



The Exporter's Handbook

It's a new era for U.S. exporters. BY GAIL DUTTON

Exporting is entering a new era, and the established rules, terms, standard business practices are changing dramatically. The Obama Administration is working to streamline export control regulations and is consolidating their management under a single agency. New and revised international commercial terms, known as Incoterms, have been in use since January 1 to more accurately specify risks and responsibilities. And, the Department of Justice is aggressively enforcing the Foreign Corrupt Practices Act, with fines increasing astronomically. Exporters who understand this new environment can use it advantageously as they determine where and how they conduct business.

The FCPA

Enforcement of the Foreign Corrupt Practices Act (FCPA) is increasingly stringent, and it's targeting individuals as well as companies. "Eight of the 10 largest fines in the FCPA's 34-year history have been levied in the past two years," according to Paul T. Friedman, chairman of the FCPA and anti-corruption task force, and partner at the San Francisco office of Morrison & Foerster. In the past year, the DOJ has imposed more than \$1 billion in criminal penalties—more than in any

year on record. In the past two years, it has charged more than 50 people for violations. In contrast, in 2004, it charged 2 people with violations and collected \$11 million in fines.

"Foreign companies are prosecuted at least as much as American companies," Friedman says. Therefore, the perceived disadvantage of practicing high ethical standards is dissipating as other nations work together to target corruption.

Not surprisingly, gray areas of the law hold the most danger. Under the FCPA it is illegal to bribe a foreign official, but, "The U.S. regulations take a very expansive view of who is a foreign official," Friedman notes. Therefore, "Companies with any international business must identify the touch points with foreign government officials, who they are and what they attend to. In China, for example, assume everyone (with whom you do business) is a government official," he advises. To further complicate the issue, anything of value may be construed as a bribe, including gifts, travel, jobs and internships. "Bribery presents as a cluster of conduct," Friedman explains.

Facilitation payments to expedite the performance of routine government actions traditionally have been allowed under the FCPA. "That means a small sum may be paid to a low- to mid-level government agent to expedite

dite a process, but not to violate a regulation or perform any non-routine action. And, the action must be legal in the country in which it is performed,” Friedman cautions.

“Internationally, the trend is against making facilitation payments,” Friedman continues. The U.K. Bribery Act, which became effective July 1, 2011 is more stringent than the FCPA. It does not allow facilitation payments to be made anywhere in the world by any organization that conducts any business in the U.K. Therefore, for example, an American pharmaceutical manufacturer with clinical trials in India, research in Singapore, manufacturing in China and some sales in the U.K. may be fined under the British law if it paid a customs official to speed temperature sensitive goods through customs at any point in the development and delivery chain, according to Friedman. “They have the ability to reach you everywhere,” he stresses.

Organizations also face considerable risk from those who do business on their behalf, and can be held liable for their actions, Friedman points out. That includes agents, consultants, joint venture partners, freight forwarders, and other third parties, as well as their direct employees. “There is an expectation that you have engaged in reasonable diligence,” that includes a review of the ethical practices of potential agents and associates, and that they are acting in accordance with the practices and values of their employers, he explains. Friedman advises holding those with whom you do business

accountable to a code of conduct that includes strong anti-corruption policies and enforcement mechanisms.

“Show you have a culture of compliance,” he says, “with a laser focus on anti-corruption. The stakes are too high to look the other way,” Friedman insists. To do this, he advises demonstrating a commitment to anti-corruption and high ethical standards. A good ethics policy should begin with an assessment that identifies the most susceptible business practices—typically hospitality expenses—and addresses those concerns as well as broader issues. Additionally, he says, “The individual or groups charged with oversight should have the autonomy from the usual chain of command and the authority to report directly to the board’s audit committee.”

A formal ethics policy should be reinforced with enterprise-wide training, “especially at the senior management level, which sets the tone,” Friedman insists. Employees and business partners also should be able to receive answers to urgent questions, even in foreign jurisdictions, quickly and easily. Friedman also recom-

mends establishing a confidential reporting mechanism so individuals may report potential abuses without fear.

The details of strong anti-corruption policies are available in the Organization for Economic Cooperation and Development (OECD)’s Good Practice Guidance on Internal Controls, Ethics and Compliance.

Incoterms

Another recent change involves international commercial terms, dubbed “Incoterms.” These terms specify who bears the risks during the shipment of goods. They were updated by the International Chamber of Commerce and became effective January 1, 2011. The new definitions eliminated the terms DAF (delivered at frontier), DEQ (delivered ex quay), DES (delivered ex ship), DDU (delivered duty unpaid), added the terms DAP (delivered at place) and DAT (delivered at terminal), and clarified the

remaining terms to reflect the way global trade actually is handled in a post-9/11 world.

The most recent definitions account for security issues that have arisen since 2001, as well as the electronic technology and practices that govern how customs documents are handled. Tom Gould, of Tom Gould Customs Consulting in Santa Clarita, California, advises shippers to state on the invoice whether they are using the 2000 or 2010 definitions.

“Under the revised terms, buyers and sellers are being urged to contract precisely where delivery is made and what charges are covered. This should avoid

double-billing of terminal handling charges at the port of discharge,” according to an explanation by the Virginia Economic Development Partnership. There are other benefits, too. The 11 Incoterms in the 2010 definitions detail exactly who pays for freight, from which point and who bears the risk if goods are lost or damaged. They also detail who pays for packaging, loading, export duties and taxes, terminal changes, delivery to destination, import duties, and taxes and insurance. Using these terms correctly can save grief later, if things go wrong.

The definitions are divided into two categories, one specifically for waterborne shipping, and another for any form of shipping. Incoterms aren’t designed for containerized freight, which often is consolidated and stowed on deck. Neither do they address when title passes, “but companies use them for that,” Gould observes.

That said, “The biggest mistake is the incorrect use of FOB,” Gould says. FOB is designed specifically for waterborne shipping and specifies when transfer of risk occurs. “Risk used to be transferred when the goods

FOR MORE INFORMATION:

**International Chamber of Commerce
Bookstore and ICC Guide to Incoterms 2010**
(<http://www.ICCBooks.com>)

A detailed explanation of Incoterms
(<http://www.exportvirginia.org>)

U.S. government site for export information
(<http://www.export.gov>)

**“Made in America” clarification from the
Federal Trade Commission**
([http://business.ftc.gov/documents/
bus03-complying-made-usa-standard](http://business.ftc.gov/documents/bus03-complying-made-usa-standard))

U.S. Trade Assistance Directory
(<http://ustradeassistance.com>)

crossed the ship's rail. The new definition transfers ownership when the goods are stowed on the ship."

"EXW—Ex works—is the most beneficial terms for sellers," Gould says. Goods shipped EXW transfer the risk to the buyer at a named place, such as the seller's loading dock.

"The terms FOB, FCA (free carrier) and FAS (free alongside ship) dictate that risk passes in the country of the seller," Gould continues. "The terms DDP (delivered duty paid), DAT (delivered at terminal) and DAP (delivered at place) dictate that the risk transfers in the country of the buyer.

The 'C' terms divide the risk between buyer and seller so that delivery is deemed to occur in the U.S., but the seller must pay to transport the goods to the buyer's country." The "C" terms specifically designed for water transport are CFR (cost and freight) and CIF (cost insurance and freight). The remaining two "C" terms, CPT



(carriage paid to) and CIP (carriage and insurance paid to) are designed for multimodal transportation, Gould explains. The details regarding each term are available through the International Chamber of Commerce.

Export controls

The export control regulations imposed by the U.S. government are in the midst of sweeping changes aimed to simplify regulations and eliminate conflicts among competing regulations that make it difficult to conduct business even with historic allies. The changes involve altering the policy for determining which products require licensing or other controls, and amending the way in which the government applies the new policy.

The biggest change in the export controls is that multiple jurisdictions are about to be combined, according to Anthony Hardenburgh, vice president of global trade content for Management Dynamics, headquartered in East Rutherford, New Jersey. Then Defense Secretary Robert Gates outlined the goals in 2010, calling for a single sanctions regime, a single licensing agency, a single enforcement agency and a single information technology system. Susan Kohn Ross, international trade counsel at the Los Angeles office of Mitchell Silberberg

& Knupp, points out that achieving those goals requires Congressional action, but there is much that individual agencies can do in the meantime to improve the export control environment.

There's no word yet on exactly how this confluence will be handled. The President signed an executive order last autumn creating the Export Enforcement Coordination Center under the Department of Homeland Security. Its purpose is to coordinate the export control activities of the Departments of State, Treasury, Defense, Justice, Commerce, Energy, Homeland Security, National Intelligence and other entities as the President may designate.

As part of the Administration's Export Initiative, it is examining the commerce control list. "Results of a reclassification study (of the commerce control list) are expected to be phased in later this year," Hardenburgh says. There's no word yet on what it contains, but he says there will be a lessening of control in some areas and a tightening in others, especially in high tech goods.

“Currently, the U.S. has approximately 90 different restricted party lists for exporters to check”

Export restrictions already have been relaxed in certain areas. In March 2010, the Obama Administration eased export controls for sensitive technologies with what it called a “one time online process” that allowed some companies to skip the 30 to 60 day review process to export network encryption technologies used for mobile phones and network storage systems. At the same time, the Administration began harmonizing the export standards to make it simpler to export products to companies with foreign and dual-nationality employees.

The Department of Defense is spearheading a review of dual-use goods (which have both civilian and military applications) to determine how individual products will be characterized, Ross says. The objective is “to evolve from such arcane concepts as ‘specifically designed, manufactured or used for military items’ to a positive list wherein the product is or is not included based on objective, transparent criteria,” she explains.

Changes also are expected in the export control country list. “Currently, the U.S. has approximately 90 different restricted party lists for exporters to check,” Hardenburgh notes. These lists identify the level of control required for each type of product or part, based upon risk for a given country. Proposed changes have not yet been made public.

Hardenburgh says he expects the export reforms to take effect the latter part of the 2011—about the same time that the World Customs Organization’s (WCO) re-harmonizing global import tariffs take effect and that organizations are going on holiday schedules. “That’s not good timing, because the bureaucrats, trade compliance organizations and department at large companies will be swamped,” adjusting to the WCO changes, he notes.

Broad concerns

To adjust to all these changes, “It’s important for exporters to understand what classifications their exports fall under now,” Hardenburgh says. “Follow the *Federal Register* and the Web sites of the relevant agency—usually the Department of Defense, Department of Commerce or the U.S. State Department.” As the changes are being made, the government is requesting public comment, he notes.

Some of the other changes, Ross says, involve trademark, copyright and intellectual property. For example, “The U.S. is inspecting exports, so if you have goods with another’s trademark, you are required to establish they are legitimate—not counterfeit—goods.” That requires conducting due diligence on the seller. She also advises paying attention to country of origin markings. For goods to bear the “Made in the U.S.A.” claim, the Federal Trade Commission says “all or virtually all” of

the components must be made in America. For practical purposes, Ross says that “virtually all” means 93 percent. In contrast, other nations allow goods in which as little as 50 percent of the added value came from that nation to bear that nation’s “Made in...” label.

Aside from changes to specific programs, exporters also need to be aware of broader trade issues. “Understand the area into which you are selling,” Ross emphasizes. Knowing the buyer, for instance, also involves knowing that organization’s customers and the end users. “There’s a huge concern about transshipment in the Middle East,” she points out. Dubai, for example, is a top Middle Eastern destination because it is a distribution center for that region. Goods shipped to Dubai may be transferred to countries, like Iran, that are on the controlled country list. Likewise, the Special Administrative Region of Hong Kong is a port of entry for China. Therefore, Ross says, it’s important to understand the political environment between the U.S. and the destination country, as well as the trade policies of both countries. **WT**

Contributing writer Gail Dutton specializes in reporting on the intersection of business and technology.

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