

Top International Trade Compliance Lessons From 2014

by Brett W. Johnson and Sarah E. Delaney

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In 2014, international trade issues have played a major role in global news. As in years past, there has been a significant amount of increased regulatory development under the auspices of export control reform and changes to governmental systems facilitating international trade. There has also been an influx of increased trade regulations and enforcement cases, such as the new Russia export restrictions, the fifth largest Foreign Corrupt Practices Act settlement since the law's creation, and congressional debates over increasing Iranian sanctions. Below is a quick sampling of the critical cases from the past year, and what they mean for future international trade compliance.

Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 et seq., was enacted in 1977. Administered jointly by the U.S. Department of Justice and the U.S. Securities and Exchange Commission, the FCPA has two primary components: anti-bribery provisions and accounting provisions. Under the FCPA, it is unlawful for companies and individuals to make payments of any item of value to foreign officials in exchange for influence or business opportunities, and also requires that foreign companies with U.S.-listed securities follow FCPA accounting provisions. Those who violate the FCPA are subject to significant fines and prison time.

Although actual FCPA prosecutions may have decreased in 2014, the year has still brought several large FCPA settlements. Of note, the Alcoa World Alumina LLC settlement in January was the fifth largest FCPA settlement of all time, at \$384 million in fines, forfeiture, and disgorgement in parallel civil and criminal actions brought by the DOJ and SEC. Alcoa pled guilty to one count of violating the anti-bribery provisions of the FCPA, when its Australian subsidiary hired a London-based middleman with close ties to Bahrain's royal family as a sham sales agent paid "commission" to conceal millions in bribe payments to key Bahraini government officials in exchange for business from the government-controlled aluminum smelter. The SEC investigation also determined that Alcoa lacked sufficient internal controls to prevent and detect the bribes.

This case demonstrates the importance of extensive oversight over foreign subsidiaries of U.S. companies and application of strict procedures regarding their financial operations — even though the SEC administrative order had no findings that any officer, director, or employee of Alcoa knowingly engaged in the bribery scheme, their subsidiaries and employees served as "agents" for purposes of the parent company's liability.

Office of Foreign Assets Controls

The Office of Foreign Assets Control is an agency within the U.S. Department of the Treasury. OFAC administers economic and trade sanctions against foreign states, organizations, and individuals in support of U.S. foreign policy and national security goals. OFAC operates under the president's emergency powers to impose controls on foreign transactions and freeze assets under U.S. jurisdiction, such as the now famous Russian sanctions that have caused significant ripples through the international energy trading circles. OFAC also develops regulations to direct financial institutions on correctly adhering to the sanctions regimes.

In one of the most significant cases this year, BNP Paribas agreed to pay \$963.6 million in settlement for 3,897 apparent violations of the Sudanese Sanctions Regulations, the Iranian Transactions and Sanctions Regulations, the Cuban Assets Control Regulations, and the Burmese Sanctions Regulations; it could have faced more than \$19 billion in penalties had it not settled.

The bank processed thousands of transactions through U.S. financial institutions over several years which involved entities and individuals subject to these sanctions programs. OFAC asked for such a large penalty because it determined BNP Paribas both did not voluntarily self-disclose the violations and engaged in a systemic practice to conceal and obscure these transactions to avoid identifying the sanctioned parties in payments sent to U.S. financial institutions. OFAC also found BNP Paribas acted with reckless disregard for U.S. sanctions regulations and did not maintain appropriate procedures or internal controls to ensure compliance. However, this case demonstrates that mitigation is always a possibility for those who play nicely — BNP's penalty was likely reduced because it cooperated with OFAC's investigation and took remedial action based on the findings. It would likely have been reduced further if they had voluntarily disclosed.

Directorate of Defense Trade Controls

The Directorate of Defense Trade Controls is part of the U.S. State Department. The DDTC controls the export/import of defense articles and services under the U.S. Munitions List, in accordance with 22 U.S.C. §§ 2778-2780 of the Arms Export Control Act and the International Traffic in Arms Regulation. The directorate also works to help the U.S. defense trade support both national security and foreign policy interests, and to prevent America's enemies from accessing our defense technology.

In order to export certain technology, U.S. defense firms must receive a license from the DDTC. Between January and November

2014, the DDTC received more than 55,000 cases, with each case processed within 22 days, on average. This was a reduction in both number of cases and average processing speed from the same period in 2013, which saw 73,563 cases and an average speed of 19 days to process. However, for those companies who do not receive a license and export anyway, they can face severe penalties.

For example, the DDTC settled this past year with Intersil Corporation for \$10 million in penalties and numerous compliance requirements. The DDTC determined that Intersil had re-exported thousands of integrated circuits, used in high-technology products like satellites, without authorization to customers in China and to customers who were known fronts for Iran, and that these circuits may have been used in foreign military satellites. Although the exports appear to have been the result of Intersil's accidental misclassification of the circuits under U.S. law, most of the exports would have been acceptable if the company had a license, and the company voluntarily disclosed the violations, Intersil still was required to submit to significant financial and administrative penalties. The important take away for the case are the continued importance of correct classifications and well drafted voluntary disclosures.

Bureau of Industry and Security

The Bureau of Industry and Security, an agency of the U.S. Department of Commerce, focuses on protecting U.S. security by preventing the spread of U.S. technology and military weapons to terrorists and certain foreign regimes. BIS regulates the export of sensitive goods and dual-use technology; enforces export control, anti-boycott, and public safety laws; and promotes policies to stop the proliferations of weapons of mass destruction. In addition, the Bureau assists U.S. industry in following international arms control agreements, encourages the development of a strong defense-industrial base to create new technologies, and promotes public-private partnerships to protect America's infrastructure.

BIS continues to play a large role in international trade compliance as more countries and foreign regimes are regulated under the Export Administration Regulations. For example, a UAE freight forwarder, Aramex Emirates LLC, paid a \$125,000 civil penalty to BIS for the unlicensed export and re-export of network devices and software to Syria. Aramex Emirates served as a middleman, receiving the shipments in the UAE and forwarding them to Syria,

despite companywide guidance advising employees not to move American products into Syria. The case shows that company management cannot simply pass out information about international trade regulations and assume employees will follow it; instead, companies should create detailed procedures to train staff and engage in due diligence to verify that the company policies are being followed.

Office of Anti-Boycott Compliance

The Office of Anti-Boycott Compliance is a department within BIS, charged with administering and enforcing the anti-boycott laws under the Export Administration Act. These laws prevent U.S. companies and individuals from supporting the Israeli boycott sponsored by the Arab League, or any other foreign boycotts not supported by the United States. The Office's purpose is to prevent U.S. firms from being used to implement foreign policies counter to U.S. goals.

As more and more countries stop officially supporting the Israeli boycott, OAC generally prosecutes only a few cases annually. As of early November, OAC had enacted proceedings against three companies.

Of note, OAC initiated administrative proceedings against Electro-Motive Diesel Inc., for 31 violations of failing to timely report requests by its Bangladeshi contacts to participate in a non-U.S. sanctioned boycott of Israel. In August, Electro-Motive Diesel, Inc., agreed to pay a \$26,350 civil penalty as a condition to restore its exporting privileges. By agreeing to pay the penalty, the company avoided any potential criminal liability or additional judicial penalties requested by the DOJ. This case highlights the importance of prompt reporting (and at least quarterly) to the BIS of any request to comply with an unsanctioned boycott, for while the penalty was not substantial, the possibility of losing exporting capabilities and other ramifications could be crippling for a company.

In sum, these cases demonstrate the power of U.S. agencies to enforce international trade regulations, and the massive penalties corporations face for failing to follow the rules. As we prepare for a new year and its new economic opportunities, smart companies will take time to evaluate their internal policies and procedures to ensure compliance with international trade requirements — lest they find themselves on this list at the end of 2015.



Brett W. Johnson
602.382.6312 | bwjohnson@swlaw.com

Brett Johnson is a partner in the Phoenix office of Snell & Wilmer. He represents businesses and individuals in government relations matters. His practice includes government regulatory compliance, export, government contracting, political and election law, and healthcare matters, including professional liability defense and commercial litigation.



Sarah E. Delaney
602.382.6231 | sdelaney@swlaw.com

Sarah Delaney is an associate in the Phoenix office of Snell & Wilmer. She focuses her practice on commercial litigation.