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Internal Compliance Program - Series (22) - Diversion Risk Screening

Today, in the hands-on practical advice series on Internal Compliance Programs for Export Control:

Part 22: Diversion Risk Screening

One of the most significant export control issues facing exporting companies today is illegal diversion risk. Simply defined, illegal diversion is when your company sells a product to a foreign customer outside the EU and that customer resells the product without your knowledge in a prohibited country (such as Iran or Syria), to a prohibited party or for a prohibited end-use. Illegal diversion can create significant problems for exporters, ranging from reputational damage (news story about your product showing up in markets in Iran) to enforcement actions.

The Internal Compliance Program should aim to reduce potential liability from illegal diversion.

Here are some steps which you should include in your ICP in order to demonstrate awareness about illegal diversion and concrete measures to fight against it (other steps are often added based upon the company, product and countries in question):

- require the purchaser to provide a complete and duly signed end-use statement in the export contract or in a separate document as part of the transaction documentation;
- conduct a careful due diligence review of the purchaser as well as all other parties to the transaction;
- maintain documentation about due diligence conducted in order to perfectly “know” your foreign customers by obtaining detailed information on the bona fides (credentials) of their customer to measure the risk of diversion, especially when the customer is a broker, trading company or distribution center and, thus, establishing your good faith attempts to comply with export control regulations;
- use only freight forwarders and other intermediaries who have sound export compliance processes;
- avoid “routed” transactions unless you have a kong standing and trustworthy relationship with your purchaser;
- conduct screening for: (a) prohibited parties (for all parties to the transaction); (b) prohibited country destinations; and (c) prohibited end-uses;
- communicate export control classifications and destination information to end-users, consignees, freight forwarders and other parties to the transaction;
- use information technology to enhance your due diligence review;

- conduct training for foreign distributors, resellers and other intermediaries regarding the legal risks from unauthorized diversion;
- include a clause in your contact with the foreign purchaser that (a) provides that the customer will not re-export the product from the purchaser's country without obtaining the consent of the exporter, and (b) provides that the purchaser will indemnify the exporter from liability (including litigation costs) arising from unauthorized diversion;
- pay high attention to any red flag and communicate internally such red flags and the measures you have taken to deal with these issues.