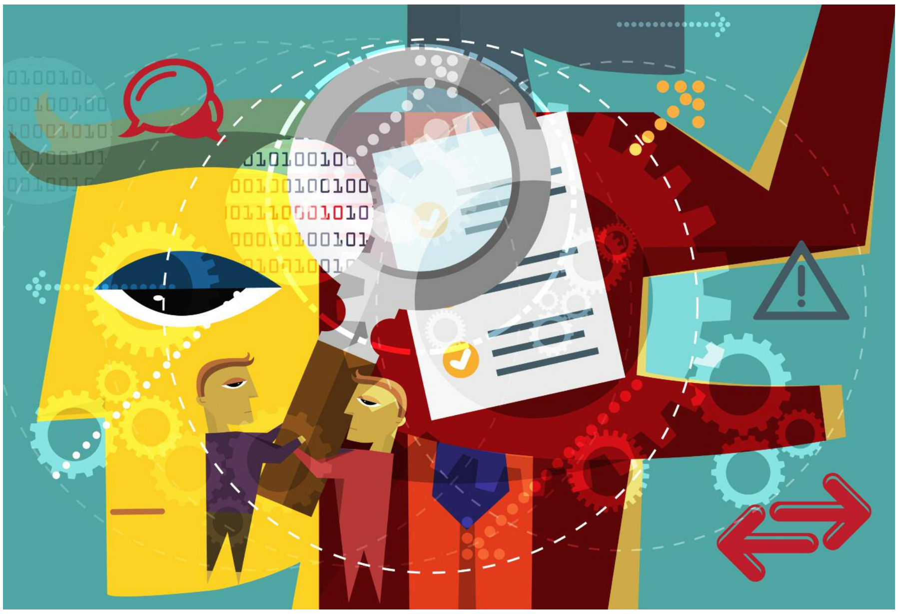

STEPTOE OUTSIDE COUNSEL

How to keep up with export controls in times of change

Global supply chains are shifting rapidly amid the ongoing public health and economic crisis caused by Covid-19. Even before the pandemic, manufacturers were shifting production in response to the US-China trade dispute. Here are a few handy reminders to mitigate the export control risk arising from changes to your supply chain.

1. EAR check-Up

When entering into new supplier or customer relationships, take a moment to consider how the US Export Administration Regulations ("EAR") might apply. This is especially important when the relationship involves a country with which you have not previously done business because many EAR license requirements are country-based.

The EAR apply to the export, reexport and in-country transfer of items (including commodities, software, and technology) that are "subject to the EAR", including US-origin items and items produced outside the United States that contain US content or are made with US technology. Key considerations include the classification of the items under the EAR, the end destination, end-user, and end use – all of which can affect the licensing requirements. The analysis can be complicated and if a license is required, the application process takes time.

Generally, if a non-US company procures a US-origin item, the US exporter is responsible for the initial licensing determination, obtaining the export license to transfer the item (if needed), or identifying a license exception. Non-US companies should look out for any restrictions conveyed by their US suppliers on reexports or retransfers of controlled items. Ultimately, the non-US company is responsible for complying with applicable US and local laws.

2. Licenses and license exceptions

If you received a license from the US Bureau of Industry and Security ("BIS") for the export of a US-origin item to one counterparty, you may not transfer that license to another counterparty without prior authorization from BIS. As explained in the EAR at §750.10, BIS may authorize a transfer of a license, but only to a person subject to the jurisdiction of the United States. BIS will approve only one transfer of the same license.

Instructions for requesting a license transfer are found in the EAR at §750.10. If you require a license for a new counterparty, and it is not eligible for a transfer, you may need to seek a new license from BIS by following the instructions in the EAR at Part 748.

Similarly, specific licenses issued by the US Office of Foreign Assets Control ("OFAC") may only be relied upon by persons identified in the license, unless otherwise specified. Acting outside the scope of a BIS or OFAC license can result in a regulatory violation leading to penalty, a revocation of existing licenses, or denial of future licenses.

If your business is conducted under an EAR license exception or an OFAC general license ("GL"), you would need just to confirm that your new counterparty meets all of the requirements of the relevant provision.

3. Due diligence

Due diligence of new suppliers and customers is essential to identifying and controlling potential risks in your modified supply chain. Such risks include exposure to sanctioned or restricted persons or territories or diversion of controlled items to prohibited destinations, end-users, or end uses. Factors to consider include (but are not limited to):

- Inclusion of the counterparty or its affiliates, beneficial owners, or controlling persons on lists of restricted parties;
- Exposure to persons or territories subject to sanctions or export control;
- Sufficiency of the counterparty's compliance program;
- Past or ongoing violations or ongoing investigations.

Once a "red flag" has been spotted, you should follow up to rule out potential risks or identify mitigating factors. Keep records of due diligence performed, supporting documents, and related communications to justify your decision making. Contractual representations and undertakings can help confirm facts about the counterparty, their past activities, and their commitments to compliance for the duration of the new commercial relationship. Representations are only as good as the due diligence used to verify them.

Process is king when it comes to managing export controls risks. ■

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