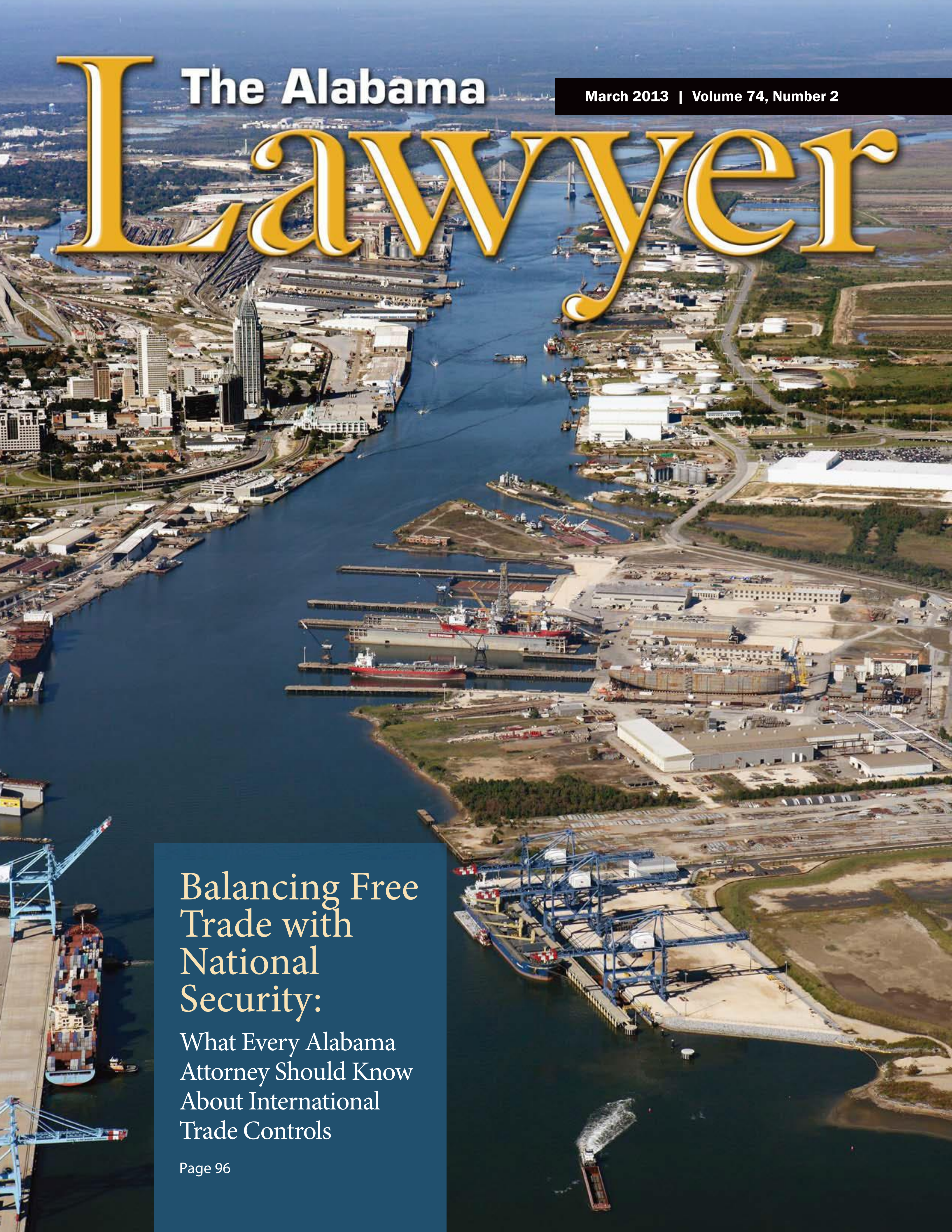

The Alabama Lawyer

March 2013 | Volume 74, Number 2

Balancing Free Trade with National Security:

What Every Alabama Attorney Should Know About International Trade Controls

Page 96


STOP
STOP

Balancing Free Trade with National Security:

What Every Alabama Attorney Should Know about International Trade Controls

By Alan F. Enslen, Bryan A. Coleman and David T. Newton

The volume of international business conducted by Alabama companies is growing at an impressive pace. Led by the automotive industry, Alabama exported almost $18,000,000,000 in goods during 2011–and almost $13,000,000 during the first eight months of 2012–increases of more than 15 percent over the previous periods.[1] Businesses in Alabama and throughout the United States are increasingly exporting products and technologies to establish or expand their overseas market share. The United States currently has multilateral or bilateral free trade agreements with 20 countries, including recent trade agreements with Panama, Columbia and South Korea, which help to foster the continued expansion of foreign trade.[2]

While most of the products and technologies exported from Alabama have dual civil-military uses, a significant number of exports feature specific military applications. Alabama and the surrounding region is home to a variety of businesses that support the national defense industry–particularly within the aerospace sector. From Redstone Arsenal to Fort Rucker and across the Florida panhandle, government contractors provide goods, services, technology and software to all branches of the U.S. military and to U.S. Government agencies, as well as to allied nations via direct commercial sales, foreign military sales or to other assistance programs. U.S. international trade controls were enhanced during the Cold War primarily to ensure that sensitive technology would not be sent or diverted to nations, entities or individuals hostile to the United States. Export and other international trade laws are enforced through a variety of federal agencies, most of which administer comprehensive regulatory regimes that implement underlying statutes. Violating international trade laws can cause immediate harm to U.S. national security. As a result, violations of such controls carry strict civil and criminal penalties for offending parties.

This article outlines the international trade controls generally applicable to both commercial and defense industries, describes the compliance framework and enforcement provisions associated with these controls and highlights typical compliance issues that international businesses may encounter. The key takeaway from this overview is that effective international trade compliance efforts must span the full spectrum of international trade controls–not just the particular control area presenting the immediate concern.

International Trade Controls

Although most international trade compliance programs tend to be anchored by export control concerns, parallel consideration of U.S. economic sanctions programs, anti-boycott restrictions, customs/import controls, anti-corruption laws, and foreign direct investment considerations are necessary to ensure full compliance. There is no single agency, statute or set of regulations that spell out the precise requirements for a company to follow in order to comply with all U.S. international trade controls. Instead, a multitude of federal agencies–many with their own (sometimes overlapping) regulatory schemes–govern the transfer of technology, the provision of services and the shipment of products to or from overseas destinations. These agencies are scattered throughout the U.S. departments of Commerce, State, Treasury, Defense, Homeland Security, Energy, and others.

Export Controls

At their core, U.S. export laws and regulations require a company to (1) determine the export control jurisdiction for its products, (2) classify its products and determine both the type and level of applicable licensing requirements, (3) conduct due diligence screening on intended end-users, destinations and end-uses for its products, (4) obtain required licenses and/or governmental approvals, and (5) monitor export transactions for unusual developments (called "red flags") that may trigger export compliance concerns.[3]

Commercial/ Dual-Use Items

Most exports are regulated by the U.S. Department of Commerce through its Bureau of Industry and Security ("BIS").[4] The BIS performs its regulatory function pursuant to the Export Administration Regulations ("EAR"), which are a set of federal regulations promulgated to serve the national security, foreign policy, nonproliferation and short supply interests of the United States.[5] The statutory authority for the EAR is found in the Export Administration Act of 1979 ("EAA").[6] The EAA is not permanent legislation, although the President of the United States generally authorizes the continuation of the EAA pursuant to authority granted by the International Emergency Economic Powers Act ("IEEPA").[7]

Although the EAR focuses on the export of U.S.-origin items denominated as commodities, technology or software, its application extends beyond the mere export of items from the U.S. The EAR also covers the "re-export" of certain controlled items that originate in the United States, but are then sent from one foreign destination to another.[8] In addition, the EAR regulates "deemed exports," which refers to the release of controlled technology or source code to a foreign person, even if that person is located in the U.S at the time of the release.[9] Examples of deemed exports include the visual inspection of controlled technology by a foreign national during a tour of a U.S. manufacturing facility, an oral exchange of controlled information between U.S. and non-U.S. persons within the U.S. or abroad, or controlled software being e-mailed by a U.S. company to a foreign person located in the U.S.[10] Deemed export compliance is often overlooked (particularly by companies that do not actively export technology) because the concept it is somewhat counter-intuitive. The "export" occurs entirely within the U.S., but is "deemed" to be an export to the country of the non-U.S. person recipient. The subject of deemed exports has arisen for many Alabama companies since February 2011, when U.S. Customs and Immigration Services began requiring petitioners to make an export control attestation in connection with a petition for certain non-immigrant visas (including H-1B, L-1, and O-1 visas).[11]

The EAR controls the export of commercial "dual use" items. A "dual-use" item under the EAR is an item that, while designed for civilian use, also has potential military application.[12] If the item is required to be controlled for export, it will be listed/described on the EAR's Commerce Control List ("CCL"), which also sets forth the export licensing requirements and restrictions applicable to each particular item.[13] Items located on the CCL are assigned a five-character Export Control Classification Number ("ECCN") that enables the exporter to identify the applicable export controls.[14] Depending on the reason(s) for control and the intended country of destination, an exporter may be required to obtain an export license (or justify a license exception) from the BIS prior to shipping the item to a foreign end-user/destination.[15] Items not specified on the CCL, but which remain subject to the U.S. Commerce Department's jurisdiction under the EAR, are designated as "EAR-99." EAR-99 items will generally not require an export license unless mandated by one of the EAR's general prohibitions (such as a prohibited end-use/user or an embargoed destination). The vast majority of items exported from the U.S. is designated as EAR-99 and are exported without a license.

Violations of the EAR are subject to severe civil and criminal penalties. Civil penalties may result in fines equaling the greater of $250,000 or twice the value of the transaction per violation.[16] Criminal penalties include fines of up to $1,000,000 and/or imprisonment of up to 20 years.[17] Violating the EAR may also result in the denial of export privileges, the seizure and forfeiture of items intended for export, and the suspension of a person or entity's right to contract with the U.S. Government.[18]

Defense Trade

The U.S. Department of State, through its Directorate of Defense Trade Controls ("DDTC"), regulates the export, manufacture and brokering of defense articles and defense services and the transfer of technical data.[19] The State Department controls defense trade pursuant to the statutory authority found in the Arms Export Control Act ("AECA"), as well as the AECA's implementing regulations, the International Traffic in Arms Regulations ("ITAR").[20]

The ITAR defines a "defense article" as any item (including technical data and software) specifically designed, developed, configured, adapted, or modified for a military application, and which does not have either predominant civil application or the performance equivalent to an article used for a civil application.[21] Items designated as defense articles are specified on the United States Munitions List ("USML"), which is a categorized listing of all defense-oriented items such as weapons, munitions, aircraft, tanks, sea vessels, and military equipment.[22] A "defense service" under the ITAR is the furnishing of assistance (to include training) to foreign persons in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing, or use of defense articles.[23] Defense services also include the furnishing of controlled technical data to foreign persons, whether in the United States or abroad.[24] ITAR technical data is defined as information required for the design, manufacture, operation, repair, or modification of defense articles.[25]

Under the ITAR, any entity that manufactures *or* exports defense articles, defense services or technical data must be registered with the DDTC.[26] In addition, any export (or even temporary import) of defense articles, defense services or ITAR-controlled technical data must be licensed in advance by the DDTC.[27] Similar to the EAR controls on dual-use items, the

ITAR controls apply to re-exports, re-transfers and "deemed" exports to foreign persons.[28] However, unlike the EAR, which offers multiple bases for license exceptions and exemptions, there are only a few narrowly-tailored ITAR exemptions available (*e.g.,* for certain shipments to close allies or in support of U.S. government operations).

While no blanket export licenses exist under the ITAR *per se*, companies may obtain approval from the DDTC for ongoing exchanges/transfers via one of three agreements–Technical Assistance Agreements, Manufacturing License Agreements or Warehouse Distribution Agreements. Once the appropriate agreement is approved by the State Department and executed by the U.S. and foreign parties involved, it essentially serves as an export license for the ongoing exchange (usually of ITAR-controlled technical data) between the parties to the agreement.

Because of the restrictive, trade-inhibitive nature of ITAR controls, a manufacturer or exporter believing that one of its products should be controlled under the EAR instead of the ITAR may request a "commodity jurisdiction," or "CJ determination in an attempt to change the export control regulations that apply to the product.[29] After submitting detailed information about the product at issue, the manufacturer/exporter will attempt to persuade reviewing authorities from the departments of State, Commerce, Treasury and Defense that the product does not meet the definition of an ITAR defense article. If successful, changing the export control jurisdiction from the State Department to the Commerce Department (*i.e.,* from the ITAR to the EAR) can have far-reaching positive effects for a company, including increased access to foreign markets.

Penalties for violating the ITAR are set forth in the Arms Export Control Act[30] and, like penalties under the EAR, can be draconian. The maximum civil penalty is $500,000 per ITAR violation.[31] Criminal penalties for violating the ITAR include fines up to $1,000,000 per violation and imprisonment up to 20 years.[32] Violations of the AECA and the ITAR may also result in the seizure and/or forfeiture of the items at issue, and could subject the violator to permanent debarment from participating in the export of defense articles or the furnishing of defense services.[33]

In August 2009, the Obama administration launched a broad interagency review of the U.S. export control system.[34] The administration's general aim was to focus control efforts on the threats that matter most, increase interoperability with our allies around the world and reduce incentives for foreign manufactures to "design out" U.S. components due to the export controls that accompany them.[35] Although it is increasingly apparent that even the second Obama administration will not meet its goal of creating a single list of controlled items to be administered under a single export regulator,[36] there is a significant migration of items underway from the U.S. Munitions List to the Commerce Control List, as well as a reduction in the controls applicable to some items.[37] However, the U.S. system of administering two export control regulatory regimes is not going away anytime soon and, thus, U.S. exporters must continue to comply with both the ITAR and EAR, as applicable.

Cumberland School of Law CLE offers a wide range of online courses.

Cumberland School of Law can help you meet your professional education requirements with numerous courses in various categories. Conveniently view anytime, anywhere, 24/7, in increments of time that are convenient for you, and without the time and expense of travel away from your office.

Start earning 2013 credits now. Go to **www.cumberland.samford.edu/cle** and select "Online On-demand Courses."

Samford University is an Equal Opportunity Educational Institution/Employer.

Find the information you need with these NEW online courses:

Ethics in Alternative Dispute Resolution, Including the New Limited Scope of Representation Rules
Alabama Business and Nonprofit Entities Code: Issues, Problems and Potential Solutions
Spotlight on Confidentiality Agreements: Recent Guidance from Delaware
Chik-fil-A, YouTube, the NLRB and You: Examining the Enigmatic Relationships Between Social Media, Handbook Policies and Employee Misconduct
Employment Issues in State Court

CUMBERLAND SCHOOL OF LAW SAMFORD UNIVERSITY
cumberland.samford.edu/cle
205-726-2391 or 1-800-888-7454
lawcle@samford.edu

Economic Sanctions Programs

The Office of Foreign Assets Control ("OFAC") within the U.S. Department of the Treasury enforces economic and trade sanctions against certain foreign countries, entities and individuals.[38] These unilateral sanctions target activities that threaten the national security and economic stability of the United States.[39] Generally, economic sanctions deprive the target of the use of its assets by either blocking the assets subject to U.S. jurisdiction or by prohibiting transactions involving the target through trade embargoes.[40] Because economic sanctions programs are direct tools of foreign policy, they are subject to changes in interpretation and implementation on a more frequent basis than other U.S. international trade controls. Moreover, the U.S. tendency to assert extra-territorial jurisdiction in executing its sanctions policies may increase tensions among global trading partners. As a result, complying with these policies involving economic sanctions is a difficult task for U.S. companies that conduct international business.

The OFAC administers a variety of programs, both comprehensive (*e.g.,* Iran) and limited (*e.g.*, Libya), which may affect a company's ability to conduct trade in certain countries or geographic areas, currently including the Balkans, Belarus, Burma, Cote d'Ivoire (Ivory Coast), Cuba, Democratic Republic of the Congo, Iran, Iraq, Lebanon, Liberia, Libya, North Korea, Somalia, Sudan, Syria, Yemen, and Zimbabwe.[41] The OFAC also enforces many activity-based sanctions programs against entities and individuals linked to disfavored activities such as terrorism, narcotics trafficking, weapons proliferation, disruption of democratic processes, conflict diamond trading, and transnational criminal organizations.[42]

The Treasury Department relies on multiple statutes, such as IEEPA, the Trading with the Enemy Act ("TWEA"), the Antiterrorism and Effective Death Penalty Act and the United Nations Participation Act, as the basis for U.S. economic sanctions programs.[43] The OFAC utilizes a host of regulations, collectively termed the Foreign Asset Control Regulations ("FACR"), to administer and enforce sanctions programs against specific targets.[44] Because the evolution of U.S. economic sanctions programs is based on differing foreign policy objectives and international events, each program is unique. For example, an activity that may be permissible under the Sudanese Sanctions Regulations may be prohibited under the Cuban Assets Control Regime. Companies conducting international business must therefore carefully evaluate the circumstances of a given situation under the regulations for the applicable sanctions program and avoid the temptation to apply general principles across the board.

However, there are common threads that exist in most U.S. economic sanctions programs. First, U.S. sanctions programs generally apply to U.S. citizens (and U.S. resident permanent aliens) worldwide, and to all individuals physically located in the U.S. Entities established under U.S. law, as well as their foreign branches, are subject to U.S. jurisdiction, as are all entities physically located in the U.S. Foreign subsidiaries that are *truly* independent of U.S. control/influence are generally not considered to be subject to U.S. jurisdiction under most sanctions programs. This principle, however, has been diluted by recent enhancements to the Iran-related sanctions being advanced by the United States.

Second, under comprehensive U.S. sanctions programs such as those currently targeting Cuba, Iran, Sudan and Syria, import and export activities to the destination are generally prohibited. However, under limited sanctions programs such as those currently targeting North Korea and Conflict Diamond Trading, prohibitions are focused on specific activities or industries. As a result, trade in other areas may be permitted. The Treasury Department also "designates" individuals, entities, banks, vessels, and organizations that are owned, controlled and/or acting on behalf of sanctions targets and places them on the "Specially Designated Nationals and Blocked Persons List" (the "SDN List"). U.S. persons are prohibited from doing business (directly or indirectly) with a Specially Designated National ("SDN").[45] Currently, there are approximately 6,000 SDNs.[46]

Third, under most U.S. economic sanctions programs, U.S. persons are prohibited from "facilitating" transactions that are otherwise unlawful under the program.[47] In other words, U.S. persons cannot do (or assist others in doing) indirectly what they are prohibited from directly doing. Attempts to circumvent U.S. economic sanctions laws or to facilitate unlawful transactions are aggressively enforced by Treasury and the Justice Department.

Fourth, the best preventive medicine for avoiding a violation of U.S. economic sanctions laws is to "know your customer" through a series of overlapping due diligence mechanisms. Prior to allowing an international sales transaction, joint venture, service contract, *etc.*, to move forward, it is crucial that a U.S. company (1) conduct list-based screening, such as checking the SDN List, as well as other applicable control/prohibition lists maintained by U.S. Government agencies, to ensure that no problematic party is involved, (2) conduct destination-based screening (such as determining whether any of the countries involved are subject to comprehensive or limited economic sanctions and, if so, the nature of any prohibitions), (3) conduct activity-based screening, such as determining whether any known activities prohibited under economic sanctions programs (or export control prohibitions) are involved, and (4) maintain awareness of any "red flags" associated with the transaction that may signal a compliance problem and diligently follow-up on any such indicators.

Maximum civil penalties for violations of U.S. economic sanctions laws are determined by the underlying statutory basis for the program at issue. For example, violations of IEEPA-based programs may warrant a fine of $250,000 per violation (or twice the value of the transaction at issue), a program based on the TWEA carries a maximum fine of $65,000 per violation and a violation of sanctions brought under the Foreign Narcotics Kingpin Designation Act can result in a fine of $1,075,000.[48] In cases involving egregious violations, the OFAC may refer the matter to the U.S. Justice Department for criminal prosecution.[49] In making a penalty determination, the OFAC considers whether the action was willful or reckless, the subject person's awareness of the violation, the harm to the sanctions program and the particular circumstances surrounding the violation.[50] The OFAC also evaluates whether the subject person possessed an effective economic sanctions compliance program at the time of the violation, as well as any response taken voluntarily to remedy the harm caused.[51] Finally, the OFAC analyzes the subject person's level of cooperation in the investigation, including whether the matter was voluntarily disclosed to the OFAC, and the future compliance/deterrence effect that any administrative action will have on promoting future sanctions compliance.[52]

Anti-Boycott Restrictions

U.S. anti-boycott laws generally prohibit U.S. persons and U.S. businesses from participating in unsanctioned foreign boycotts. The purpose of these laws is to prevent U.S. entities from being used by foreign nations, entities or persons to implement policies and advance objectives that run contrary to U.S. foreign policy. Chief among the prohibited foreign boycotts affecting U.S. trade abroad is the Arab League's boycott of Israel.

The 1977 amendments to the EAA and the Ribicoff Amendment to the Tax Reform Act of 1976 form the basis of the current U.S. anti-boycott restrictions.[53] The U.S. Department of Commerce has implemented anti-boycott regulations that are administered by the Office of Antiboycott Compliance ("OAC"). U.S. persons may be penalized under these regulations for conduct that includes: (1) agreeing to refuse or refusing to do business with a boycotted country or with a blacklisted company; (2) agreeing to discriminate or discriminating against other persons based on race, religion, sex, national origin, or nationality; (3) agreeing to furnish or furnishing information about business relationships with a boycotted country or with a blacklisted company; or (4) agreeing to furnish or furnishing information about the race, religion, sex or national origin of another person.[54] Boycott requests are often located (and sometimes buried) in transaction documents, such as contracts, purchase orders, letters of credit, bills of lading, or certificates of origin.

A U.S. person who receives an improper boycott request not only is prohibited from complying with the request, but must also report receipt of the request to the Commerce Department.[55] Failure to report receipt of an improper boycott request to Commerce may result in administrative penalties, including monetary fines, denial of export privileges and exclusion from professional practice before the BIS. Even if no boycott request is received, if a U.S. person conducts business in a "boycotting country," it must file an International Boycott Report with the Internal Revenue Service. Failure to file the requisite report may result in the loss of any foreign tax credits that the U.S. person would otherwise receive.[56] The Treasury Department's determination of what constitutes a "boycotting country" is fluid. However, Treasury's current list of the nine countries associated with carrying out the Arab League's boycott of Israel (and thus are certainly considered to be "boycotting countries") are Iraq, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, UAE, and Yemen.[57]

Customs/ Import Controls

U.S. Customs and Border Protection ("Customs") is responsible for border security and facilitating the arrival of foreign goods and visitors to the United States.[58] Given the breadth of Customs' mission, this section will focus on two key points. First, in its enforcement of U.S. laws and the regulations promulgated by various federal agencies, Customs is empowered to seize and forfeit goods arriving into the U.S.[59] Second, Customs is charged with assessing the applicable duties for goods arriving at a U.S. port of entry for importation into the United States.[60]

Customs seizures and forfeiture actions primarily arise in two situations. Customs *will* seize and forfeit property that has been involved in illegal activity, such as stolen merchandise or smuggled contraband.[61] Customs *may* seize and forfeit property under certain conditions, such as goods imported without the required licenses or permits and goods which may violate certain U.S. trademark, copyright or trade name laws.[62] Once goods have been seized at the port by Customs, the matter will be referred to a Customs Fines, Penalties and Forfeiture ("FP&F") office.[63] Following an appraisal of the seized goods,[64] the FP&F officer assigned to the matter will send a notice of the seizure to parties with an interest in the goods, such parties usually being determined from the documents and other information (*e.g.*, bill of lading) associated with the shipment.[65] The notice will advise these interested parties of the particular laws alleged to have been violated, the circumstances giving rise to Customs' determination that these laws had been violated and the parties' right to apply for relief from forfeiture of these goods.

Upon receipt of the seizure notice, most interested parties will pursue administrative relief from the seizure by filing a petition for relief.[66] Customs will review the petition and make a decision fully granting, partially granting or denying the interested party's petition. Should the interested party find Customs' decision unsatisfactory, it has the option of filing a supplemental petition.[67]

Assuming imported goods are not targets for seizure and forfeiture, importing companies must navigate the entry process at the U.S. port or entry, which includes several administrative and regulatory requirements.[68] While most companies seek the assistance of a knowledgeable customs broker, certain aspects of this process must be understood by the importer. For example, imported goods must be designated with a proper tariff classification under the U.S. Harmonized Tariff Schedule ("HTS").[69] This designation controls the rate of duty assessed for a particular imported good.[70] Each section and chapter of the HTS contains explanatory notes to aid importers in determining the appropriate tariff classification under the HTS.[71]

Moreover, imported goods must be properly valued, since in most cases the duty on an imported good is based on a percentage of its value.[72] Customs uses several different types of valuation methods,[73] but typically prefers the "transaction value" method,[74] which is the price "actually paid or payable" for the goods to the seller, plus certain costs (if not already included in the price), such as any packing expenses or sales commissions incurred by the buyer.[75]

Finally, subject to certain limited exceptions,[76] imported goods must be accurately marked with their country of origin,[77] and importers must declare this country of origin to Customs upon entry into the United States.[78] According to Customs regulations, "country of origin" is generally defined as "the country of manufacture, production, or growth of any article of foreign origin entering the United States."[79] However, to the extent the imported good is comprised of materials from or was processed in more than one country, the last country to effect a "substantial transformation" on the imported good will be designated as the country of origin.[80]

Though Customs regulations focus on the import of goods into the United States, the export practitioner should be cognizant of how these rules relate to the U.S. Government's overall trade control process. Penalties for violating customs regulations can be severe. For example, the penalties for making a materially false statement (written or oral) or a material omission regarding the importation of goods can lead to monetary penalties up to the domestic value of the merchandise, depending on the level of culpability.[81] Consequently, every company's compliance program should address Customs' role in the international trade process.

Anti-Corruption Compliance

U.S. companies should conduct thorough anti-corruption compliance in connection with their business operations abroad. The most important areas for trade-based anti-corruption compliance are anti-bribery laws, such as the U.S. Foreign Corrupt Practices Act ("FCPA") and applicable foreign country anti-corruption laws, as well as relevant anti-money laundering restrictions.

The FCPA makes it unlawful for certain classes of persons and entities to corruptly give, promise, offer or knowingly allow a third party to give, promise or offer anything of value to a foreign (non-U.S.) government official for the purpose of influencing the official's actions, securing an improper advantage, obtaining/retaining business or directing business to any person.[82] The FCPA also has record-keeping provisions that apply to all companies issuing securities (or American Depository Receipts ("ADR")) on a United States stock exchange.[83]

FCPA prosecutions have expanded markedly since 2007 and it appears that the trend will continue indefinitely. Formal guidance regarding what is permissible and impermissible under the FCPA is limited. There are no implementing regulations to clarify the statute's meaning or to provide practical guidance for compliance. Companies must therefore look to cases, FCPA Opinions and other materials issued by the U.S. Department of Justice ("DOJ"), as well as to private sector "best practices," for interpretive guidance. Few FCPA cases result in published legal opinions, as most cases are resolved through plea agreements or deferred prosecution agreements. These agreements are individualized and fact-specific, and while they can help identify trends in enforcement, they cannot give parties concrete assurances with respect to FCPA compliance. In such an environment, companies must make individualized assessments regarding the level of resources to devote to anti-corruption compliance based on their own risks for FCPA violations.

The bribery provisions of the FCPA apply (1) to United States citizens, nationals, residents and companies, wherever located,[84] and (2) to non-United States citizens or companies who: (a) have registered securities on the United States stock exchange, (b) act as an agent or intermediary of another party governed by the FCPA[85] or (c) cause something to be done in the United States in furtherance of an FCPA violation. Although an in-depth treatment of the FCPA's elements is beyond the scope of this article, it is critical for companies doing business abroad (particularly if they are dealing with intermediaries and/or foreign government officials) to conduct an anti-corruption risk assessment and implement an effective anti-corruption compliance program that complements their other international trade compliance efforts.[86]

The DOJ is the chief enforcement agency for criminal violations of the bribery provisions of the FCPA. Penalties for such violations include a fine of up to $2,000,000 for business entities[87] and a $100,000 fine and a prison term of up to five years for officers, directors, employees and agents.[88] Under the U.S. Sentencing Guidelines, courts may impose higher fines, including up to twice the defendant's gross gain from the bribe.[89] The Securities and Exchange Commission or the Attorney General may sue in the civil court system for fines of up to $10,000 per violation against a culpable business[90] and any officer, director, employee or agent of the business who violates the FCPA's bribery provisions.[91] In addition to criminal and civil penalties, violations of the FCPA may result in a debarment from participating in U.S. Government contracts and a loss of export privileges.[92]

Foreign Direct Investment Considerations

The Committee on Foreign Investment in the United States ("CFIUS") is an inter-agency committee established to review proposed transactions involving an investment in a U.S. company by a foreign entity to determine the probable effect of the proposed transaction on U.S. national security.[93] The CFIUS was authorized pursuant to section 721 of the Defense Production Act of 1950, but the law and procedures governing CFIUS reviews (also called "Exon-Florio reviews") have been amended significantly over time, primarily by the Exon-Florio Amendment of 1988, the Foreign Investment and National Security Act of 2007 ("FINSA") and five Executive orders between 1975 and 2008.[94] The CFIUS is chaired by the Secretary of the Treasury, but includes the heads of the departments of Defense, State, Commerce, Justice, Homeland Security, and Energy, as well as the U.S. Trade Representative and the Director of the Office of Science & Technology Policy.[95]

Although the CFIUS review process is often overlooked by U.S. business due to the narrow circumstances in which it becomes relevant, any U.S. company that is a potential recipient of foreign investment should be aware of the existence of this process. It allows parties to a covered transaction to voluntarily submit transaction information to CFIUS for review.[96] In accordance with its formal procedures, the CFIUS reviews the information provided and identifies any national security risks associated with the transaction.[97] This review takes 30 days (sometimes less) to accomplish. If the CFIUS does not identify national security risks associated with the proposed transaction, the parties may proceed.[98] The transaction will then receive a "safe harbor" from further reviews.[99] However, without the safe harbor protection, the investment transaction may be unilaterally reviewed by the CFIUS at any time and is subject to being amended or, at worst, unwound, in the event unacceptable national security risks are discovered.[100]

Companies facing foreign direct investment scenarios should consider the prospect of submitting the proposed transaction for CFIUS review–particularly if the company deals in technology controlled under the ITAR or EAR, or if the foreign party to the proposed transaction is a foreign government (or is controlled by a foreign government). However, due to the review times involved,[101] parties must decide whether to pursue a CFIUS review well in advance of the anticipated closing date.[102]

International Trade Compliance

The most important step that an Alabama company conducting international business can take with respect to international trade compliance is to maintain a comprehensive and effective compliance program. The company's program should be in writing, should state senior management's commitment to strict compliance, should address all international trade regulatory schemes implicated by the company's operations and must be understood by all employees. The company should also designate an international trade compliance officer whose duties include the implementation and maintenance of the company's compliance program.

U.S. Government regulators usually consider the existence of an *effective* international trade compliance program as a significant mitigating factor when determining whether, and to what extent, a penalty should be assessed for violations. However, it is not enough to merely have a program gathering dust on the shelf. The program must be effectively implemented and employees must receive training in the applicable areas of control. Senior management must take an active role in international trade compliance and be pro-active in continually evaluating risk in connection with the company's international operations. Most effective international trade compliance programs provide for audits to be conducted by internal and external elements in order to evaluate the effectiveness of the program and to keep it headed in the right direction.

Companies seeking to acquire, merge or partner with businesses that perform international trade activities, whether from/in the U.S. or abroad, should conduct due diligence that includes an audit of the subject company's international trade compliance efforts. In addition to measures necessary to "know" the subject company itself (as well as its owners), an appropriate audit includes a review of the company's international trade compliance program, research into previous trade-related penalties or actions received by the company and an evaluation of the effectiveness of the company's record-keeping policy. Due diligence also requires an analysis of the specific items exported or imported; jurisdiction, classification and controls applicable to those items; export destinations and end uses; any intermediaries affiliated with international transactions; and the customers/end users who receive the company's items.

If at any time during the conduct of international business activities a company suspects that a potential violation exists, it is imperative that the company immediately conduct an investigation into the suspected violation. This is necessary to determine if actions should be taken to prevent imminent problematic conduct and to evaluate the need to submit a voluntary disclosure to the applicable federal regulator/agency. U.S. Government entities regulating international trade, including the BIS, DDTC and OFAC, have formal mechanisms in place that permit companies to voluntarily disclose known or suspected violations of the respective international trade regulations that they administer. While the determination of whether a company discloses a violation is always a business decision, international trade regulators generally afford substantial mitigation "credit" to a company for such disclosure–provided the Government does not discover the violation first.

International trade controls are a complex web of statutes, regulations, policies and guidelines administered by multiple federal agencies. Changes in the economy, shifts in the global balance of power and the continued existence of hostile foreign regimes add to the complexity by ensuring that trade restrictions remain in a constant state of flux. Often, businesses with limited resources become overwhelmed in their attempt to navigate the export and other international trade laws applicable to their business. The end result is often either abstention from foreign markets or an increased risk of doing business overseas without having the proper international trade compliance mechanisms in place.

Neither of these situations is preferred or necessary. By helping businesses better understand their international trade compliance obligations and their opportunities in the international marketplace, the Alabama lawyer can assist clients in achieving the optimal balance between conducting robust trade and protecting U.S. national security. | AL

Endnotes

1. Budd McLaughlin, *Alabama Exports for 2011 Surge to Record High*, The Huntsville Times, Feb. 24, 2012, *http://blog.al.com/huntsville-times-business/2012/02/alabama_exports_for_2011_surge.html*.
2. Office of the U.S. Trade Representative, Free Trade Agreements, *http://www.ustr.gov/trade-agreements/free-trade-agreements*. The U.S.-Panama Free Trade Agreement, known as the "Panama Trade Promotion Agreement," was signed by President Obama on October 21, 2011, but has not been implemented as of this writing.
3. Examples of "red flag indicators" provided by the Bureau of Industry and Security are located at *http://www.bis.doc.gov/enforcement/redflags.htm*.
4. *See* 15 C.F.R. § 730.1 (2012).
5. 15 C.F.R. § 730.6 (2012).
6. 50 U.S.C. app. §§ 2401-2420 (2011); 15 C.F.R. § 730.2 (2012).
7. 50 U.S.C. § 1701 (2012); 15 C.F.R. § 730.2 (2012). The most recent extension of the Export Administration Act was set forth in the Continuation of the National Emergency with Respect to Export Control Regulations, 77 Fed. Reg. 49697 (Aug. 16, 2012), available at *https://federalregister.gov/a/2012-20378*.
8. 15 C.F.R. § 730.5(a) (2012); 15 C.F.R. § 734.2(b)(4)-(8) (2012).
9. 15 C.F.R. § 730.5(c) (2012); 15 C.F.R. § 734.2(b) (2012).
10. *See* 15 C.F.R. § 734.2(b)(3)(i)-(iii) (2012).
11. *See* USCIS Form I-129, Petition for a Nonimmigrant Worker, pt. 6 (Rev. Oct. 7, 2011). An important distinction to understand when navigating U.S. export controls is that, while a Lawful Permanent Resident of the U.S. (which includes a U.S.

Citizen and a "Green Card" holder) is a "U.S. Person" for the purposes of U.S. export laws, someone in the U.S. under a non-immigrant visa (*e.g.*, H-1B) is *not* considered to be a "U.S. Person" and thus may be subject to additional export compliance measures. *See* 22 C.F.R. pts. 120.15-120.16 (2012); 15 C.F.R. § 772.1 (2012).

12. 15 C.F.R. § 730.3 (2012).
13. 15 C.F.R. §§ 738.1-738.4 (2012); 15 C.F.R. § 774.1 (2012); 15 C.F.R. pt. 774, Supp. 1 (2012).
14. 15 C.F.R. § 738.2(d) (2012).
15. See 15 C.F.R. § 738.4 (2012).
16. Int'l Emergency Economic Powers Enhancement Act, Pub. L. No. 110-96, § 2, 121 Stat. 1011 (2007).
17. *Id.*
18. 15 C.F.R. § 764.3(a)(2)-(3) & (c) (2012).
19. *See* 22 C.F.R. § 120.1 (2012).
20. 22 U.S.C. § 2778 (2011); 22 C.F.R. pts. 120-130 (2012).
21. *See* 22 C.F.R. § 120.3 (2012). It is important to note that the designation of "defense article" under the ITAR is not dependent upon the item's intended "use." Thus, decisions about whether or not an item constitutes a defense article should be evaluated strictly against the definition.
22. 22 C.F.R. § 120.6 (2012) (defining a defense article); 22 C.F.R. § 121.1 (2012) (defining the United States Munitions List).
23. 22 C.F.R. § 120.9 (2012). Although the U.S. State Department has proposed a revision to the definition of Defense Service aimed at reducing its scope, no final rule has been adopted as of this writing. International Traffic in Arms Regulations: Defense Services, 76 Fed. Reg. 20590-01 (Apr. 13, 2011), available at *http://www.pmddtc.state.gov/FR/2011/76FR20590.pdf.*
24. 22 C.F.R. § 120.9 (2012).
25. 22 C.F.R. § 120.10 (2012). Technical data is considered to be a defense article under the ITAR. 22 C.F.R. § 120.6 (2012).
26. 22 C.F.R. § 122.1 (2012). Although the DDTC administers the ITAR, it works closely with the Defense Technology Security Administration ("DTSA") within the U.S. Department of Defense.
27. 22 C.F.R. § 123.1 (2012).
28. *See* 22 C.F.R. § 120.17 (2012) (defining export); 22 C.F.R. § 120.19 (2012) (defining re-export). Although the ITAR does not use the EAR term "deemed export," the same concept applies to transmissions of ITAR-controlled technical data to foreign persons, whether in the U.S. or abroad.
29. 22.C.F.R. § 120.4 (2012).
30. 22 U.S.C. § 2778(c)&(e) (2011); 22 C.F.R. § 127.3 (2012).
31. 22 U.S.C. § 2778(e) (2011).
32. 22 U.S.C. § 2778(c) (2011).
33. 22 .C.F.R. § 127.6 (describing seizure and forfeiture) (2012); 22 .C.F.R. § 127.7 (2012) (defining debarment procedures).
34. Statement of the Press Secretary (Aug. 13, 2009), available at *http://www.whitehouse.gov/the_press_office/Statement-of-the-Press-Secretary.*
35. Press Release, Office of the Press Secretary, White House Chief of Staff Daley Highlights Priority for the President's Export Control Reform Initiative (Jul. 19, 2011), available at *http://www.whitehouse.gov/the-press-office/2011/07/19/white-house-chief-staff-daley-highlights-priority-presidents-export-cont*.
36. Commerce Control List: Revising Descriptions of Items and Foreign Availability, 75 Fed. Reg. 76664 (Dec. 9, 2010); Revisions to the United States Munitions List, 75 Fed. Reg. 76935 (Dec. 10, 2010).
37. Press Release, Office of the Press Secretary, Fact Sheet: Latest Steps to Implement the President's Export Control Reform Initiative (Mar. 7, 2012), available at *http://www.whitehouse.gov/the-press-office/2012/03/07/fact-sheet-latest-steps-implement-presidents-export-control-reform-initi/*.
38. Economic Sanctions Enforcement Guidelines, 73 Fed. Reg. 51933 (Sept. 8, 2008), available at *https://www.federalregister.gov/articles/2008/09/08/E8-20704/economic-sanctions-enforcement-guidelines. See also* U.S. Department of Treasury, Office of Foreign Assets Control, Mission available at *http://www.ustreas.gov/offices/enforcement/ofac*.
39. *See id.*
40. Economic Sanctions Enforcement Guidelines, 73 Fed. Reg. 51933 (Sept. 8, 2008), available at *https://www.federalregister.gov/articles/2008/09/08/E8-20704/economic-sanctions-enforcement-guidelines*.
41. U.S. Department of Treasury, Office of Foreign Assets Control, Sanctions Programs and Country Information, *available at http://www.ustreas.gov/offices/enforcement/ofac/programs/index.shtml.*
42. *See id.*
43. 50 U.S.C. §§ 1701-1707 (2011); 12 U.S.C. § 95a, *et seq.* (2011); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (Apr. 24, 1996); 22 U.S.C. § 287c (2011).
44. 31 C.F.R. pts. 500-598 (2012).
45. *See, e.g.,* 31 C.F.R. §§ 515.201, 515.306 (2012); 31 C.F.R. §§ 536.201, 536.312 (2012).
46. The SDN List is available at *http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx*.
47. *See, e.g.,* 31 C.F.R. §§ 515.201(c), 535.208(a), 536.204 (2012).
48. *See* 50 U.S.C. § 1705 (2011); 31 C.F.R. § 501.701(a)(3) (2011); 31 C.F.R. § 598.701(a)(3) (2011).
49. *See* 31 C.F.R. §536.705 (2012).
50. *See* 31 C.F.R. pt. 501, App. A (2012).
51. *See id.*
52. *See id.*
53. Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (Jun. 22, 1977); 26 U.S.C. § 999 (2005). The anti-boycott provisions under the Export Administration Act and the Tax Reform Act should be evaluated separately. In general, the EAA prohibits certain boycott-related conduct, while the TRA provides for the denial of tax benefits for certain boycott-related agreements. Also, while the Commerce Department has promulgated anti-boycott regulations, *see* 15 C.F.R. pt. 760 (2012), the Treasury Department has only issued guidelines.
54. 15 C.F.R. § 760.2 (2012).
55. 15 C.F.R. § 760.5 (2012); 26 U.S.C. § 999 (2005).
56. 15 C.F.R. § 764.3(a) (2012).
57. *See* 26 U.S.C. § 999(c)(2) (2005).
58. 26 U.S.C. § 999 (f) (2005).
59. *See* 19 U.S.C. § 1595a (2011); 19 C.F.R. § 162.23 (2012).
60. *See* 19 U.S.C. § 1500 (2011); 19 C.F.R. § 141.1 (2012).
61. *See* 19 U.S.C. § 1595a(c)(1) (2011).
62. *See* 19 U.S.C. § 1595a(c)(2) (2011).
63. *See* U.S. Customs & Border Prot., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: CUSTOMS ADMINISTRATIVE ENFORCEMENT PROCESS: FINES, PENALTIES, FORFEITURES AND LIQUIDATED DAMAGES (Feb. 2004).
64. *See* 19 U.S.C. § 1606 (2011).
65. *See* 19 C.F.R. § 162.31 (2012).
66. The regulations governing seizures and petitions for relief can be found at 19 C.F.R. parts 162 and 171. The petition for relief must be filed no later than 30 days from the date on the

seizure notice, unless the notice states otherwise or specifically permitted more time by the FP&F officer, and, while there is no required format for a petition for relief, many petitions take the form of a letter. The factors considered by Customs when evaluating a petition for relief are listed in appendices A-D to part 171 and Customs publications, and interested parties should tailor their petition to these factors as applicable to the facts of the individual case. *See* U.S. Customs & Border Prot., What Every Member of the Trade Community Should Know About: Mitigation Guidelines: Fines, Penalties, Forfeitures and Liquidated Damages (Feb. 2004).

67. The supplemental position must be filed within 60 days of the date on the notice of Customs' decision, unless the notice of decision states otherwise. *See* 19 C.F.R. §§ 171.61-64 (2012).
68. *See* U.S. Customs & Border Prot., What Every Member of the Trade Community Should Know About: Entry (Mar. 2004).
69. Although not published in the *U.S. Code*, *see* 19 U.S.C. § 1202 (2011), the HTS is available at *http://www.usitc.gov/tata/hts/index.htm.*
70. *See* 19 C.F.R. § 152.11 (2012) ("Merchandise shall be classified in accordance with the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202) as interpreted by administrative and judicial rulings.").
71. *See also* U.S. Customs & Border Prot., What Every Member of the Trade Community Should Know About: Tariff Classification (May 2004).
72. *See* 19 U.S.C. §§ 1401a, 1500(a) (2011). *See also* U.S. Customs & Border Prot., What Every Member of the Trade Community Should Know About: Customs Value (Jul. 2006).
73. *See* 19 C.F.R. §§ 152.100-108 (2012).
74. *See* 19 C.F.R. § 152.101(b) (2012).
75. *See* 19 C.F.R. § 152.103 (2012).
76. *See* 19 C.F.R. §134.32 (2012).
77. *See* 19 C.F.R. §134.11, which states, in pertinent part: Unless excepted by law, section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), requires that every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article, at the time of importation into the Customs territory of the United States.
78. *See* CBP Form 7501, U.S. Customs and Border Protection Entry Summary, pt. 10 (Rev. Jun. 2009).
79. *See* 19 C.F.R. § 134.1(b) (2012). Note however, that "for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin." *Id.*
80. *See* 19 C.F.R. Part 102 (2012).
81. *See* 19 U.S.C. § 1592 (2011).
82. 15 U.S.C. §§ 78dd, *et seq.* (2011). The full text of the FCPA may be reviewed online at *http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-english.pdf.* The U.S. Department of Justice website also provides unofficial translations of the FCPA in select languages. The FCPA does not address giving, promising or offering things of value to United States officials or state officials. However, other laws, such as the United States' bribery statute, 18 U.S.C. § 201 and the Alabama bribery statute, *Ala. Code* § 13A-10-61, prohibit such conduct.
83. 15 U.S.C. § 78m (2011).
84. The FCPA specifically applies to "domestic concerns," which are United States citizens or residents and business entities organized under United States law (or which have their principle place of business in the United States). U.S. subsidiaries of foreign parent companies are "domestic concerns" for purposes of the FCPA. The FCPA applies to all officers, directors, employees or agents of "domestic concerns" regardless of their nationality.
85. A controlled foreign subsidiary of a U.S. company, or a foreign company registered on a U.S. exchange, may be subject to the FCPA as an agent or instrumentality.
86. For a more in-depth treatment of the FCPA, see Bill Athanas's article published in the September 2010 issue of *The Alabama Lawyer*.
87. 15 U.S.C. § 78dd-2(g)(1)(A) (2011).
88. 15 U.S.C. § 78dd-2(g)(2)(A) (2011). Fines against individuals for criminal violations of the FCPA may not be paid by the individual's employer.
89. *See* U.S. Sentencing Guidelines Manual § 2B4.1(b) (2011).
90. 15 U.S.C. § 78dd-2(g)(1)(B) (2011).
91. 15 U.S.C. § 78dd-2(g)(2)(B) (2011). The SEC is the primary enforcement agency for violations of the Books and Records provisions of the FCPA.
92. *See* 2 C.F.R. 180.800 (2012).
93. 50 U.S.C. app. § 2170(b)(1) (2011). Similarly, under 50 U.S.C. app. § 2170a, entities controlled by foreign governments may not merge with, acquire or take over certain U.S. defense contractors. This restriction applies to contractors working with the departments of Defense or Energy under a national security program, as well as contractors working on programs valued in excess of $500,000,000. *See* 50 U.S.C. app. § 2170a(a) (2011).
94. Foreign Investment and National Security Act of 2007, Pub. L. 110-49, 121 Stat. 246 (Jul. 26, 2007), codified at 50 U.S.C. app § 2170 (2011). In addition, CFIUS Regulations are located at 31 C.F.R. Part 800 (2012).
95. 50 U.S.C. app. § 2170(k) (2011). *See also* Executive Order 11858 of May 7, 1975, 40 Fed. Reg. 20263, 3 CFR, 1971-1975 Comp., p. 990, *as amended by* Executive Order 13456 of Jan. 23, 2008, 73 Fed. Reg. 4677 (Jan. 25, 2008), *available at https://federalregister.gov/a/08-360*. The Director of National Intelligence and the Secretary of Labor are non-voting members of CFIUS. *See* 50 U.S.C. app. § 2170(k)(2).
96. 50 U.S.C. app. § 2170(b)(1)(C) (2011); 31 C.F.R. § 800.402 (2012).
97. 31 C.F.R. § 800.501 (2012); 50 U.S.C. app. § 2170(b)(1) (2011). Pursuant to FINSA, the Treasury Department issued guidelines regarding CFIUS reviews in December 2008. Office of Investment Security; Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States, 73 Fed. Reg. 74567 (Dec. 8, 2008) ("CFIUS Guidance"), *available at https://federalregister.gov/a/E8-28791*.
98. 31 C.F.R. §800.504 (2012); 50 U.S.C. app. § 2170(b)(6) (2011).
99. *See* 31 C.F.R. § 800.601 (2012); Executive Order 11858 of May 7, 1975 § 7(f), 40 Fed. Reg. 20263, 3 CFR, 1971-1975 Comp., p. 990, *as amended by* Executive Order 13456 of Jan. 23, 2008, 73 Fed. Reg. 4677 (Jan. 25, 2008), *available at https://federalregister.gov/a/08-360.* If national security risks or other potentially problematic issues are identified in the initial 30-day review, the CFIUS may conduct an additional 45-day investigation. Simultaneously, the CFIUS would likely work with the parties in an attempt to mitigate identified risk areas. If issues still remain after the second CFIUS investigation, the proposed transaction may be submitted to the President for a decision. 31 C.F.R. §§ 800.503, 800.505, 800.506 (2012).
100. 50 U.S.C. app. § 2170(d)(3)&(4) (2011).
101. *See* 31 C.F.R. §§ 800.501–800.506 (2012).
102. *See also* CFIUS Guidance, 73 Fed. Reg. 74567 (Dec. 8, 2008).