods Announced:
  - August 6, 2018 for any business relating to Iran’s automotive sector, industrial and raw materials, gold, precious metals, any U.S. dollar bank notes, purchase or sale of Iranian rials.
    - Prior exceptions related to aircraft and the purchase by U.S. persons of some Iranian goods (i.e. carpets) now revoked
  - November 4, 2018 for reimposition of secondary sanctions including energy, financial, insurance, logistics related activities including sanctions on transactions by any foreign financial institution with the Central Bank of Iran.



## THE EU RESPONDS



- Blocking statute originally adopted by the EU in 1996 related to Cuba. Literally never enforced.
- August 7<sup>th</sup>, the EU amends its blocking statute.
- Specifically addresses U.S. withdrawal from the JCPOA and anticipates “secondary sanctions” on EU member organizations.
- Prohibits any EU Person from complying with U.S. sanctions.



## “SPECIAL FINANCING VEHICLE”

- September 24, 2018, the EU announces its plans to establish a “special payment channel” to allow EU companies to legally continue financial transactions with Iran
- Would prevent exposure to U.S. sanction as the need for use of the U.S. banking system would be avoided
- This new “special purpose vehicle” for financing would allow the countries still committed to the JCPOA – the EU, U.K., France, Germany, Russia and China to continue to honor its terms



## WHAT DOES THIS MEAN?



- Hypothetical:

You are a SEC-listed, publicly traded global manufacturing company. Your company headquarters are in the Netherlands and you are a Dutch corporate entity. You have offices all over the world.

You have offices in the United States and some U.S. incorporated entities. They are prohibited from transacting business with Iran.

You also have offices in France and Italy, among others. Under EU law, they are prohibited from honoring the U.S. sanctions against Iran. Under U.S. “secondary sanctions”, however, they could be sanctioned by the U.S. for transacting business with Iran.



## WHAT CAN YOU DO?



- Inform the EU commission of the issue
- Request a waiver
- Ask for formal authorization to comply with U.S. sanctions
- Authorization can help:
  - Prevent enforcement by EU member countries for complying with U.S. regulations
  - Help provide a defense in the event your company is sued for Iran-related contract breaches.



## LATE BREAKING NEWS



### **Europe Plans ‘Special Vehicle’ to Maintain Companies’ Ties to Iran, Avoid U.S. Sanctions**

**The move is a direct rebuke of President Trump’s policy on Iran and his decision to withdraw from the nuclear deal**

EU foreign-policy chief Federica Mogherini and Iran’s Foreign Minister Javad Zarif made the announcement of a “special purpose vehicle” jointly, in English and Farsi, after a meeting at the U.N. of the parties still committed to the deal—Iran, EU, U.K., France, Germany, Russia and China.



## ANOTHER HYPOTHETICAL

- Your company produces goods in India
- You start seeing a sudden spike of sales to Dubai and Turkey and Kuwait
- Should you be worried?

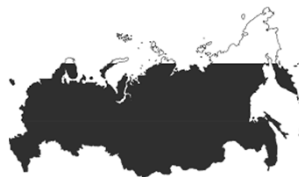


## SUGGESTION

- Talk to you logistics people
- Make sure they know shipping “through” Iran is also a problem
- No good solutions for the “stans”



## RUSSIAN SANCTIONS



- December 2016, sanctions imposed on certain Russian individuals for “malicious cyber-enabled activities”
- August 2017, new sanctions imposed on Russia by the U.S. over its annexation of the Crimea in Ukraine and alleged election interference
- U.S. orders closure of Russian diplomatic headquarters in San Francisco
- Russia order U.S. diplomatic staff in Russia be cut by 755 employees
- During 2018, other Russian companies and persons sanctioned



## RUSSIA PREPARES TO COUNTER



- Effective June 4, 2018
- Countermeasures against “unamicable foreign states”
- No list of such “unamicable states” created yet
- But clearly a “shot across the bow” at the U.S.
- List of products/raw materials this will apply to also not yet available
- July 6, 2018 Russia publishes new tariffs against certain construction equipment products of U.S. origin



## SANCTIONS - RUSSIA

US Says Russia Was Behind Salisbury Nerve Agent Attack, And Will Impose Sanctions



- Russia accused by the UK of using deadly nerve agent to attack former Russian spy living in London
- Tiny amount placed on door knob on front door of his home
- He and daughter (and a cleaning woman) all touched the door knob; all become ill
- Former spy and daughter found unconscious and near death in a nearby park
  - UK and dozens of other countries “kick-out” Russian diplomats over the incident.
  - U.S. eventually bows to pressure and sides with the UK, vows “severe sanctions” if they don’t meet a November deadline to comply with international chemical weapons laws.



## CHEMICAL WEAPONS LAW



- First set of sanctions went into effect August 27, 2018
  - Terminating foreign assistance
  - Prohibiting sales of certain arms and provision of certain financing
  - Prohibiting export of security-sensitive goods and technology
- 1991 Chemical and Biological Weapons Control and Warfare Elimination Act penalizes countries using chemical weapons in violation of international law.
- UK and other countries demand Russia allow chemical weapon inspections by November
- Russia maintains it destroyed all of its chemical weapons last year
  - Criticizes the U.S. for not having decommissioned its own chemical stockpile



## RUSSIA AND NORTH KOREA

- U.S. Ambassador to the United Nations, Nikki Haley, accuses Russia of working to “cover up” breaches of U.N. Sanctions by North Korea.
  - U.N. Security Council’s North Korea sanctions committee prepared a report with details provided by independent sanctions monitors showing North Korea had not stopped its nuclear and missile programs as required.
  - Report also showed North Korea was violating U.N. sanctions on exports.
  - Russia allegedly pressured sanctions monitors to change their report.
  - Russia and China have urged the Security Council to ease sanctions on North Korea



## RUSSIA, CHINA AND NORTH KOREA

- September 13, 2018, U.S. imposes new sanctions against China-based tech firm Yaniban Silverstar Network Technology Company as well as the company’s:
  - North Korean Chief Executive Officer, Jong Song Hwa; and
  - Russia-based sister company, Volasys Silver Star
- “These efforts are intended to stop the flow of illicit revenue to North Korea from overseas information technology workers disguising their true identities and hiding behind front companies, aliases and third-party nationals.”
  - Treasury Secretary Steven Mnuchin



# Export Control Reform



## EXPORT ADMINISTRATION REGULATIONS

- “EAR” for short
- Administered by the Commerce Department’s Bureau of Industry and Security (“BIS”)
- Regulate the export, re-export, and in-country transfer of commercial, dual-use and some military items, technology and services to non U.S. persons
- Each item has an Export Control Classification Number (“ECCN”) on the Commerce Control List (“CCL”)
- Look at ECCNs on the CCL for licensing requirements for export, re-export, or transfer which vary based on destination, ultimate end-user and intended end-use.



# EXPORT CONTROL REFORM ACT OF 2018



- Known as “ECRA”
- Included as part of National Defense Authorization Act for FY 2019
- Effective August 13, 2018
- Establishes permanent statutory basis for existing EAR export controls on commercial, dual-use and some military items.
- Previously kept in force through executive orders under the International Emergency Economic Powers Act (“IEEPA”)



## ECRA

- Commerce Department now required to establish an inter-agency process to identify “emerging and foundational technologies” essential to national security of the U.S.
- New licensing requirements will then be imposed for at least arms embargoed countries (particularly China), possibly more
- Technologies likely to be included:
  - Artificial Intelligence
  - 5G technology
  - Robotics
  - Virtual reality
  - Augmented reality
  - Financial technology



## EMERGING TECHNOLOGIES



- Designed to protect these technologies from foreign espionage
- Intended to address threats from China and Russia
- Factors to be assessed in determining whether a technology is “emerging and foundational”:
  - Development of similar technologies in other countries
  - Impact of export controls on the development in the U.S.
  - Whether controls are effective in limiting proliferation to other countries
- Notice and comment period included in process prior to designation



## LICENSING OF EMERGING TECHNOLOGIES

- Commerce, Departments of Defense, State and Energy charged with reviewing all license applications
- If they don't agree, agencies will resolve application by majority vote
- Designated technologies also subject to additional government scrutiny and potential restrictions
  - Treated as “critical technologies”
  - Separate national security review as a proposed foreign investment
  - CFIUS (Committee on Investment in the United States)



## FOREIGN MILITARY INTELLIGENCE

- ECRA also expands the EAR to control activities of U.S. person, wherever located, relating to “foreign military intelligence services”
- May make dealings by U.S. companies and U.S. nationals relating to such services more complicated as licenses may now be required



## ECRA LICENSING PROCEDURE CHANGES

- New requirement for an assessment of the proposed technology transfer's impact on the U.S. defense industry
- Denial of export license application if there would be a significant negative impact on the U.S. defense industry
- Factors to be assessed include:
  - Any reduction in U.S. production of an item that resulted from R&D funded by the Defense Department



## NEW REQUIREMENTS FOR ARMS EMBARGO COUNTRIES

- Departments of Commerce, Defense, State, Energy and other agencies to review licensing applications for any countries subject to comprehensive U.S. arms embargoes such as China
- Review will include:
  - Scope of EAR controls that apply for military end users and uses
  - Potential controls on CCL list items that don't currently require licenses
- Expect transactions with China and other arms embargoed countries to take longer and be more difficult



## JOINT VENTURES UNDER ECRA

- License applicants who are joint ventures, joint development agreements, other collaborative arrangements required to identify any foreign person with a significant direct or indirect ownership interest in any non-U.S. party to the transaction
- As written, could require submission of detailed information about non-U.S. passive investors even in U.S. incorporated and U.S. controlled ventures



## ECRA CONTINUED...

- Creates a new statutory basis for the EAR's antiboycott provisions (see EAR Part 760)
- Prohibit U.S. persons from supporting unsanctioned boycotts
  - Primarily Arab League of Nations boycott of Israel
- Any requests to support or honor an unsanctioned boycott must be reported to the U.S. Commerce Department on a quarterly basis



## INCREASED PENALTIES

- Violations of the act and its regulations increased to \$300,000 per violation or half the value of the transaction, whichever is higher.
- Criminal penalties for willful violations remain \$1,000,000 per violation or twice the value of the gain or loss from the transaction, whichever is greater AND up to 20 years in prison



## NEW BEST PRACTICES GUIDE

- ECRA requires the Commerce Department to publish and keep updated a new set of “best practices” guidelines
- Designed to assist companies in developing an effective export compliance program
- An effective compliance program and a “high quality overall export compliance effort” are two factors given weight as mitigating factors in a civil penalty proceeding under ECRA



## Customs



## C-TPAT PROGRAM



- Customs Trade Partnership Against Terrorism Program
- A voluntary public-private sector partnership program which recognizes that CBP can provide the highest level of cargo security by working in close cooperation with the principle stakeholders of the international supply chain such as importers
- Participants agree to maintain a high level of security throughout their supply chain
- In exchange, they are considered “lower risk” and are less likely to be subjected to scrutiny at U.S. ports of entry



## REQUIREMENTS

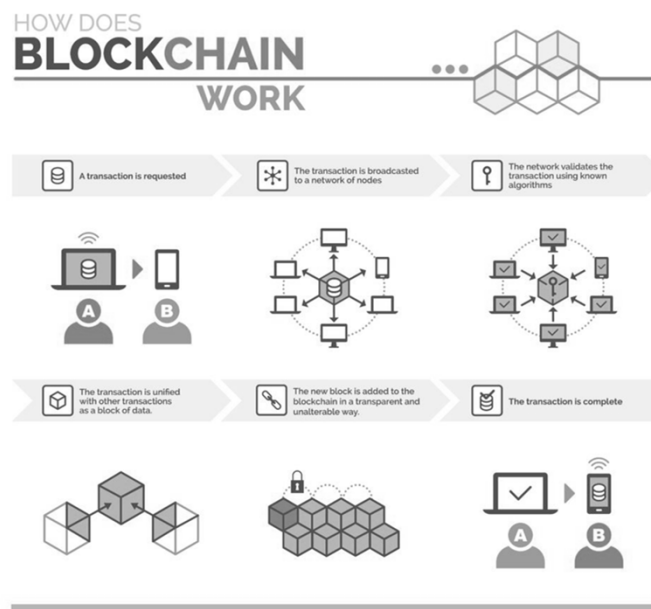


- Minimum Security Criteria and Guidelines
- Modified in June, 2018
- New Trade Based Money Laundering Prevention requirements
- 12 different categories of requirements
- You can find the updates here:
- <https://www.cbp.gov/border-security/ports-entry/cargo-security/c-tpat-customs-trade-partnership-against-terrorism/apply/security-criteria#>



# BLOCKCHAIN

- If you don't know what it is, you should!
- U.S. Customs and Border Protection announced August, 2018 it will start testing use of Blockchain for certificates of origin
- Moving towards paper-free customs transactions?



## EXPORT ENFORCEMENT CASES



- Seiler Instrument
- \$1.5M in fines
- Defense contractor fined for use of optical materials imported from China
- Used them weapons sights which they manufactured under a series of contracts with the Department of Defense
- Company admits the parts were improperly certified as compliant with the Buy American Act
- Company agreed to a pretrial diversion agreement in which it further agreed to enter a plea of guilty to a false statement charge in the event that the company does not meet the full terms of the agreement



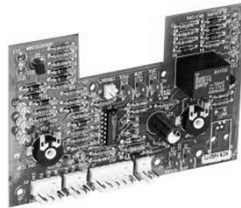
## EXPORT ENFORCEMENT CASES

- Yi-Chi Shih, 62, an electrical engineer who was a part-time Los Angeles resident, and Kiet Ahn Mai, 63, of Pasadena
- Shih and Mai conspired to illegally provide Shih with unauthorized access to a protected computer of a United States company that manufactured specialized, high-speed computer chips known as monolithic microwave integrated circuits (MMICs).
- The conspiracy count also alleges that the two men engaged in mail fraud, wire fraud and international money laundering to further the scheme.



## EXPORT ENFORCEMENT CASES

- Peter Zuccarelli, 62, of Plano, Texas was sentenced to 46 months in prison
- Conspiring to smuggle and illegally export from the U.S. in violation of the International Emergency Economic Powers Act (IEEPA), radiation hardened integrated circuits (RHICs)
- Used in the space programs of China and Russia.
- Zuccarelli also sentenced to three years supervised release and a \$50,000 fine.



## EXPORT ENFORCEMENT CASES



- Turkish national Gulnihal Yegane and three affiliated Turkish companies who are involved in illicitly procuring and supplying Iranian airlines with U.S.-origin aircraft engines and spare parts.
- The action, called a “temporary denial order” (TDO), suspends the export privileges of Gulnihal Yegane (“Yegane”), Trigron Lojistik Kargo Limited Sirketi (“Trigron”), Ufuk Avia Lojistik Limited Sirketi (“Ufuk Avia”), and RA Havacilik Lojistik Ve Tasimacilik Ticaret Limited Sirketi (“RA Havacilik”).
- Yegane is actively involved in the illicit procurement of U.S.-origin aircraft engines and spare parts (ECCN 9A991) for Iranian airlines and has taken extensive steps to continue this activity while attempting to conceal her involvement



## EXPORT ENFORCEMENT CASES



- A Chinese national was arrested and charged in connection with violating export laws by conspiring with employees of an entity affiliated with the People's Liberation Army (PLA) to illegally export U.S. origin goods to China
- Also made false statements to obtain a visa to enter the United States and to become a lawful permanent resident under the EB-5 Immigrant Investor Visa Program
- From at least July 2015 to December 2016, Qin allegedly exported approximately 78 hydrophones (devices used to detect and monitor sound underwater) and used in submarine technology



## Foreign Trade Zones

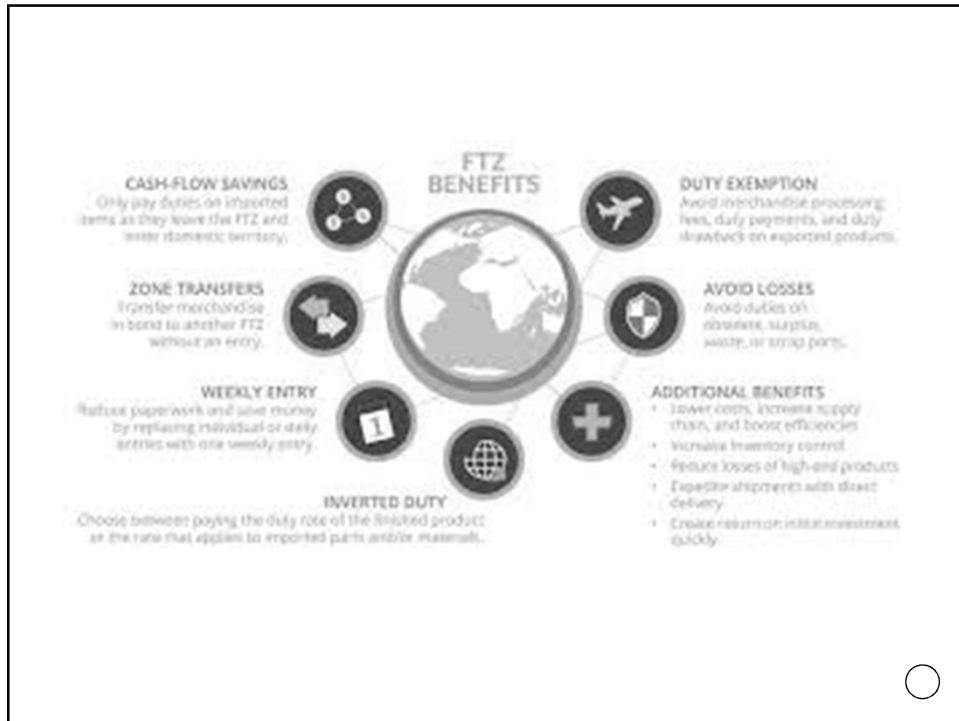


# FOREIGN TRADE ZONES



- What is a Foreign Trade Zone?
  - A warehouse or facility within a designated and authorized "Zone"
  - Bonded and subject to C-TPAT (Customs and Trade Partnership Against Terrorism), high level security and premises access requirements
  - Items imported into the "Zone" are not considered to have "entered the commerce of the United States"
  - Can be incorporated (substantially transformed) into another product and you never have to pay duty on that item
  - Can save significant amounts in duty
  - Strict rules about what can and cannot enter a zone and what work can and cannot be performed in a zone.
  - Meticulous record keeping required





## FOREIGN TRADE ZONE



- Must apply to join a “Zone”
- Foreign Trade Zone Board under CBP grants membership
- Must obtain specific authority to bring items into the zone and to perform manufacturing or assembly in the zone
- If you import items into the Zone or perform manufacturing or assembly other than as provided for in your authorization, you will be deemed to have violated your Zone authorization
- Voluntary self-disclosure required

# Hypotheticals



## COMPANY HYPOTHETICALS



### Recommended Methodology:

- Analyze the “flow” or “steps” in the transaction
- Where are the risks?
- What regulations do you need to know?
- Are there areas of overlap?
- How will you minimize your risk?



## NUMBER 1



- You are a U.S. manufacturer listed on the NYSE. You have multiple European manufacturing sites. One of your dealers is based in Turkey and has been your dealer for years. You have another dealer located in Dubai. You notice through warranty records that some of the products sold to the Turkish Dealer are being transferred to the dealership in Dubai. What potential International Trade Compliance issues do you see and how can you mitigate them?



## RISKS/ISSUES

- Sanctions avoidance
- Diversion
- Money Laundering
- Things to ask:
  - Is there U.S. or EU content?
  - Are the dealers related? Who are the UBO's of these dealers?
  - Which banks are they using?
- Potential Mitigation:
  - Get end-user certifications
  - Perform diligence on both dealers



## NUMBER 2



- Your company manufactures buses in the U.S. You order certain sub-assemblies for your buses from. These sub-assemblies are needed to keep your U.S. manufacturing line “up” and running and in order to meet your manufacturing schedules so you can meet customer delivery dates.
- The sub-assemblies are stopped at the border due to issues with the wooden crates the sub-assemblies were shipped in. Can this issue be mitigated? How can you avoid it from happening again?



## RISKS/ISSUES



- U.S. Customs rules require that any wood products to enter the United States, including shipping pallets and containers, must have been fumigated to kill potentially invasive pests
- If wood materials aren't stamped indicating certification, they can't enter the U.S. and neither can the products being transported on/in them
- Solution:
  - Return products to the vendor, have them re-ship at their cost
  - Does your supply agreement have indemnification for this issue?
  - Who covers cost of idled production line?



## OTHER ISSUE?



- What is the country of origin of these goods?
- Is it China?
- If so, are these goods subject to the U.S. tariffs in place against China?
- If so, what is the additional tariff cost?
- Should you be considering sourcing these from elsewhere instead?



## NUMBER 3



- Your sales department wants to ship a 3D Printer from the U.S. to a consignment company in the Middle East. When you ask why, the consignment company tells you the in-region distributor wants to speed-up the delivery process and the end-user customer is in a big hurry and needs the equipment immediately. What potential International Trade Compliance issues do you see and how will you mitigate them?



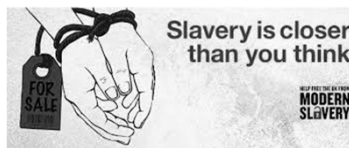
## RISKS/ISSUES



- Hiding of end-user
- Is end-user subject to sanctions/export controls?
- Is the product going to be diverted or re-exported to a sanctioned country?
- Potential Mitigation:
  - Demand end-user certificate
  - Demand compliance certification from all parties involved in the transaction



## NUMBER 4



- You work for a big-box retail company that internationally sources many of its goods and sells everything from tires to oranges. You receive service of process for a lawsuit filed against your company in California.
- The case has been filed by a group of individual consumers seeking to certify as a class. They claim the chocolate you sell in your stores is grown and harvested in South America using slave labor in direct contravention of statements made by your company in its annual sustainability report. What do you need to be aware of?



## RISKS/ISSUES



- Could there be merit to the allegations?
- Do you do business in the UK? (Modern Slavery Act)
- Are you “doing business” in California? (California Transparency in Supply Chain Act)
- Have you conducted a risk assessment?
- Have you conducted diligence on your supply chain?
- Are you supplying any of the chocolate to U.S. government department?
  - FAR and DFAR rules related to Human Trafficking



## NUMBER 5



- You work in the compliance department for a large multi-national in the oil and gas industry. You are responsible for management of the company's helpline investigations.
- You receive an allegation of potential wrongdoing in the company's facility in the Netherlands. The allegation concerns pricing irregularities including the proper accounting for certain royalty payments. In addition there is uncertainty about from where some product is sourced. It is a small office with people often wearing multiple hats. How will you respond?



## RISKS/ISSUES

- If you aren't sure where product is sourced, customs duties calculations could be inaccurate
- If you aren't including/correctly calculating royalty payments (assists) then your valuation is likely wrong
- Duty underpayment?
- FCPA/UK Bribery Issue (Books and Records, Adequate Controls?)
- Voluntary Self-Disclosure?
- Audit?
- Adequate compliance program?



## NUMBER 6



- You are on a deal-team working on the potential acquisition of a battery and light bulb manufacturing company in South Korea by a U.S. company.
- The target sources raw materials from multiple countries. One of their biggest suppliers is a mining company based in Indonesia that provides lead for the batteries. They also source chemicals from Japan, Germany and Brazil.
- The target exports finished goods to Japan, the UK, Myanmar, Vietnam, Taiwan and China. What potential International Trade Compliance issues do you see and how will you mitigate them?



## RISKS/ISSUES



- Conflict Minerals?
- Human Trafficking?
- REACH?
- ITAR?
- Export licensing requirements from South Korea?
- Import duties/licensing requirements from customer countries?
- UK – Brexit impact?
- Counter-tariffs imposed by South Korea on U.S.



## NUMBER 7



- You are a U.S. manufacturing company listed on the NYSE with offices and manufacturing sites around the world.
- You receive a call from someone working on one of your manufacturing plants in Nebraska. He tells you he received an email from a large customer (another U.S. company) asking them to find a different supplier of glass components because they “can’t” sell products with that glass in the Middle East.
- What issues do you see with this? How do you address?



## RISKS/ISSUES



- Is glass marked with a country of origin?
- Is the country of origin Israel?
- U.S. Antiboycott regulations apply
- Cannot make changes to products or suppliers based on Middle East's boycott of Israel.
- Request must be disclosed and reported in a Quarterly Boycott Request Form
  - <https://www.bis.doc.gov/index.php/enforcement/oac>



## NUMBER 8



- You manufacture delivery vans. The U.S. Army asks to order 500 of these vans but they want to increase the horsepower of the engines to 425 hp and they want them painted in CARC paint (camouflage paint) and also ask that a special reinforcement be built around the gas tank to protect it from gunfire and IEDs.
- What issues do you see? What will you need to do to be compliant?



## RISKS/ISSUES



- Military customer
- Military modifications? Do these changes serve a “military purpose?”
- ITAR registration
- Government Contract – Human Trafficking Compliance Requirements in the FAR and DFAR
- TAA needed?
- Deemed export risks
- Export license exception for sale to U.S. government in foreign locations



## NUMBER 9



- You work for a Midwest manufacturing company in the U.S. A large and prestigious University has just reached-out to your engineering group and asked them to participate in a research and development project relating to autonomous “self driving” vehicles.
- The University has received a federal research grant and wants to partner with your engineers on the development of new satellite guided vehicles. Your engineering group is excited about this high profile opportunity. What do you need to be concerned about?



## RISKS/ISSUES



dreamstime.com

- Is the technology to be developed likely to be controlled technology?
- Is the University private or public?
- What are the terms of the grant?
- Are any of the engineering team non- U.S. persons?
- Are any of the students or professors who will be working on the project non U.S. persons?
- Will an export license or TAA be required?



## NUMBER 10



- Your company decides to centralize its purchasing function and have all components purchased through a central team in Europe.
- Among the components that are purchased are metal washers and connectors used to build one of your products.
- Your purchasing function purchases components from all over the world to minimize the potential risks associated with "sole sourcing". After these parts are purchased by the European team, they are held in a centralized warehouse and then shipped out to the various manufacturing sites around the world. What issues might there be with this?



## **RISKS/ISSUES**

- Warehouse rule?
- Free Trade Agreement Qualification?
- Country of Origin Tracking
- ADCV Issues?



## **BACKUP MATERIALS**

## WHAT DOES THE TERM “TRADE COMPLIANCE” MEAN?

- International Trade: “The Buying and Selling of Goods and Services across International Borders\*”

+

- Compliance: “Conformity in Fulfilling Official Requirements\*”

=

“Fulfilling of official requirements when buying and selling goods or services across international borders”

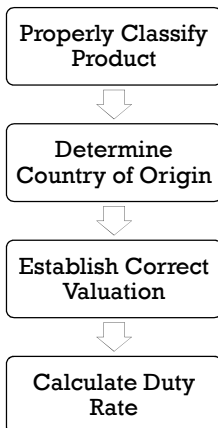
\*Source: Webster's Dictionary

## IMPORTS

- Bringing product or components into a country from another country
- May be subject to tariffs or duties
- May be subject to Anti-Dumping, Countervailing Duties
  - e.g. Chinese Steel
- May required certain certifications or conformity with U.S. regulations (e.g. engines)
- Primary agency: U.S. Customs



## IMPORT PROCESS OVERVIEW



## CLASSIFICATION



- All products imported into the United States must be classified using the Harmonized Tariff Code System (Often referred to as the HTS Code)
- Different codes are subject to different duties depending on their country of origin (COO)
  - 8701 Tractors (other than tractors of heading 8709):
    - 8701.90 Other:
      - 8701.90.10 Suitable for agricultural use
- Duty is calculated using the value of the goods being imported



**Compliance Tip:** Have an outside expert/broker/law firm audit your customs classifications on a regular cadence. Include country of origin marking requirements as part of your purchasing contracts and audit for same.



# IMPORT VALUATION



Customs duty is levied on the value of the goods at the time of import, which should include:

**Commissions**

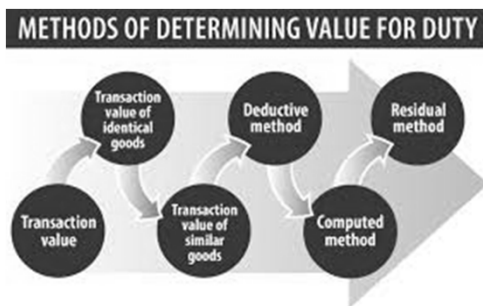
**Royalties & License Fees**

**Assists**

**Packing Costs & Proceeds**



# VALUATION METHODS



Key take-away: Hire yourself good customs counsel!



## CUSTOMS BASICS:



- High-Level Best Practices:
  - The importer of goods into the US is responsible for taking reasonable care to ensure the information declared to US Customs is accurate.
  - Errors can lead to under and over payments of duty to US customs.
  - US Customs can levy penalties and interest on errors and underpayments.
  - Working closely with your third parties on key customs issues mitigates and reduces risk
  - Country of Origin must be tracked and indelibly marked on most goods



## FREE TRADE AGREEMENTS



- What is a Free Trade Agreement?
  - Agreement between various countries to give each other “free” access to each other’s markets
  - Normally reduced or “preferential” duty rates (often no duty at all for certain types of products)
  - Limited only to agreement participants who “qualify”
  - To qualify under some agreements, must be able to prove local content value (e.g. Mercosur)

NAFTA  
North American Free Trade Agreement



## EXPORT CONTROL CONCERNS



- The US Government carefully controls the export of controlled US products and technology. Exports to vendors of technology or other assists may be controlled.
  - Even if controlled, goods and technology may be exported with the appropriate license from the US Government. Conditions of the license may restrict certain activities once exported.
  - It is a good practice to review how third parties treat and handle controlled technology and whether further exports are being made.
  - Beware of re-export and diversion potential
  - Beware of “deemed exports”
  - Primary Government Agency: BIS (Bureau of Industry and Security at the U.S. Department of Commerce)



## WHAT IS “CONTROLLED” TECHNOLOGY?



- EAR = Export Administration Regulations (15 CFR §§730-774)
- Also referred to as “Dual Use” technology
- Determine the ECCN (Export Control Classification Number) of your item on the CCL (Commerce Control List)
  - A five character number designates the type of product
  - <https://www.bis.doc.gov/index.php/licensing/commerce-control-list-classification/export-control-classification-number-eccn>



## COUNTRY CHART

- Check the Commerce Department's "Country Chart " to see if your good is controlled for export
  - <https://www.bis.doc.gov/index.php/forms-documents/regulations-docs/14-commerce-country-chart/file...\\Trade Compliance\\country chart.pdf>



## EXAMPLE



- Diesel Engines
  - 9A990
    - **License Requirements**
    - *Reason for Control: AT*
    - *Control(s) Country Chart (See Supp. No. 1 to part 738).*
  - **Commerce Control List Supplement No. 1 to Part 774 Category 9—page 26**
  - **Export Administration Regulations Bureau of Industry and Security August 15, 2017**
  - AT applies to entire entry except 9A990.a
  - AT Column 1
  - AT applies to 9A990.a only AT Column 2

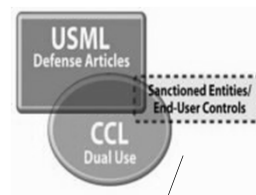


**ITAR**

- International Traffic in Arms Regulations
  - United States Munitions List
- Special export controls apply to all goods and services for military projects
- Anything designed for military use
- Any commercial design “modified” for military purpose or use
- Skid Steer Example
- TAA (Technical Assistance Agreement) required to provide information or services related to a military good or service



# EAR 99



- Not on the CCL or USML?
- Then it's EAR 99
- Not “controlled” for export
- Can be exported without obtaining a product-based license

## HOWEVER

## Trade Sanctions still apply and may require a license



## TRADE SANCTIONS



- “List of Lists”
- Country-level sanctions/embargos
  - For example, entire country of North Korea
- Individual (person) or Entity (company) based sanctions
  - DPL
  - SDN
  - <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>



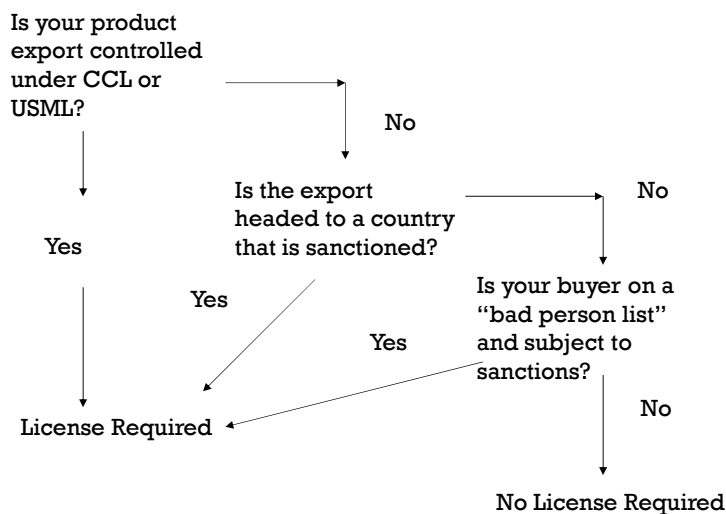
## DEEMED EXPORTS



- Controlled technology
- Being manufactured here in the U.S.
- Foreign employees who are not U.S. citizens or permanent green card holders work for you
- Allowing them access to plans, technical information, engineering designs, is considered an “export” of controlled technology to their home country
- U.S. employees sits next to employee from China. Opens plans to new encryption system on his desk and invites employee from China to review. Plans have just been “exported” to China without a license.



## EXPORT LICENSE DECISION TREE

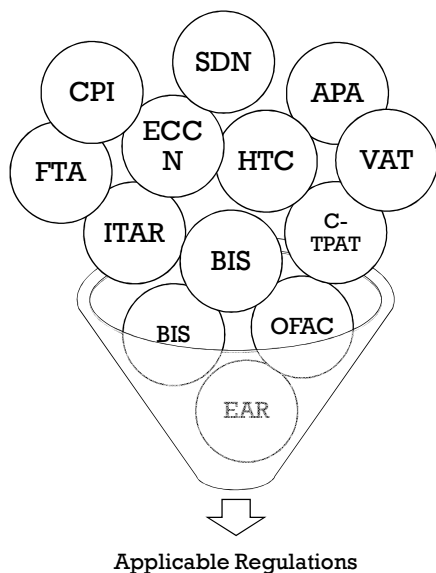


## SCREENING PROGRAM



- The only way you can be sure you are not selling or shipping to a sanctioned party or person is to screen
- Type/extent of screening solution will depend on your company's specific business and risk appetite
- Manual screening process can be used, but is it sufficient?
- Many different tools out there to automate
- Make sure you are re-screening at a regular cadence, lists change all the time!

## SO MANY ACRONYMS, SO LITTLE TIME!



## WHICH REQUIREMENTS APPLY TO YOU?

STEP 1

STEP 2

STEP 3

- Depends on your transaction/industry
- Break your transaction down into “steps”
  - Sale of a product or a service? To whom? Who is the end user? Are they in a high risk country or industry? Is the good or service controlled?
  - Purchase of a product or a service? From whom? Who is the supplier? Are they in a high risk country or industry? Is the good or service controlled?
  - Shipping of product or travel for service delivery required? To where?
  - Permitting or licensing requirements from the source country?
  - Permitting or licensing requirements in the destination country?
  - Duties to be paid upon entry of goods in destination country?
  - Method of payment for product or service
  - Will product or service be re-sold or distributed outside of the United States?
  - After-sale support or warranty services likely?
  - Disposal of product at end of life

## LOCATION BASED CONSIDERATIONS



- Where does your product or service originate from?
  - Do any content rules apply?
- Where is it now?
  - Are there permits or licenses required by the country I'm exporting from?
- Where is it going?
  - Are there permits/licenses required by the country I'm shipping to?
  - Are there country sanctions or boycotts that apply?



## CUSTOMER BASED CONSIDERATIONS

- Who is the buyer?
  - Is your buyer on any sanctions list?
  - Have you checked for AML/KYC compliance?
  - Is the buyer a government entity?
  - Is the buyer in a high-risk country?
  - Is the buyer a PEP?
- Are they the end-user?
  - Do you need an end-user certificate from them?
- Will they be reselling your product/service?
  - Due Diligence
- How will they pay for their purchase?
  - LOC language acceptable?



## PRODUCT BASED CONSIDERATIONS

- What is the product?
  - Is it controlled?
    - Do I need a license or special permission to sell this?
  - Does ITAR apply?
    - Do I need State Department approval to sell this?
  - Does it have Conflict Mineral content?
  - Does REACH apply?
  - Are there end-of-life requirements?
  - Who will provide warranty service?
  - Are there duties or VAT that apply?



## SHIPPING/LOGISTICS CONSIDERATIONS

- Who is the Exporter of Record?
- Who is the Importer of Record?
- Under which Incoterms are the items shipping?
  - Who bears the risk of loss?
- Who is responsible for clearing customs?
- Are you using a freight forwarder or customs broker?
  - Does your agreement with them indemnify you for their errors?
- How are the good being transported? Air? Land? Sea? Intermodal?



# INCOTERMS

- Logistics “shorthand”
- Not just for fun
- Real liability implications
- <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/>



**Incoterms® 2010**  
by the International Chamber of Commerce (ICC)



# SALE OF SERVICES CONSIDERATIONS

- What are the services?
  - Are they controlled?
  - Does ITAR apply?
  - Do you need a TAA?
- Is there an intermediary, subcontractor or dealer involved?
  - Where is the intermediary located?
  - How are they being paid?



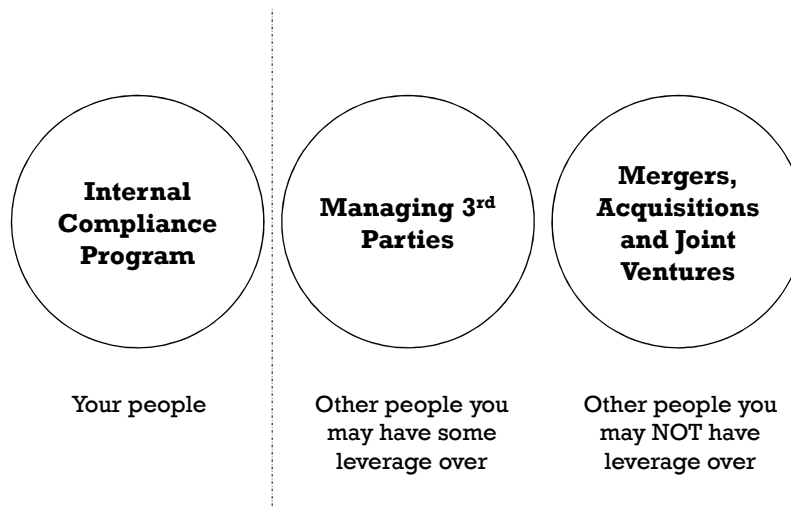
# CORRUPTION RISK

- Corruption Perception Index published by Transparency International

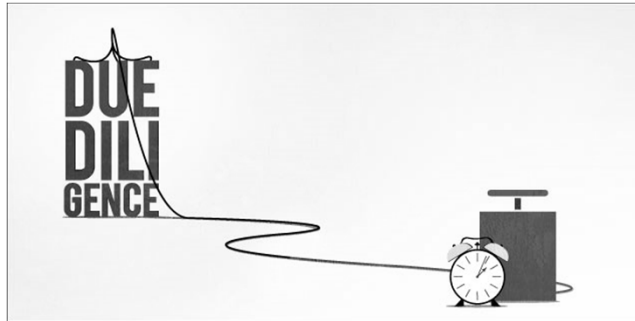
[https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](https://www.transparency.org/news/feature/corruption_perceptions_index_2016)



# INTERNATIONAL TRADE CONSIDERATIONS



# DUE DILIGENCE



## A NOTE ABOUT THIRD PARTY MANAGEMENT

It is critical that there are processes and controls to manage your 3<sup>rd</sup> parties, both on the sale and on the purchasing side.

Process Category	Process Description
1. Identification & Qualification	1.1 Company has a process in place for identifying potential at risk 3rd parties
	1.2 This identification process is cross-functionally validated
	1.3 A formal due diligence process is in place that includes a 3 <sup>rd</sup> party risk ranking based on likelihood of government interaction, region, size, nature of service. The due diligence includes sanction screening, adverse media search, whether the 3 <sup>rd</sup> party has government affiliations when required.
	1.4 There is a function or person responsible for overseeing risk based due diligence
2. Contracting & OnBoarding	2.1 Company uses standardized contracts that include terms and conditions that include anti-bribery and corruption provisions, trade compliance, anti-money laundering and right to audit and assignment clauses.
	2.2 Deviations from standard contracts are reviewed by Legal and Finance if necessary.
	2.3 The on-boarding process is automated, captures key information related to the third party.
3. Monitoring & Oversight	3.1 Company has assigned persons to manage the 3rd party relationship.
	3.2 There are KPI's to evaluate the 3rd party.
	3.3 Contracts are properly retained either electronically or manually.
4. Renewals	4.1 There is a contract renewal process in place.
	4.2 Contracts have a renewal date that requires 3 <sup>rd</sup> parties to go through a assessment.
	4.3 As part of the renewal process, the appropriate risk-based due diligence is performed on the 3 <sup>rd</sup> party as deemed necessary. This would include sanction screening, adverse media search and government affiliations.

## INTERNATIONAL TRADE CONSIDERATIONS



Consider the “Homeowner” Analogy



## SOLUTION?

- Detailed Risk Assessment
- Specific to:
  - Your company
  - Your markets
  - Your products
  - Your customers
- GAP Analysis
- Prioritize “fixes” over multi-year plan



## QUESTIONS?



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